IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JEAN PIERRE RICES, Appellant.	)	S175851 San Diego County Case No. SCE266581

APPELLANT'S OPENING BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, San Diego County

Honorable Lantz Lewis, Judge

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DEATH PENALTY

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INTRODUCTION

Along with Anthony Miller, appellant Jean Pierre Rices was charged with murder arising out of the March 1, 2006 shooting deaths of two employees at the Granada Liquor Store in El Cajon, California. The state sought death against Rices alone. Prior to trial, Rices pled guilty to murder. Thus, his jury would have only one decision to make: should Jean Pierre Rices live or die?

Both Rices and Miller are black. Because the shootings had received extensive coverage in the local media -- including nearly 100 newspaper articles with numerous references to evidence that would never come before the jury -- the parties prepared a detailed questionnaire to assess the views of prospective jurors. The results were stark.

> "They Should KILL Them NIGGA'S . . . ."
>
> "He needs to fry."
>
> "In my opinion these two guys should be hanged on the courthouse lawn! Also the hanging should be shown on every network T.V. station in the world."

The statements of prospective jurors appear to have reflected the views of the local population at large. As one resident of the county candidly told a newscaster:

> "They should hang him here, in front of the liquor store. This way, he never do it again."

Defense counsel sought a change of venue. That motion was denied. Although the jury was solely deciding whether Mr. Rices would live or die, the court then refused to strike several jurors who candidly admitted their view that "black[s] . . . are more likely to be violent" than whites. Moreover, despite the fact that a substantial part of the defense case in mitigation involved presenting evidence regarding Mr. Rices's difficult childhood and upbringing, the court also refused to strike several jurors who conceded they would not "consider the defendant's childhood and upbringing" in deciding whether he would live or die. Finally, although the state gave notice it would rely on other crimes evidence in asking the jury to impose death, the trial court refused to permit defense counsel to ask *any* voir dire questions at all about this critical area and whether prospective jurors could hear evidence of this nature and still consider life as an option.

As discussed more fully below, although defense counsel did all in his power to mitigate the court's errors -- objecting, using peremptory challenges when he could and preparing both oral and written motions for additional challenges when his allotment of peremptory challenges was exhausted -- the jury selection and voir dire process in this case posed significant hurdles to a fair penalty phase. But these were not the only hurdles.

Because the state was not seeking death against Miller, the court empaneled two juries to hear the case. The Miller jury would decide whether Miller was guilty. The Rices jury would decide whether Rices would live or die. The parties agreed on a procedure where (1) the two juries would sit together to hear the state's case about the crime itself, (2) the Rices jury would be discharged for Miller's defense case and (3) the Rices jury alone would reconvene to hear aggravating and mitigating evidence in connection with Rices's penalty phase. Inexplicably, despite the logic of this procedure, the Rices jury was re-convened early to hear Miller testify in his own defense.

This testimony was devastating to Mr. Rices. Unbeknownst to the defense, Miller had been interviewed by police and the prosecutor for several hours. Prior to trial, the court permitted the state to suppress this interview after the prosecutor promised that Miller would "not be called as a witness by the People." When Miller *was* called as a witness in front of the Rices jury, defense counsel -- completely unaware of what Miller told police during this secret interview -- did not object. Miller then testified that Rices forced him to commit the crime. In addition, the state was then able to introduce Miller's statements to police that Rices shot both victims as they were begging for their lives. When counsel for Mr. Rices finally objected and asked that the Rices jury be excused, the trial court asked "why is this objection coming in now" and overruled the objection. In urging the jury to impose death, the prosecutor repeatedly relied on Miller's testimony.

But even taken together, the jury selection and suppression of evidence issues referenced above -- which impacted Mr. Rices's ability to obtain a fair jury as well as his ability to confront aggravation -- were not the only hurdles to a reliable penalty phase verdict. Mr. Rices's right to conflict free counsel -- and counsel's own ability to make conflict free decisions about mitigation -- was also compromised.

When the state initially brought charges against Mr. Rices -- and when private defense counsel was appointed to represent Mr. Rices -- the charges were not capital. It was not until eight months later that the state decided to seek death against Mr. Rices. Because Rices was indigent, the state appointed private counsel to represent him. The court and counsel agreed on a flat fee for the case.

Because the case against Mr. Rices was now capital, the agency that had recommended private counsel advised the trial court that in its view although appointed counsel was qualified to handle a non-capital murder case, he was not qualified to handle a capital case. Defense counsel disagreed and the trial court appointed "independent counsel" to advise Mr. Rices of his options. This was entirely appropriate.

Unfortunately, however, and apparently unbeknownst to the court, the "independent counsel" it selected to advise Mr. Rices was *not* independent at all. In fact,

the lawyer it selected to advise Mr. Rices actually represented a witness who had come forward *against* Mr. Rices. Mr. Rices asked the court several times why the independent lawyer appointed to advise him had represented a cooperating witness in the case. The trial court made no inquiry into the potential conflict at all. Instead, it simply accepted Mr. Rices's decision -- made with the advice of this "independent" lawyer -- to continue with defense counsel.

But there is more. In the many months Mr. Rices was incarcerated in county jail awaiting his penalty phase, he began to experience severe mental health issues, hearing voices telling him to kill. Mr. Rices told appointed counsel about these issues and asked for help in obtaining psychiatric services. Later, when Mr. Rices attacked a jail officer -- an attack used as evidence in aggravation by the state -- counsel had to make a difficult decision.

On the one hand he could serve as a percipient mitigation witness to help explain the mental health circumstances under which the jail attack took place. If counsel did this, however, under the rules of professional conduct he could no longer represent Mr. Rices. Alternatively, counsel could continue to represent Mr. Rices, but then he could not serve as a mitigation witness. As discussed more fully below -- and through no fault of his own -- given the flat fee financial arrangement between the county and appointed

counsel, this situation presented an intolerable conflict of interest. Even with the best of intentions, counsel was forced to make a critical tactical decision as to what mitigating evidence to present while laboring under an obvious conflict between his own financial interest and serving as a mitigation witness.

The voir dire, suppression of evidence and conflict issues -- as well as numerous other issues -- will all be discussed below. As explained, the penalty phase in this case was fundamentally flawed. Reversal of the death sentence is required.

STATEMENT OF THE CASE

On August 3, 2007, San Diego county district attorney filed a two-count information against defendants Miller and Rices. Each count charged a separate March 1, 2006 murder in violation of Penal Code § 187. (1 CT 69-70.) Each count added robbery, burglary and multiple murder special circumstance allegations in violation of §§ 190.2(a)(17) and 190.2(a)(3). (1 CT 69-71.) Each count added an allegation that Mr. Rices personally used a firearm in violation of § 12022.53(d). (1 CT 70-71.) Finally, the information alleged that Mr. Rices had served one prior prison term within the meaning of § 667.5(b) and had been convicted of a prior serious felony. (1 CT 72.)

On August 29, 2007, Mr. Rices pled not guilty and denied the enhancing allegations. (1 CT 77.) The state sought the death penalty against Mr. Rices, but only a life without parole term against Mr. Miller. (1 CT 78-79.)

More than a year later, Mr. Rices changed his plea to guilty and admitted the robbery and multiple murder special circumstance allegations. (4 CT 716-718.) The burglary special circumstance, and the prior strike allegation, were both dismissed. (4 CT 716; 3 RT 455-456, 468-469.) Because Miller had not pled guilty, and because the state was still seeking death against Rices, the court instituted the following procedure.

There would be separate juries selected for the two defendants. Miller's jury would hear the guilt phase against Miller and decide on his guilt. The Rices jury would be present for Miller's guilt phase and thereby learn the circumstances of the crime. After Miller's trial was completed, the Rices penalty phase would continue.

Miller's trial began on June 9, 2009 with the Rices jury present. (5 CT 1076.) The state rested its case against Miller on June 11, 2009. (5 CT 1095.) Miller rested his defense case on June 16, 2009. (5 CT 1104.)

On June 18, 2009 -- while Miller's jury was deliberating on guilt -- the Rices jury heard the remainder of the state's penalty phase case against Mr. Rices. (5 CT 1186.) The state's penalty phase case ended on June 19, 2009; the defense penalty-phase case began the next day and ended on June 23. (5 CT 1196-1197, 1199, 1207.) Several hours after closing arguments on June 24, the jury sentenced Mr. Rices to death. (6 CT 1252.)

Defense counsel moved for a new trial. (6 CT 1294-1327.) In addition, defense counsel moved for a reduction in the sentence to life without parole. (6 CT 1328-1334.) The trial court denied these motions and imposed death. (6 CT 1408-1411.)

This appeal is automatic.

STATEMENT OF FACTS

A. Introduction.

The state charged Mr. Rices with two counts of special circumstances murder. (1 CT 69-70.) Because Mr. Rices pled guilty to these charges -- and his jury was not asked to determine guilt -- there was no guilt phase for Mr. Rices. Instead, because the state sought death for Mr. Rices, there was only a penalty phase.

Because Mr. Rices pleaded guilty, the facts of the crime itself will be described briefly in section B below. These facts about the crime were introduced by the state in the joint portion of the trial -- at which both juries were present -- as circumstances of the crime within section 190.3, subdivision (a). After the joint portion of the trial, and because the state sought death for Mr. Rices, the parties then presented mitigating and aggravating evidence. This evidence is described in section C below.

B. The Charged Crime.

Around 11:00 p.m. on March 1, 2006, Mr. Rices and his codefendant Anthony Miller arrived at the Granada Liquor Store in El Cajon. (13 RT 1906-1907.) Mr. Rices's

female companion, Nichele Hopson, drove them there. (13 RT 1907.)

According to the primary investigator on the case, Officer James Hoefer, Mr. Miller later admitted that it was his idea to rob the store. (12 RT 1778.) This frank admission to police was in stark contrast to Miller's trial testimony, in which he told both juries that Rices forced him to do the crime. (13 RT 1309-1321, 1939.)

At roughly the same time the three arrived, Heather Mattia and Firas Eiso were preparing to close the store. (10 RT 1435-1438.) As they were getting ready to chain the front doors, defendant confronted them with a gun and told them to go back inside the store. (11 RT 1630-1631.) Miller then came inside the store as well. (*Ibid.*) Only Miller wore a mask. (11 RT 1648-1649.) The jury would see grainy, poorly lit video surveillance footage of what happened next.

Mr. Rices held a gun, Mr. Eiso and Ms. Mattia were on the store's floor, and Miller was going through the cash register. (11 RT 1630-1631.) Miller had difficulty locating the money. (13 RT 1915.) Finally, he found the money, as well as his favorite brands of cigarettes. (*See* 13 RT 1918, 1961.) Miller then left the store. (11 RT 1631.)

By this time, Ms. Mattia and Mr. Eiso are mostly out of view of the video cameras.

(11 RT 1642-1644.) One camera from another part of the store shows debris being cast off from a ceiling tile. (10 RT 1485-1487; 11 RT 1640.) Mr. Rices then left the store. (11 RT 1632.) In the minutes that followed, the surveillance camera showed what appeared to be Ms. Mattia's foot. (11 RT 1644-1648.)

Ms. Mattia's friend, Samir Yousif, came to the store around 11:30 p.m. and noticed the doors were unlocked and the lights were off. (10 RT 1372.) He went next door to a pizza shop to look for Ms. Mattia; when he saw she was not there, he enlisted the help of two workers to accompany him inside the store. (10 RT 1374-1375.) There, the three men found the bodies of Ms. Mattia and Mr. Firas. (10 RT 1375.) A pathologist testified that each died from a single gunshot wound to the head. (11 RT 1617.)

C. Aggravating And Mitigating Circumstances.

Because the state was seeking death, it was important that the jury learn something about Jean Pierre Rices. Both sides presented evidence on this issue.

The defense presented substantial evidence about defendant's childhood, evidence which child developmental expert Dr. Rahn Minagawa testified was "a pretty horrendous

childhood." (18 RT 2670.) In fact, Jean Pierre Rices's mitigation case began even before he was born.

Defendant's mother was Celeste Rices. (17 RT 2448.) She was a prostitute; defendant's father, Sammy Johnson, was her pimp. (17 RT 2449-2450.) Defendant's mother continued working as a prostitute while she was pregnant until she began to show. (17 RT 2452.) She worked because she was addicted to PCP. (17 RT 2449-2450.)

Ms. Rices moved in with her grandmother shortly before Jean Pierre was born. (17 RT 2452-2453.) After he was born, Jean Pierre's father was allowed to hold him once, and then told by Ms. Rices's family not to return. (17 RT 2453.)

Mr. Johnson ran into Ms. Rices several times after the baby was born. (17 RT 2453-2454.) He did not maintain contact with her because she was once again addicted to PCP. (17 RT 2453-2454.)

As might be expected in light of the circumstances of his birth, Jean Pierre suffered a difficult childhood. Charlene Wright was Jean Pierre's aunt and Ms. Rices's sister. (17 RT 2462.) With some understatement, Ms. Wright recalled that Ms. Rices was "not fully capable" of being a mother; she was not affectionate with Jean Pierre and "she

was always calling him stupid . . . ." (17 RT 2465.)

In 1987, when Jean Pierre was only five, Dianne Northrup was driving through a Jack-in-the-Box restaurant in Los Angeles between 6:00 and 7:00 one February evening. (17 RT 2430.) She saw a heart-breaking scene; Celeste Rices was outside yelling at a little boy, four or five years old, who was crying. (17 RT 2431-2432.) The little boy -- later identified as defendant -- was not dressed properly for February. (17 RT 2440.)

Ms. Rices was cursing at five-year old Jean Pierre, telling him to stay away and yelling that she did not want him. (17 RT 2431-2432.) She threw rocks and a beer can at him to keep him away from her. (17 RT 2432.) Ms. Northrup recalled Jean Pierre pleading with his mother: "Mama, I want to go, I want to go. Mama!" (17 RT 2431.) She also recalled that Jean Pierre was was scared and would back away whenever the woman approached him. (17 RT 2431.) Ms. Northrup feared Ms. Rices was going to hurt Jean Pierre so she got out of her car and told her to stop. (17 RT 2432-2433.) Ms. Rices simply left, leaving Jean Pierre behind. (17 RT 2433.) As Ms. Northrup recalled, Ms. Rices left quickly and "never turned around to look back." (17 RT 2434.)

Ms. Northrup was unable to calm Jean Pierre down; he just kept crying as he watched his mother leave. (17 RT 2433.) Jean Pierre did not give his name; he just

nodded when Ms. Northrup asked if the woman was his mother. (17 RT 2440-2441.)

Ms. Northrup waited for Ms. Rices to return, but she never did. (17 RT 2441.) Northrup took Jean Pierre to the local police station. (17 RT 2441.) Child Protective Services ("CPS") took custody of Jean Pierre. Jean Pierre never saw his mother again.

CPS contacted Jean Pierre's grandparents who took Jean Pierre from ages 5 to 10 or 11. (17 RT 2502-2503.) Barbara Duey, an expert on dependency proceedings, reviewed Jean Pierre's dependency file and noted that he received no services or therapy of any kind. (17 RT 2550.) Jean Pierre was never assigned a lawyer to represent his interests and ensure that he got the kinds of services needed. (17 RT 2549, 2551-2552.) Treatment and therapy are important because a very high number of abused, dependant children can become delinquent. (17 RT 2555, 2557-2558.)

Jean Pierre was one such child. He received no therapy. His grandparents reported that -- not surprisingly in light of the fact that he was abandoned by his mother -- he was not trusting. (17 RT 2503.) He would occasionally steal things. (17 RT 2503.) When Jean Pierre was eight years old, and living with his grandparents, his mother was found unconscious after having fallen off an overpass in Los Angeles. (17 RT 2505.) She was in a coma for four months; Jean Pierre was not permitted to see her. (17 RT

2505-2506.) After she died, Jean Pierre regressed, and began to run away; his grandparents were aware he needed more help than they could provide and they called CPS. (17 RT 2506-2507.) Other relatives too noted the change in Jean Pierre after his mother died; he became more introverted and withdrew into himself. (17 RT 2518-2519, 2521.)

CPS placed Jean Pierre with his aunt Cheryl in San Diego. (17 RT 2507, 2522.) Cheryl received no professional assistance from either social workers or therapists so she too was unable to help. (17 RT 2522.) According to social worker Barbara Herron, Cheryl simply dropped Jean Pierre off at the Hillcrest Receiving Home. (17 RT 2575.) At that point, Jean Pierre was sent to live at the Mozell Pennington group home for boys. (17 RT 2524.)[1]

Bobby Sparks worked at the group home and recalled Jean Pierre. (17 RT 2524.) Mr. Sparks was responsible for getting them to school and making them do their homework; he also took them to movies and sporting events. (17 RT 2525-2526.) He spent substantial time with Jean Pierre, began to see that he was "progressing well" and

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[1] Child development expert Dr. Rahn Minagawa explained professional intervention was called for when Jean Pierre was (1) abandoned by his mother, (2) rejected by his grandparents and (3) rejected by his aunt. (18 RT 2664--2665.) Jean Pierre was damaged at age 5, but there was no professional help made available to him. (18 RT 2676.)

"at the time I said 'man, this kid is really -- I think he's going to make it.'" (17 RT 2526-2527.) Mr. Sparks testified that he and Jean Pierre were "really close." (17 RT 2528.)

Unfortunately, Mr. Sparks left the home. (17 RT 2527.) Perhaps not surprisingly in light of Jean Pierre's background with adults leaving him, Mr. Sparks was later told his leaving was a "big blow to Pierre" and "I just was told that he had gone south." (17 RT 2527-2528.) Mr. Sparks thought if he had stayed Jean Pierre "had a good chance of making something of himself because he knew that I cared about him." (17 RT 2528.)

The Rices jury also heard evidence in aggravation. Miller -- called as a witness in his own defense case in front of both juries -- testified that Rices forced him to commit the crime. (13 RT 1909-1921.) And because Miller was now testifying in front of the Rices jury, the state was able to introduce Miller's pre-trial statements to police in which he explained that Rices shot both victims as they were begging for their lives. (13 RT 1958-1959.)

In addition to those circumstances of the crime, the state presented evidence of a bank robbery Mr. Rices committed after the murders, as well as an attempted bank robbery, both of which Mr. Rices pled guilty to prior to trial. (15 RT 2222-2230, 2237-2248, 2250-2260, 2262-2265, 2308-2309.) The state also introduced evidence showing

defendant attacked a corrections officer while housed in the San Diego County Jail, charges to which Mr. Rices also pled guilty before trial. (15 RT 2309, 2311-2335, 2346-2356.) Additionally, the state proved two jailhouse batteries against other inmates; in one of these, Mr. Rices and several other African American inmates attacked a white inmate after the latter was overheard using a derogatory racial epithet. (15 RT 2266-2272, 2287-2306.) Then there were two instances of possessing a weapon while in custody, as well as a threat to a correctional officer. (15 RT 2307; 16 RT 2377-2383, 2384-2391.) Finally, the state presented evidence from a carjacking and Taco Bell robbery, both of which occurred in 1999 when Mr. Rices was a juvenile; Mr. Rices was convicted only of the carjacking. (15 RT 2197-2220, 2307; 16 RT 2375-2376.)

After acknowledging Mr. Rices's guilt to the jury, defense counsel made clear that "[Mr. Rices] is going to die in prison" and urged the jury to return a verdict in favor of life. (19 RT 2760.) Given this strategy, defense counsel presented testimony from expert witness Daniel Vasquez, who was the former warden at San Quentin State Prison, and who had extensive experience in evaluating and classifying literally tens of thousands of inmates. (18 RT 2605-2607.) The general theme of Vasquez's testimony was that Mr. Rices functioned well inside of state prisons. (*See* 18 RT 2605-2615.) Indeed, in Mr. Rices's previous five-year stint in prison, his only act of aggression was a single write up for "mutual combat." (18 RT 2611-2613.)

Notwithstanding this and other evidence in mitigation, the jury imposed death. (19 RT 2800-2801.) And the trial court, while noting that Dr. Minagawa's testimony about Mr. Rices's "very troubled and traumatic childhood . . . was very persuasive" (20 RT 2817) nevertheless denied Mr. Rices's motion to modify the verdict. (20 RT 2818.)

ARGUMENT

I. GIVEN THAT DEFENDANT WAS BLACK, AND JURORS WERE DECIDING IF HE SHOULD LIVE OR DIE, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO STRIKE JURORS WHO CANDIDLY ADMITTED THEIR BELIEF THAT BLACKS WERE MORE VIOLENT THAN WHITES.

A. The Relevant Facts.

1. The voir dire process.

Prospective jurors were called in this case on May 15, 2009 and given questionnaires to fill out, along with hardship applications. (5 RT 778-801.) The court and parties first addressed the hardship applications, discharging some 74 prospective jurors for hardship. (28 CT 6732-6897.) The prospective jurors that survived the hardship process were called back for questioning (and the exercise of for-cause challenges) in four panels -- A, B, C and D -- on May 21 and May 22, 2009. (6 RT 858 - 7 RT 1244.)

The first panel of prospective jurors was called on the morning of May 21, 2009. (6 RT 872.) Based on the jury questionnaires, the parties stipulated that 10 prospective

jurors could be discharged. (6 RT 867.) The trial court discharged these ten prospective jurors. (6 RT 872-874.) Defense counsel then questioned the remaining prospective jurors on this panel, followed by the prosecutor. (6 RT 885-913 [defense counsel], 914-939 [prosecutor].) This questioning was done in the presence of all prospective jurors. After the potential jurors on the panel were questioned, the court permitted individual voir dire of several prospective jurors from the panel. (6 RT 946-955.) The court then ruled on the parties' for-cause challenges to these jurors. (6 RT 958-960.) The potential jurors who survived the hardship and for-cause process were then ordered to return on May 27. (6 RT 960.)

The court followed a similar pattern with respect to each of three additional panels called in the case. (6 RT 964-1053 [stipulations, questioning and discharge of prospective jurors from second panel]; 7 RT 1055-1151 [third panel]; 1152-1240 [fourth panel].) On May 27, the jurors from each of these panels returned to court for random selection, the exercise of peremptory challenges and the seating of 12 jurors and six alternates. (8 RT 1272-1296.) There were 78 jurors who survived the hardship and for-cause process who were ordered back for the random draw. (8 RT 1255.)

2. The trial court refused to strike prospective jurors T.T. and L.M. even though they believed blacks were more likely to be violent than whites.

As noted above, prospective jurors were asked to fill out a jury questionnaire. In fact, prior to trial each party had prepared a proposed jury questionnaire to be distributed to prospective jurors. (4 CT 784-804 [state's proposed questionnaire]; 4 CT 809-836 [defense proposed questionnaire].) After reviewing the two different questionnaires, the court ordered the parties to prepare a joint questionnaire. (4 CT 841-842.) The parties did so.

Defendant Jean Pierre Rices is black. (6 CT 1337.) In the joint questionnaire, the parties mutually agreed to several questions regarding racial attitudes of the prospective jurors. (*See* 4 CT 859.) The obvious purpose of these questions was to allow the parties to ferret out any jurors who may have harbored racial attitudes which could prevent a fair decision as to penalty. Question 53 of the juror questionnaire asked prospective jurors the following question:

> "Do you believe that certain races or ethnicities are more violent than others?
>
> "Yes __ No __ If Yes, please explain: _____."

Prospective juror T.T. filled out her questionnaire on May 15, 2009. (4 CT 6226.) In answer to question 53, prospective juror T.T. unequivocally stated her view that people of certain races *were* indeed more violent than people of other races. (25 CT 6237.) She explained that although "any race has violent people" she "believe[d] black and mexican (sic) are more likely to be violent." (6 CT 6237.) As a result, during voir dire prospective juror T.T. -- number 25 on panel D -- advised defense counsel that he would have an "uphill battle" to convince her to impose life without parole rather than death. (7 RT 1167, 1172.)

Prospective juror L.M. also filled out her questionnaire on May 15, 2009. (19 CT 4468.) In answer to question 53, L.M. admitted that she too believed people of certain races were more violent than people of other races. (19 CT 4479.) L.M. explained that the races which were more violent were "Hispanic [and] African-Americans." (19 CT 4479.) Perhaps not surprisingly, when questioned during voir dire (as juror 37 on panel D) she too advised defense counsel that before hearing even a single witness she was leaning towards imposing death in this case. (7 RT 1167, 1189.)

Defense counsel challenged both jurors for cause. (7 RT 1232, 1233.) The trial court denied both challenges. (7 RT 1234, 1235.) Voir dire continued.

After the hardship and for-cause parts of jury selection were completed, there were approximately 78 jurors available to serve. (8 RT 1255.) Because the court had denied defense counsel's for-cause challenge to prospective jurors T.T. and L.M., both were still in this group of 78.

On May 27, 2009, jurors who survived the hardship and for-cause process were randomly selected to sit in the jury box so the parties could exercise their peremptory challenges. Both T.T. and L.M. were called into the jury box. (8 RT 1276, 1277.) Defense counsel exercised a peremptory challenge as to each. (8 RT 1276, 1277.)

Ultimately, defense counsel exercised all 20 of his peremptory challenges. (8 RT 1273-1280.) After he had exhausted all his challenges, defense counsel filed a written motion asking for additional peremptory challenges. (4 CT 931.) He specifically asked for additional peremptory challenges because the trial court's refusal to strike T.T. and L.M. for cause was incorrect. (4 CT 937-938.)

Defense counsel made no secret of his objections to the court's rulings. Thus, he explained his concern about the court's refusal to strike prospective juror T.T.:

> "[T.T.] admits in her questionnaire 'I believe blacks and Mexicans are more likely to be violent.'" (4 CT 937-938.)

Similarly, defense counsel also explained his concern about the court's refusal to strike prospective juror L.M.:

> "[L.M.] wrote in her questionnaire that she believes Hispanic and African Americans involved in gangs are more violent . . . ." (4 CT 938.)

In open court, defense counsel made an oral motion for additional challenges as well. (8 RT 1281.) The trial court denied these motions. (8 RT 1281.) The jury was sworn. (8 RT 1287.)

As more fully discussed below, the trial court erred in refusing to strike jurors T.T. and L.M. for cause. The jury was being asked to make one decision: should Mr. Rices live or die? Although Mr. Rices is black, the trial court refused to discharge two jurors who admitted their belief that blacks were more violent than other races. In any capital case with a black defendant this would be improper; it was worse here because the prosecutor was specifically permitted to ask jurors to consider whether Mr. Rices would be violent in the future if sentenced to life without parole.

Because of the trial court's ruling, defense counsel was forced to use several peremptory challenges to ensure that neither T.T. nor L.M. sat on the jury deciding Mr. Rices's fate. Defense counsel ultimately used every one of his peremptory challenges.

When he asked for more because he was still dissatisfied with the jury, the trial court denied his request. On this record, as more fully discussed below, the trial court's refusal to discharge potential jurors who thought blacks were more violent than whites requires a new penalty phase.

B. Because Prospective Jurors T.T. And L.M. Both Believed Blacks Were More Violent Than Other Races, The Trial Court Erred In Refusing To Discharge Them For Cause From A Case In Which They Would Have To Decide If Jean Pierre Rices -- A Black Man -- Should Live Or Die.

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." As in most states, California law effectuates the constitutional guarantee of an impartial jury, at least in part, by permitting the parties to strike jurors for both actual and implied bias. (*See* Code of Civ. Pro. §§ 225, 228-231.)

The question in this case is whether the trial court violated state law and/or the Sixth Amendment right to an "impartial jury" when it refused to strike jurors T.T. and L.M. for cause. As Chief Justice Cantil-Sakauye recently noted for a unanimous court, in order to attack a trial court's denial of a for-cause challenge to a prospective juror a defendant must show (1) the trial court's denial of the challenge was improper, (2) defendant used a peremptory challenge to remove the juror and exhausted his peremptory

challenges and (3) defendant expressed dissatisfaction with the seated jury. (*People v. Whalen* (2013) 56 Cal.4th 1, 42. *Accord People v. Jones* (2012) 54 Cal.4th 1, 45; *People v. Mills* (2010) 48 Cal.4th 158, 186; *People v. Bonilla* (2007) 41 Cal.4th 313, 339; *People v. Cunningham* (2001) 25 Cal.4th 926, 976; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088.) Because each of these predicates for relief is established here, the trial court's ruling violated both state and federal law and requires a new penalty phase.

1. The trial court's refusal to discharge prospective jurors T.T. and L.M. was improper.

The United States Supreme Court has made clear that under the Sixth Amendment a prospective juror is properly discharged for cause whenever the record shows the prospective juror's views would "substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas* (1980) 448 U.S. 38, 45.) California law similarly provides that a juror may be challenged for cause when the record shows "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of any party." (Code of Civ. Pro. § 225, subd. (b)(1)(C). *See People v. Nessler* (1997) 16 Cal.4th 561, 581.)

The Supreme Court has also noted that because race may play an important factor in some cases, there are situations where a trial court must permit voir dire to reveal racial prejudice. (*See Turner v. Murray* (1986) 476 U.S. 28; *Ham v. South Carolina* (1973) 409 U.S. 524.) Given that Mr. Rices is black it was important for the defense to find out if there were any prospective jurors who would not be impartial simply because of generalized attitudes towards blacks. This was especially true here, where the prosecutor asked the jury to impose death -- at least in part -- based on an argument that Mr. Rices would be violent in the future to other inmates and prison staff. (19 RT 2752-2753.) Here, in the joint juror-questionnaire the parties *agreed* that such questioning was proper and specifically included a question designed to see if any prospective jurors believed one race or ethnicity was more violent than others. (*See* Question 53.) The trial court properly exercised its discretion to permit such an inquiry.

And the irony of this case is that the voir dire process actually worked. Two prospective jurors stated their belief that "certain races or ethnicities are more violent than others." (19 CT 4479; 25 CT 6237.) This is precisely the type of view the questionnaire was designed to uncover.

Both prospective jurors explained that "blacks and mexican[s]" and "Hispanic/ African Americans" were more likely to be violent. (19 CT 4479; 25 CT 6237.) Both

told defense counsel that before hearing even a single witness, they were inclined to impose death. (7 RT 1167, 1172, 1189.) When defense counsel challenged each of these jurors for cause, the trial court denied the challenges. (7 RT 1232-1235.)

The trial court's ruling cannot be sustained. These jurors were going to decide whether Jean Pierre Rices, a black man, would get life or death. They were going to be asked whether he would be violent in the future. Jurors who have declared a belief that blacks are more violent than other races plainly have "a state of mind . . . in reference to the case, *or to any of the parties*, which will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of any party." (Code of Civil Procedure section 225, subdivision (b)(1)(C), emphasis added.) Just as plainly this same state of mind would "substantially impair" the ability of these jurors to perform impartially as jurors in deciding whether Mr. Rices should be put to death. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) The trial court's refusal to discharge these jurors for cause was error. (*See People v. Taylor* (2010) 48 Cal.4th 574, 609 n.8 [black defendant charged with capital crime, prospective juror stated in his questionnaire that he had "moderate" prejudice against blacks; juror discharged for cause].)

2. Defense counsel properly preserved this issue for appeal.

The fact that the trial court erroneously denied the for-cause challenges to prospective jurors T.T. and L.M. does not end the analysis. As noted above, in order to preserve this issue for appeal a defendant must also show (1) counsel used a peremptory challenge to remove the juror and exhausted all his peremptory challenges and (2) counsel expressed dissatisfaction with the seated jury. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 42; *People v. Jones*, *supra*, 54 Cal.4th at p. 45; *People v. Mills*, *supra*, 48 Cal.4th at p. 186; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 339; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 976; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 444; *People v. Morris*, *supra*, 53 Cal.3d at p. 184; *People v. Bittaker*, *supra*, 48 Cal.3d at pp. 1087-1088.)

With respect to this latter requirement, counsel may express dissatisfaction with the jury by conduct. Thus, counsel can express dissatisfaction with the jury by requesting additional peremptory challenges to excuse members of the seated jury. (*See People v. Whalen*, *supra*, 56 Cal.4th at p. 42 [trial court denied for cause challenges, defense counsel did not seek additional peremptory challenges; held, claim not preserved since defendant did not "express any dissatisfaction with the jury ultimately selected."]; *People v. Ramirez* (2006) 39 Cal.4th 398, 448 [trial court denied for cause challenge to alternate juror, defendant exhausted peremptory challenge to remove this juror but "defendant did

not request additional peremptory challenges" as to the alternates; held, claim not preserved since defendant "fail[ed] to express dissatisfaction with the jury . . . ."]; *People v. Shambatuyev* (1996) 50 Cal.App.4th 267, 272 [recognizing that a request for additional peremptory challenges would preserve a claim of improper denial of for-cause challenges]; *People v. Terry* (1994) 30 Cal.App.4th 97, 103-104 [failure to seek additional peremptory challenges after exhausting challenges waives the issue].)

Here the record shows that defense counsel (1) used peremptory challenges to discharge T.T. and L.M. and (2) exhausted his allotted challenges. When prospective jurors T.T. and L.M. were called into the jury box, defense counsel exercised a peremptory challenge as to each. (8 RT 1276, 1277.) And defense counsel exercised all 20 of his peremptory challenges. (8 RT 1273-1280.)

The record also shows that defense counsel expressed dissatisfaction with the jury by asking for additional peremptory challenges. In fact, counsel asked for more peremptory challenges both in writing and orally. (4 CT 931; 8 RT 1281.)

For good reason. There were a number of seated jurors who counsel would have wanted to challenge. For example, seated juror 4 stated she would give more weight to the testimony of police officers than other witnesses and admitted that she would "favor

the side that had law enforcement officers as witnesses." (7 CT 1509, 1511.) She had been the victim of several violent crimes and believed that as to one of these crimes, the sentence imposed was not harsh enough. (7 CT 1512.)

There should be little doubt that seated juror 4 was a problematic juror from the defense perspective. Based on what she had heard about the case, she had formed an extremely negative view of Mr. Rices before the case even started. When asked what opinion she had formed of Mr. Rices she responded as follows:

> "None, other than he sounds obviously violent and without regard for human life." (7 CT 1518.)

Juror number 4 made clear that she would not weigh or consider defendant's childhood or upbringing because "by a certain age they should know right from wrong unless they are mentally incapable of that reasoning." (7 CT 1521.) During voir dire, this juror stated that the death penalty was used too seldom. (6 RT 917.) Given that the aggravation phase of this case involved testimony from numerous law enforcement officers, the mitigation case depended largely on evidence of defendant's childhood, this juror already believed that Mr. Rices was "obviously violent and without regard for human life," this was hardly a positive juror for the defense. But without a peremptory challenge left, counsel could not challenge her.

Similarly, seated juror number 10 was also problematic from the defense perspective. In his questionnaire, this juror made clear that he was strongly in favor of the death penalty. When asked what his general feelings about the death penalty were, juror number 10 did not mince words: "If you take a life (inosent) [sic] yours should be taken." (8 CT 1652.)

Seated juror number 6 was also problematic from the defense perspective. The juror too stated that he would give more weight to the testimony of law enforcement officers. (7 CT 1555.) Perhaps worse, when asked his views on the death penalty he explained that "the Bible says if you take a life . . . 'willfully' [your] life should be taken." (7 CT 1564.) Given that there was no dispute that the killings in this case were willful, this was not a juror who counsel could have wanted on this jury. Once again, however, when defense counsel's request for additional peremptory challenges was denied, he was unable to challenge this juror either.[2]

In sum, defense counsel in this case did all that he was supposed to do to preserve

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[2] During the regular voir dire process, seated juror 1 made the court and parties aware of a potential financial hardship if he was seated. (6 RT 921, 946-947.) When selected in the random draw, seated juror 1 reiterated that he had a financial hardship in serving a significant amount of time on the jury. (8 RT 1254.) The court refused to hear any more hardship requests. (8 RT 1254.) Because defense counsel had no more peremptory challenges, he could not discharge seated juror 1. The jury returned a verdict sentencing Mr. Rices to death in under two hours. (6 CT 1251.)

this issue for review. He used a peremptory challenge to discharge prospective jurors T.T. and L.M., he exhausted all his peremptory challenges, and -- for good reason -- he expressed dissatisfaction with the seated jury. Because the trial court erred in refusing to discharge two jurors for cause who admitted they thought people who are black are more prone to violence, Mr. Rices was denied a fair and reliable sentencing determination in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights, as well as similar provisions of the state constitution. A new penalty phase is required.

II. BECAUSE THE MAIN THRUST OF THE DEFENSE CASE WAS THAT MR. RICES'S CHILDHOOD AND UPBRINGING CONSTITUTED MITIGATING EVIDENCE CALLING FOR A SENTENCE LESS THAN DEATH, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO STRIKE JURORS WHO EXPLICITLY ADMITTED THEY WOULD NOT CONSIDER CHILDHOOD EVENTS IN MITIGATION.

A. The Relevant Facts.

As the statement of facts above makes clear, in its case in mitigation the defense presented substantial evidence about Mr. Rices's childhood. There is no need to repeat those facts in detail here; the evidence showed defendant's mother was a PCP-addicted prostitute who constantly called her son "stupid." She ultimately abandoned her son at a Jack-in-the-Box restaurant when he was only five years old as he stood in the parking lot crying "Mama, I want to go, I want to go. Mama!" (17 RT 2430-2440, 2441, 2449-2450, 2453-2455, 2465.) The five-year-old Jean Pierre Rices received no therapy or services of any kind; he never saw his mother again and he was shipped off to the homes of various relatives for the next years of his life before being placed in group homes. (17 RT 2549-2503, 2507, 2522, 2664-2665.)

As this record shows, Mr. Rices's childhood and background were central to the defense case in mitigation. Accordingly, during voir dire the trial court permitted the parties to ask prospective jurors whether they would be able to consider "childhood and

upbringing" in deciding on the proper penalty. Thus, question 90 of the jury questionnaire reads as follows:

> "In determining whether life in prison with no possibility of parole or death is the appropriate penalty, would you be willing to weigh and consider the defendant's childhood and upbringing as factors in reaching your decision? Yes ☐ No ☐"
>
> "Please explain: _____
> _____."

Prospective juror V.B. responded candidly to this question, checking the "No" box and explaining that "everyone has to be responsible for their actions." (10 CT 2114.)[3] During voir dire, V.B. said he could consider both life and death as options, but he was not asked about -- and he did not retreat from -- his position that he would refuse to consider childhood and upbringing as mitigation. (7 RT 1090-1091, 1130-1131.)

Prospective juror T.T. was similar. She too stated on her questionnaire that she would refuse to consider childhood and upbringing as mitigating evidence. She noted

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[3] Prospective juror V.B. was originally given juror number 144. (10 CT 2097.) When called for voir dire, he was given a new juror number -- 25 -- which pursuant to the trial court's practice simply reflected the order in which V.B. was called on the morning of May 22, 2009. (7 RT 1090. *See* 7 RT 1062-1063. [V.B. is the 25th juror called that morning].) When actually called to the box, he was given another new number -- juror 23. (8 RT 1274-1275.) For the sake of convenience, he will he referred to as V.B. throughout this argument.

that although "childhood upbringing has a lot to do with it everyone has the choice to make positive changes in their life. A lot of people have horrible childhoods and become wonderful adults. Childhood upbringing should not be an excuse for bad choices in life." (25 CT 6243, 6245.) During voir dire T.T. said she would listen to both sides, but she too never retreated from her position that she would not consider childhood and upbringing as evidence of mitigation. (7 RT 1172, 1212.)[4]

Defense counsel challenged both jurors for cause. (7 RT 1145 [challenging prospective juror V.B. by name], 1231-1232 [challenging prospective juror T.T. by juror number].) The trial court denied the challenges. (7 RT 1145-1148, 1234.) Near the end of voir dire, defense counsel renewed his challenges. As to V.B., defense counsel noted in part that based on his answer to question 90, he was "unwilling to fairly assess mitigating evidence." (4 CT 937.) As to T.T., defense counsel noted in part that she "demonstrates an inability to fairly consider mitigation evidence." (4 CT 937-938.) The trial court refused to reconsider its rulings. (8 RT 1253.)

The trial court's refusal to discharge both V.B. and T.T. was error. As discussed

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[4] Prospective juror T.T. was originally given juror number 181. (25 CT 6226.) When called for voir dire, she was the 25th juror called for the afternoon session so she too was given 25 as a new juror number. (*See* 7 RT 1155, 1172.) When actually seated in the box, she was given another new number -- juror 27. (8 RT 1277.) For the sake of convenience, she will be referred to as T.T. throughout this argument.

more fully below, the trial court's refusal to strike these jurors for cause requires a new penalty phase.

B. The Trial Judge Erred As A Matter Of Law In Refusing To Discharge For Cause Prospective Jurors Who Said They Would Not Consider Childhood Evidence In Mitigation.

As discussed in Argument I, *supra*, a juror should be excluded for cause if his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) In the penalty phase of a capital case, a juror's duties necessarily include giving meaningful consideration to any mitigating evidence that the defendant can produce. (*See Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 [noting that sentencer may *not* refuse to consider mitigating evidence of a defendant's troubled childhood and upbringing].)

In light of *Eddings*, the Supreme Court has made clear that where voir dire examination shows that a juror "will fail in good faith to consider the evidence of . . . mitigating circumstances as the instructions require him to do," he is excludable for cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729.) As the Court observed nearly a quarter century ago, "[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence." (*Boyde v. California* (1990) 494 U.S.

370, 377-378.)

Applying these principles here is straightforward. Under *Eddings*, evidence of a troubled and difficult childhood is mitigating evidence. (455 U.S. at p. 115.) And "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." (455 U.S. at pp. 113-114.) Here, once prospective jurors V.B. and T.T. stated that they would not consider childhood and upbringing in mitigation, they could not sit as jurors and should have been dismissed for cause.

As discussed in Argument I above, the fact that the trial court erroneously denied the for-cause challenges to these two prospective jurors does not end the analysis. Defendant cannot successfully contest the denial of a for-cause challenge on appeal unless (1) defense counsel used a peremptory challenge to remove the juror and exhausted all his peremptory challenges and (2) counsel expressed dissatisfaction with the seated jury. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 42; *People v. Jones*, *supra*, 54 Cal.4th at p. 45; *People v. Mills*, *supra*, 48 Cal.4th at p. 186; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 339; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 976; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 444; *People v. Morris*, *supra*, 53 Cal.3d at p. 184; *People v. Bittaker*, *supra*, 48 Cal.3d at pp. 1087-1088.) And as discussed above, dissatisfaction with the jury may

be expressed by conduct, such as requesting additional peremptory challenges to excuse members of the seated jury. (*See People v. Whalen*, *supra*, 56 Cal.4th at p. 42; *People v. Ramirez*, *supra*, 39 Cal.4th at p. 448; *People v. Shambatuyev*, *supra*, 50 Cal.App.4th at p. 272; *People v. Terry*, *supra*, 30 Cal.App.4th at pp. 103-104.)

This aspect of the issue has been discussed in detail in connection with Argument I. Suffice it to say here that defense counsel (1) used peremptory challenges to discharge V.B. and T.T. and (2) exhausted his allotted challenges. When prospective jurors V.B. and T.T. were called into the jury box, defense counsel exercised a peremptory challenge as to each. (8 RT 1274-1275, 1277.) Moreover, not only did defense counsel exercise all 20 of his peremptory challenges, but at the end of the voir dire he explicitly asked for additional peremptory challenges both in writing and orally. (4 CT 931; 8 RT 1273-1280, 1281.)

As also discussed above, the record shows why defense counsel wanted additional peremptory challenges. Left on the jury was one juror who had herself been the victim of violent crimes where the sentence imposed was not harsh enough, who believed the death penalty was not used often enough, conceded she would "favor the side that had law enforcement officers as witnesses" and who said that based on the press she had read, Mr. Rices "sounds obviously violent and without regard for human life." (7 CT 1509, 1511,

1512, 1518; 6 RT 917.) Another seated juror thought death was proper for anyone who took a life willfully and admitted he would give more weight to the testimony of law enforcement officers. (7 CT 1555, 1564.) Yet another seated juror, who was in favor of the death penalty, explained simply that "if you take a life (inosent) [sic] yours should be taken." (7 CT 1652.)

As with the claim raised in Argument I, defense counsel here did all that he was supposed to do to preserve this issue for review. Because the trial court erred in refusing to discharge two jurors for cause who said they would refuse to consider defendant's childhood and upbringing in mitigation, Mr. Rices was denied a fair and reliable sentencing determination in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights, as well as similar provisions of the state constitution. A new penalty phase is required.

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PRECLUDING DEFENSE COUNSEL FROM FULLY VOIR DIRING JURORS TO DETERMINE IF THEY WOULD CONSIDER LIFE AS AN OPTION IN DECIDING MR. RICES'S PENALTY.

A. The Relevant Facts.

Since Mr. Rices pled guilty, the only question in this case was whether the jury would choose life or death. Put another way -- in the language of California's death penalty scheme -- the only question for the jury was whether it would find the aggravating evidence outweighed the mitigating evidence.

The joint jury questionnaire made clear that the mitigating evidence was going to consist of evidence regarding Mr. Rices's difficult childhood, the impact of domestic violence in the home and his parents' use of drugs. Questions 55-58 (drugs and alcohol), 59-60 (domestic violence) and 90 (childhood and upbringing) solicited information from prospective jurors about each of these areas. (*See* 7 CT 1537-1538, 1543.)

The state's notice of aggravating evidence set forth the aggravating evidence the state was planning to introduce. This consisted, in part, of other crimes evidence including (1) a prior carjacking involving Paul Hilliard in March of 1999, (2) an attack on law enforcement (jail) personnel on August 8, 2008 and (3) the possession of a shank in

prison in 2001. (4 CT 778.) In contrast to the mitigating evidence, the joint juror questionnaire solicited information about *none* of these areas.

After the court handled the hardship discharges, the first panel of prospective jurors was called for voir dire. (6 RT 872.) Defense counsel was the first lawyer to question the prospective jurors. (6 RT 885.) Early on in the voir dire process defense counsel tried to find out whether prospective jurors would still at least consider life as an option if they knew about the other criminal offenses of carjacking, possession of a shank and attempted murder of a law enforcement officer. (6 RT 893.)

The court refused to allow any such questioning. According to the court, the voir dire was to be conducted only "in the abstract." (6 RT 893.) The court stressed that "this is inquiry in the abstract." (6 RT 894.)

Defense counsel made clear he did not want to go into the other crimes evidence in any detail. (6 RT 894.) He simply wanted to present prospective jurors with "the violent conduct that [defendant] has previously been engaged in, that he has previously been convicted of . . . ." (6 RT 894.) Defense counsel believed "I have a right to ask them in the abstract whether a combination of the two attempted -- the two murders, the attempted murder, the carjacking in the abstract . . . ." (6 RT 895.) Defense counsel reiterated that

he was not asking to present the jury with any facts of the prior convictions:

> "Your honor, so the record is really clear, what I'm asking to be allowed to do is to put in, in the abstract, the conviction of the two murders, the attempted murder, the conviction of the carjacking, the conviction of the shank in prison. . . .
>
> "I understand the court's ruling that I'm not allowed to go there, but this is not a fact specific exercise. This is a general exercise as to convictions in these areas. And based upon the court's direction, I won't go into them." (6 RT 896.)

Here, the trial court made quite plain in its rulings that defense counsel could not pursue this area at all at any time. The court could not have been much clearer: in denying defense counsel's repeated requests the court stated "that's not going to happen," "I'm not going to allow [it] . . . . It's not going to happen," and "it's not going to happen in this case." (6 RT 894, 895, 896.)

Nonetheless, defense counsel renewed his motion to ask about the attempted murder convictions later on during voir dire. (7 RT 1057-1058.) The court denied the renewed motion. (7 RT 1059.) When the matter was discussed again, the court stated that defense counsel was not permitted even to "give the jury hints as to what they are going to be hearing about." (7 RT 1101.) As more fully discussed below the court's limitation on defense counsel's ability to voir dire the jury was improper, violated Mr.

Rices's rights to an impartial jury, a fair trial and the effective assistance of counsel. A new penalty phase is required.

B. The Trial Court's Repeated Refusal To Permit Defense Counsel To Ask Prospective Jurors If They Would Consider Life In A Case Where Defendant Had Prior Convictions For Attempted Murder, Carjacking And Possession Of A Shank Requires A New Penalty Phase.

Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) This Court has noted that this qualification standard operates in the same manner "whether a prospective jurors' views are for or against the death penalty . . . ." (*People v. Cash* (2002) 28 Cal.4th 702, 720.) Accordingly there are two questions to be answered in exercising for cause challenges under this standard depending on which side is exercising the challenge: (1) "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror* . . . [and (2)] whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole *in the case before the juror.*" (*People v. Cash, supra*, 28 Cal.4th at pp. 719-720, emphasis added.)

In order to properly exercise for-cause challenges under this standard, both parties

are permitted to provide prospective jurors with sufficient case-specific information to determine the views of the prospective jurors "in the case before the juror." (*See People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Ervin* (2000) 22 Cal.4th 48, 70; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005-1005.) This rule has long been applied to permit the prosecution to specifically identify certain important mitigating evidence during voir dire and ask prospective jurors if they could at least consider death as an option even if such mitigation was presented. (*See, e.g. People v. Taylor* (2010) 48 Cal.4th 574, 636-637 [defendant charged with felony murder, a key mitigator was that defendant was not the actual killer and did not intend to kill, during voir dire prosecutor asks prospective jurors if they could consider death as an option where defendant did not kill or intend to kill; held, prosecutor's questions about the mitigation were entirely proper way of effectuating his right to challenge jurors who would not consider death as an option]; *People v. Ochoa* (2001) 26 Cal.4th 398, 428-431 [same]; *People v. Noguera* (1992) 4 Cal.4th 599, 645-647 [defendant charged with capital murder, a key mitigator was defendant's youth, during voir dire prosecutor asks prospective jurors if they could consider death as an option where defendant was only 18 or 19 years old; held, prosecutor's questions about the mitigation were entirely proper way of effectuating his right to challenge jurors who would not consider death as an option].)

The same rule should, of course, apply to the defense. And indeed it does; just like

the prosecutor, defense counsel is permitted to specifically identify certain important aggravating evidence during voir dire and ask prospective jurors if they could at least consider life as an option even if such aggravation is presented. (*See, e.g., People v. Cash, supra*, 28 Cal.4th at pp. 719-720 [defendant charged with capital murder, a key aggravator was the presence of prior murders, during voir dire defense counsel was precluded from asking prospective jurors if they could consider life as an option if this aggravator was present; held, reversal of penalty phase required because defense counsel's questions about the aggravation were an entirely proper way of effectuating his right to challenge jurors who would not consider life as an option]. *Compare People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1004-1005 [defense counsel should have been allowed to question prospective jurors about "facts likely to be shown by the evidence at trial" in order to establish a basis for a for-cause challenge].)

This does not mean, of course, that either the prosecution or the defense may ask questions that are so specific it would require jurors to prejudge the evidence. (*People v. Edwards* (2013) 57 Cal.4th 658, 749; *People v. Cash, supra*, 28 Cal.4th at pp. 721–722.) Nor does it mean either side has a right to question jurors about unimportant aggravation or mitigation. Instead, the general rule is that the right of a party to ask about particular aggravation or mitigation is limited to aggravation or mitigation which is so potentially important under the facts of that case that it could result in a reasonable juror

deciding to invariably vote either for death (in the case of aggravating evidence) or life (in the case of mitigating evidence). (*See, e.g., People v. Valdez* (2012) 55 Cal.4th 82, 167-168; *People v. Solomon* (2010) 49 Cal.4th 792, 840.)

The case law discussed above provides some guidance in applying this general rule. Thus, when it is the *prosecutor* who wants to learn the views of prospective jurors, this Court has deemed the fact that the defendant was only 18 or 19, the fact that defendant did not intend to kill and the fact that defendant did not actually kill to be the type of mitigation which is so important to the penalty decision that it could result in an invariable vote for life. (*See People v. Taylor, supra*, 48 Cal.4th at pp. 636-637 [defendant did not kill or intend to kill]; *People v. Ochoa, supra*, 26 Cal.4th at pp. 428-431 [defendant did not kill]; *People v. Noguera, supra*, 4 Cal.4th at pp. 645-647 [defendant only 18 or 19].) Where it is the *defense* that seeks to learn the views of prospective jurors, this Court has deemed the fact that defendant had prior murders to be the type of aggravation which is so important to the penalty decision that it could result in an invariable vote for death. (*People v. Cash, supra*, 28 Cal.4th at pp. 719-720.)

Thus, there are two issues to be resolved in this case. First, was the area defense counsel sought to probe one of these areas recognized as important enough to have a particularly significant impact on the sentencing determination? Second, if the answer is

yes, then can the trial court's refusal to permit questioning in this area be found harmless? It is to these questions Mr. Rices now turns.

1. The area defense counsel sought to probe has long been recognized as an area which has a substantial impact upon the sentencing determination.

As noted, the first question presented here is whether the other crimes evidence which defense counsel sought to reference -- the prior carjacking, the possession of a shank in prison and the attempted murder of a law enforcement officer (6 RT 893) -- were of sufficient importance to permit defense counsel to probe the views of the prospective jurors. Under decades of this Court's precedents, the answer must be yes.

For nearly half a century this Court has consistently observed the practical reality that evidence of other crimes "may have a particularly damaging impact on the jury's determination whether to impose the death penalty." (*People v. Heishman* (1988) 45 Cal.3d 147, 181. *Accord People v. Davenport* (1985) 41 Cal.3d 247, 281; *People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. Polk* (1975) 63 Cal.2d 443, 450; *People v. Brawley* (1969) 1 Cal.3d 277, 299.) More than 40 years ago the Court went even further, recognizing that other crimes evidence may be the most important factor causing jurors to impose death:

> "Evidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty according to a survey recently published by the Stanford Law School." (*People v. McClellan* (1969) 71 Cal.2d 793, 804 n.2.)

Social science data supports this Court's conclusion. The study which this Court referenced in *McClellan* concluded after an extensive analysis that "[t]he aspect of the cases with the greatest impact on penalty was the presence or absence of a prior criminal record. . . . According to nearly all of the analytical techniques employed, the admission of defendant's 'priors' into evidence at penalty is the most significant of all the variables analyzed in the study." (Note, *A Study of the California Penalty Jury in First-Degree Murder Cases* (June 1969) 21 Stan. L. Rev. 1297, 1326.) Other studies across the nation have consistently confirmed that among aggravating factors related to the defendant himself (as opposed to aggravating factors relating to the crime), jurors place extremely heavy reliance on other crimes evidence in imposing a death sentence. (*See, e.g.*, S. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1559 (1998); Baldus et al., *Comparative Review of Death Sentences: an Empirical Study of the Georgia Experience* (1983) 74 J. Crim. L. & Criminology 661, 686; Barnett, *Some Distribution Patterns for the Georgia Death Sentence* (1985) 18 U.C. Davis L. Rev. 1327, 1363; Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach* (1980) 33 Stan. L. Rev. 1, 26.)

Commentators have similarly recognized "the importance of other crimes evidence to the jury's life-or-death decision . . . ." (3 Witkin, Cal. Crim. Law 4th (2012), Punishment, section 559, p. 913.) And the United States Supreme Court has weighed in as well, noting that evidence of a prior felony conviction -- even without details of violent conduct -- could be "decisive in the choice between a life sentence and a death sentence." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 586.)

On this record, the aggravating evidence of other crimes was sufficiently important such that defense counsel should have been permitted to voir dire on it. Indeed, it should be hard to argue otherwise; not only does social science data from California and around the country support this conclusion, but this Court itself has observed that this kind of evidence has "a particularly damaging impact on the jury's determination whether to impose the death penalty" and has recognized that such evidence "is the strongest single factor that causes juries to impose the death penalty." (*People v. Heishman*, *supra*, 45 Cal.3d at p. 181; *People v. McClellan*, *supra*, 71 Cal.2d at p. 804, n.2.) Given that this evidence is so critical to any decision to impose death, it stands to reason that the trial court erred in precluding defense counsel from asking the prospective jurors if they could at least consider life despite the presence of such evidence.

It is worth noting here that defense counsel repeatedly stated this "was not a fact

specific exercise." (6 RT 896.) He explained he was *not* seeking to present the jury with *any* of the facts of the prior crimes. (6 RT 894-895.) Instead, he was asking to present them with the existence of the other crimes "in the abstract" and ask about whether a life sentence was still an option in light of that aggravation. (6 RT 896.) It was error for the court to preclude defense counsel from even giving "the jury [a] hint[] as to what they are going to be hearing about." (7 RT 1101.) The infringement on counsel's ability to voir dire the jury not only violated Mr. Rices's right under state law, but his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair and reliable sentencing phase, an impartial jury and the effective assistance of counsel.

2. The state cannot prove that the trial court's improper limitation on defense counsel's voir dire was harmless.

The only remaining question is prejudice. An erroneous limitation on defense counsel's voir dire of jury during death qualification can be found harmless. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.) Where the trial court permits defense counsel to explore the area in general voir dire, or where the record affirmatively shows that no jurors could have been disqualified based on the additional aggravation, the error may be deemed harmless. (*Ibid.*) Absent such a showing by the state, however, the ruling in this case barring voir dire based on the attempted murder, the carjacking and the shank possession "create[s] a risk that a juror who would automatically vote to impose the death

penalty on a defendant [who had committed these other offenses] was empaneled and acted on those views, thereby violating defendant's due process right to an impartial jury." (*Id.* at p. 723.)

Here, the trial court made quite plain in its rulings that defense counsel could not pursue this area at all at any time. As noted above, the court was entirely clear. In denying defense counsel's repeated requests the court stated "that's not going to happen," "I'm not going to allow [it] . . . . It's not going to happen," and "it's not going to happen in this case." (6 RT 894, 895, 896.) Nor does anything in the record even remotely suggest that all of the prospective jurors would still have been able to consider life as an option in light of the other crimes evidence.

To the contrary, numerous prospective and seated jurors forthrightly conceded in their questionnaires that they viewed law enforcement personnel with a special aura of credibility. (*See, e.g.*, 7 CT 1509, 1511, 1555.) Precisely because of the trial court's ruling, it is impossible to determine if an attempted murder on a law enforcement officer would have prevented these jurors from fairly considering a life option.

For these reasons the trial court erred in limiting defense counsel's voir dire. Because that error cannot be proven harmless, a new penalty phase is required.

IV. BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR WADHAMS WHO REPEATEDLY AGREED SHE WOULD ADDRESS THE QUESTION OF PENALTY BY LISTENING TO ALL THE EVIDENCE, REVERSAL OF THE PENALTY PHASE IS REQUIRED.

A. The Relevant Facts.

As discussed in Argument I above, after the hardship process in this case, prospective jurors were questioned in four panels. At the conclusion of questioning of each panel of prospective jurors, the parties exercised (and the court ruled on) for-cause challenges.

After the third panel was questioned, the prosecutor successfully moved to discharge three potential jurors for cause: prospective jurors Gregg, Wimberly and Wadhams. During her voir dire, prospective juror Lorie Gregg said she "would not be able to give the death penalty." (7 RT 1097.) She was 95 to 99% sure that she could not impose death. (7 RT 1096.) Prospective juror Alice Wimberly stated that she would vote for life without parole "no matter what evidence is presented at the penalty phase." (27 CT 6705.) She confirmed during voir dire that she would not consider death as an option. (8 RT 1121-1122.)

However, prospective juror Heather Wadhams was different. In her written jury

questionnaire, Ms. Wadhams stated that she was "somewhat biased against the death penalty" which was "harsh & severe." (26 CT 6484.) But she stated that she would *not* automatically vote for life without parole regardless of the evidence. (26 CT 6485.)

Ms. Wadhams appeared for voir dire on May 22, 2009 as juror 28. (7 RT 1055, 1063, 1146.) Under questioning by defense counsel, Ms. Wadhams stated that sitting on a capital case jury would be stressful; she "did not want the stress of having to make a verdict on [the victim's] death." (7 RT 1079.) She agreed it would be "a difficult [decision] to make." (7 RT 1080).

The prosecutor questioned Ms. Wadhams. This was the entirety of that questioning:

> "Q: [by prosecutor McAllister] Ms. Wadhams
>
> "A: [by prospective juror Wadhams] Correct.
>
> "Q: Oh, good. I noticed that in response to some of your questions you indicated that you were somewhat against the death penalty.
>
> "A: Correct.
>
> "Q: That being the ultimate issue here, do you think that you can legitimately consider the death penalty as an option in this case?
>
> "A: Yes.

"Q: And has there been anything about -- I don't want to say something I am not supposed to. It's important that you recognize that we really are here, meaning that we really are getting to the meat of the matter, and I am going to be standing here in three or four weeks asking all the jurors to bring back a verdict of death. It's a tough, tough, tough decision and I can't imagine many more decisions in life that are that tough. So I want you to search your heart and your soul and say, 'yeah, I really think I could if I am convinced' or 'no, I really don't think I could.'

"A: I think it's really going to depend on the evidence.

"Q: You are willing to listen to that evidence?

"A: I am willing to be open to it, yeah.

"Q: Thank you, ma'am. If you wouldn't mind handing [the microphone forward.] There was another question. If you could take the mike again. There was another question I meant to ask you and, that is, that you had --

"The Court: Is that an issue regarding travel?

"[The prosecutor]: Yes.

"The Court: We'll take that up in a few minutes. I was going to ask a few people to come back in individually.

"[The prosecutor]: There was one other issue as well. In your questionnaire, apparently when you were asked whether you could consider these things, you made a statement that the stress of this type of decision, you thought, was going to be too difficult for you. Do you recall that?

"A: Yeah.

"Q: And has something intervened to change your mind about that?

"A: No. I think it's a heavy burden.

"Q: But you think you are up to it? This is the whole thing. I see the hesitation. I guess the point I am trying to make is, some people can serve on a case like this and some people can't.

"A: I think I am willing to. I just don't know subconsciously if I have other beliefs.

"Q: Well, that's important.

"A: Yeah.

"Q: That's important because that -- that's what I meant by this is reality. We are really here. Because if you were, for example --

"[Defense counsel]: Your honor, I am going to renew my objection at this point.

"The Court: I'll allow one more question, hopefully for some clarification, and that would be it.

"[The prosecutor]: If you were, for example, to be sitting there, saying to yourself, 'I just' -- you know, 'I just don't think I could take the stress of even considering imposing the death penalty,' then the time to tell us, I guess, is now.

"A: I do believe it would be stressful on me, and I don't know if I can make a fair assumption, but I would try.

"Q: Thank you." (7 RT 1032-1035.)

The prosecutor did not ask Ms. Wadhams if she would have any difficulty applying the law as given to her by the court. The prosecutor did not ask Ms. Wadhams if she would refuse to apply to the law as given to her by the court. The prosecutor did not ask Ms. Wadhams whether, if seated and sworn as a juror, she would refuse to follow her

oath to follow the law as set forth by the court.

Instead, as noted above, the prosecutor challenged Ms. Gregg, Ms. Wimberly and Ms. Wadhams for cause. (7 RT 1142.) When asked to explain the basis for his challenge of Ms. Wadhams, the prosecutor's entire explanation was as follows:

> "Your honor, Ms. Wadhams. It's almost an overall assessment of her ability to sit as a juror on this case as much as it is anything else." (7 RT 1145.)

Over defense objection, the trial court discharged prospective juror Wadhams:

> "As to the request from the people, I am going to excuse Ms. Wadhams. In listening to her, watching her body language, it does appear to me she . . . would be substantially impaired in her ability to return a verdict of death." (7 RT 1148.)

No other findings were made to support the court's decision to exclude Mr. Wadhams from the jury.

As more fully discussed below, the trial court's ruling was improper. It was the state's burden to prove Ms. Wadhams unfit to serve as a juror. Given the jury questionnaire and the voir dire, the state did not carry its burden. Reversal of the penalty

phase is required.

B. The State May Not Excuse A Prospective Juror For Cause Based On Her Personal Views About The Death Penalty Unless It Affirmatively Establishes The Juror Will Not Follow The Law.

As noted above, a prospective juror may be discharged for cause because of her views on the death penalty only where the record shows the juror is unable to follow the law as set forth by the court. (*Adams v. Texas*, *supra*, 448 U.S. at p. 48.) If the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) The "test for excluding a juror for cause is whether the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424.)

This Court has repeatedly held that it is the *Adams/Witt* standard which reviewing courts should apply in evaluating a trial court's decision to discharge jurors because of opposition to the death penalty. (*See, e.g.*, *People v. Holt* (1997) 15 Cal.4th 619, 650; *People v. Avena* (1996) 13 Cal.4th 394, 412.) "Under *Witt*, therefore, our duty is to examine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would substantially impair the performance of

[the juror's] duties . . . was fairly supported by the record." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1094. *See People v. Miranda* (1987) 44 Cal.3d 57, 94.)

In reviewing the trial court's ruling here, the Court must keep in mind that as the Supreme Court has emphasized, the *Adams/Witt* standard "is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48.) As the Court has concluded, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Here, application of the *Adams/Witt* standard to the voir dire of Ms. Wadhams shows the trial court erred in discharging her for cause. Indeed, the facts of *Adams* itself provide a useful guide for this case.

Ultimately, *Adams* held the state had *not* carried its burden of proving that the views of a number of jurors "would prevent or substantially impair the performance of

[their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) In fact, the voir dire in *Adams* involved five jurors who were plainly equivocal about whether their views on the death penalty would impair their performance as jurors in the penalty phase.

For example, prospective juror Francis Mahon was unable to say her feelings about the death penalty would not impact her deliberations. Instead, she admitted these feelings "could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no." (*Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix ("Adams App.") at p. 3, 8.)[5] Prospective juror Nelda Coyle expressed the same concern, admitting that she could not say her penalty phase deliberations "would not be influenced by the punishment . . . ." (Adams App. at p. 24.) Prospective juror Mrs. Lloyd White was not entirely sure, but believed her aversion to imposing death would "probably" affect her deliberations and she "didn't think" she could vote for death. (Adams App. at pp. 27-28.) Prospective juror George Ferguson admitted his opposition to capital punishment "might" impact his deliberations, while prospective juror Forrest Jenson stated his views on the death penalty would "probably" affect his deliberations. (Adams App. at p. 12, 17.)

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[5] The Appendix to Brief of Petitioner in *Adams* is a transcript of the voir dire examination of prospective jurors.

In other words, *Adams* involved five jurors who expressed equivocal comments about whether they would put aside their personal views which might conflict with their ability to follow the law. In connection with each of these five jurors expressing equivocal comments, the trial court resolved the ambiguity in the state's favor, discharging them all for cause. Nevertheless, the United States Supreme Court held the state had *not* carried its burden of proving these jurors were properly stricken for cause "because they were unable positively to state whether or not their deliberations would in any way be affected." (448 U.S. at pp. 49, 50.) Thus, *Adams* shows that even when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

Here, read as a whole, Ms. Wadhams' questionnaire and voir dire responses were not even equivocal. At no point did she suggest that she would be unable to follow the law as set forth by the court or her oath as a juror. To the contrary, she stated in her questionnaire that although she was "slightly against the death penalty" she would *not* automatically vote for life. (26 CT 6484-6485.) Under questioning by the prosecutor she repeated that she *could* consider death as an option and her decision as to the penalty was "going to depend on the evidence." (7 RT 1133.) She admitted under questioning by defense counsel that sitting on a capital case would be very stressful and she reiterated

this under questioning by the prosecutor: it was a "heavy burden." (7 RT 1079, 1134.) Because of this stress, she admitted she did not know in advance if she "could make a fair assumption," but explained that she would try. (7 RT 1135.)

On this record, the state did not carry its burden of proving that Ms. Wadhams's views would "prevent or substantially impair the performance of [her] duties as a juror . . . ." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) As noted above, this required the state to prove that Ms. Wadhams' "views on capital punishment would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Witt*, *supra*, 469 U.S. at p. 424.) Because neither her questionnaire nor her voir dire come close to satisfying this burden, reversal of the penalty phase is required. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660.)

In making this argument Ms. Rices recognizes that the record certainly shows Ms. Wadhams was concerned with the stress of sitting on a capital jury. But this is not enough to justify a for-cause discharge based on her views on the death penalty. As this Court has itself noted, "[a]ny juror sitting in a case such as this would properly expect the issues and evidence to have an emotional impact. A juror is not to be disqualified for cause simply because the issues are emotional." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1091.) And as the United States Supreme Court itself stated in *Witherspoon v.*

Illinois (1968) 391 U.S. 510 "'[t]he declaration of the rejected jurors, in this case, amounted only to a statement that they would not like . . . a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.'" (*Id.* at p. 515.)

In short, on the state's motion the trial court discharged Ms. Wadhams because "she would be substantially impaired in her ability to return a verdict of death." But the record shows the state had simply presented insufficient evidence to sustain its burden of showing that Ms. Wadhams' "views on capital punishment would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Witt, supra*, 469 U.S. at p. 424.) A new penalty phase is required.

V. THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IN CAPITAL CASES IS INCONSISTENT WITH BOTH THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL.

A. Introduction.

The trial court discharged prospective juror Wadhams who was opposed to the death penalty because it found "she . . . would be substantially impaired in her ability to return a verdict of death." (7 RT 1148.) In addition, presumably applying this same standard, the trial court discharged prospective jurors Wimberly and Gregg. (7 RT 1142, 1150.)

As discussed in Argument IV above, even accepting this standard as a correct application of the Sixth Amendment (and the parallel jury trial provisions of the state constitution), the trial court here applied this standard improperly as to prospective juror Wadhams. This requires reversal of the penalty phase. As Mr. Rices explains below, however, the standard itself is inconsistent with both the state and federal constitutions. For these reasons too a new penalty phase is required.

The standard used by the trial court here was taken from the Sixth Amendment framework erected by a series of United States Supreme Court cases decided between

1968 and 1980. This standard reflected a then-common approach to the Sixth Amendment which did not examine the intent of the Framers in enacting the Sixth Amendment, but instead defined the scope of that amendment by identifying and balancing competing interests of the state and the defendant.

As more fully discussed below, however, in the past 15 years the Court has rejected this "competing interest" approach to the Sixth Amendment, reexamined its framework for analyzing the scope of the Sixth Amendment, and held that the contours of the Sixth Amendment are to be determined by the Framers' intent in enshrining the right to an "impartial jury" in the Constitution. As also discussed below, the test used by the trial court here is fundamentally inconsistent with the intent of the Framers in adopting the Sixth Amendment. Reversal of the penalty phase is required.

B. Development Of The *Adams* Test For Discharging Jurors Based On Their Views Of Capital Punishment.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the Supreme Court first addressed whether the Sixth Amendment right to a jury trial permitted the state to exclude from jury service in a capital case jurors who opposed the death penalty. *Witherspoon* held that the Sixth Amendment permitted the state to exclude jurors only if the record made "unmistakably clear" the jurors would (1) automatically vote against the imposition of

capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. (391 U.S. at p. 515, n.9, 522, n. 21.)

Twelve years later, in *Adams v. Texas*, *supra*, 448 U.S. 38, the Court revised this standard. As discussed above, *Adams* held that the Sixth Amendment permitted the state to discharge any juror "based on his views about capital punishment [if] those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 45.) The Court stated that its conclusion was part of an effort "to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (448 U.S. at pp. 43-44.)

The approach to the Sixth Amendment which resulted in the rule set forth in *Adams* -- an approach which considered the interests of the defendant and the interests of the state and then sought to reach a principled accommodation of the two -- was not unique to *Adams*. Indeed, on the very same day the Court decided *Adams* it issued another decision applying the Sixth Amendment -- *Ohio v. Roberts* (1980) 448 U.S. 56. In *Roberts*, the Court addressed whether the Sixth Amendment confrontation right

permitted the state to introduce preliminary hearing testimony against a defendant at trial. Ultimately, as it did in *Adams*, the Court's Sixth Amendment analysis in *Roberts* recognized "competing interests" between the goals of the Confrontation Clause itself and effective law enforcement, sought to accommodate these competing interests, and ruled the evidence admissible. (448 U.S. at p. 64, 77.)

The question presented here is whether the "competing interests" approach to the Sixth Amendment taken in *Adams* -- and the standard *Adams* set forth as a result -- is consistent with the Court's current approach to the Sixth Amendment, or the intent of the Framers who drafted the Sixth Amendment. As discussed below, the *Adams* standard is consistent with neither.

C. The Supreme Court's Modern Sixth Amendment Precedent Focuses *Not* On Identifying And Accommodating Competing Interests, But On The Historical Understanding Of The Rights Embraced By The Sixth Amendment And The Intent Of The Framers.

In a series of decisions issued over the last 15 years, the Supreme Court has reexamined much of its Sixth Amendment jurisprudence. In those decisions, the Court has consistently explained that the contours of the Sixth Amendment are no longer to be determined by seeking to balance competing interested, but instead are to be determined by assessing the intent of the Framers. Indeed, the Court's decisions over the last decade

show that the Court has not hesitated to overrule its prior Sixth Amendment precedents to incorporate into its Sixth Amendment jurisprudence a fidelity to the Framers' intent. (*See, e.g., Ring v. Arizona* (2002) 536 U.S. 584 overruling *Walton v. Arizona* (1990) 497 U.S. 639 (1990); *Crawford v. Washington* (2004) 541 U.S. 36 overruling *Ohio v. Roberts, supra*, 448 U.S. 56.)

The starting point for this analysis is the Court's decision in *Jones v. United States* (1999) 526 U.S. 227. There, the Court addressed whether a particular factual finding was an element of the offense (which had to be proven to a jury under the Sixth Amendment) or merely a sentencing factor which could be decided by a judge. In making this assessment, the Court emphasized the Sixth Amendment implications based on the historical role of juries.

Thus, the Court explained that, historically, there had been "competition" between judge and jury over their respective roles. (526 U.S. at p. 245.) Juries had the power "to thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." (*Ibid.*, quoting 4 William Blackstone, Commentaries on the Laws of England at pp. 238-39.) The Court explained that "[t]he potential or inevitable severity of sentences was

indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." (*Ibid.*)

Of course, there is no more "sanguinary consequence" than capital punishment. Although *Jones* was not a capital case, the Court's concern with the "genuine Sixth Amendment issue" that would flow from diminishing the jury's significance applies to death qualified juries as well. (*Id.* at p. 248.) The Court echoed a crucial warning from Blackstone that was "well understood" by Americans of the time: there is a need "'to guard with the most jealous circumspection'" against erosions of the jury trial right flowing from a variety of plausible pretenses for limiting the right. (*Ibid.*) As the Court reiterated, "however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." (*Id.* at p. 246, quoting 4 Blackstone, *supra*, at pp. 342-44).

In capital cases, limiting juries to death-qualified juries is precisely the sort of convenience that Blackstone warned a free nation must guard against. That it may be more convenient to accommodate the government's interest in only trying a capital case

to a jury that has excluded from its ranks all of the individuals who might interfere with the government's effort to impose a death sentence is no answer. The historical basis for the Sixth Amendment, as *Jones* emphasizes, is to interpose citizens between the government and an accused.

One year after *Jones*, the Court again invoked the Sixth Amendment's "historical foundation" as support for its conclusion that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) Like *Jones*, *Apprendi* was not a capital case. It involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate-crime statute. But in analyzing the question presented, the Court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties . . . ." (*Ibid.*, quoting 2 Joseph Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873).) These principles, important in a case where the consequence at stake for a defendant is imprisonment, are indispensable in the context of a capital case.

Two years later, the Court applied the Sixth Amendment principles set forth in *Jones* and *Apprendi* in the capital context. (*See Ring v. Arizona* (2002) 536 U.S. 584.) *Ring* involved the question whether it violated the Sixth Amendment for a trial judge to

alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first degree murder charge. In answering that question "yes," the Court reversed its earlier holding in *Walton v. Arizona* (1990) 497 U.S. 639 and recognized that "[a]lthough 'the doctrine of stare decisis is of fundamental importance to the rule of law[,] . . . [o]ur precedents are not sacrosanct." (*Ring*, *supra*, 536 U.S. at p. 608.) *Ring* continued the Court's focus on the historical right to a jury trial and discussed the juries of 1791, when the Sixth Amendment became law -- just as Justice Stevens had done in his *Walton* dissent. (*See Walton*, *supra*, 497 U.S. at p. 711.)

Ring unequivocally stressed that at the time the Bill of Rights was adopted, the jury's right to determine "which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" was "unquestioned." (*Ring*, *supra*, 536 U.S. at p. 608.) In addition, the Court repeated that "the Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." (*Id.* at p. 607.) "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free." (*Ibid.*)

Two years after *Ring*, the Court again overturned one of its earlier Sixth Amendment decisions which had not relied on a historical understanding of the Sixth Amendment. In *Crawford v. Washington* (2004) 541 U.S. 36 the Court focused on an historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio v. Roberts*, *supra*, 448 U.S. 56.

As noted above, in *Roberts* the Court had held that the Sixth Amendment permitted the state to introduce preliminary hearing testimony against a defendant at trial as a method of accommodating the "competing interests" between the goals of the Sixth Amendment and the government's interest in effective law enforcement. (448 U.S. at p. 64, 77.) In *Crawford*, however, the Court took a very different approach, one that was consistent with the approach it took in *Jones*, *Apprendi* and *Ring*. The Court examined the "historical record" and concluded that under the common law in 1791, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54.) The Court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection from even core confrontation violations." (*Id.* at p. 63.)

Finally, only three months after *Crawford*, the Court applied its historical record

model yet again in the Sixth Amendment context. In *Blakeley v. Washington* (2004) 542 U.S. 296, the Court held that it violated the Sixth Amendment for a judge to impose a longer sentence based on fact-finding not made by the jury. As the Court reiterated, again citing Blackstone, every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." (*Id.* at p. 301.) Once again focusing on the Framers' intent, the Court stressed that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Id.* at pp. 306-08, citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed., 1981) [describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"]; John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed., 1850) ["[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature]; Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson, 282, 283 (J. Boyd ed., 1958) ["Were I called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative."]; *Jones, supra,* 526 U.S. at pp. 244-48.)

The clear and consistent line of cases from *Jones* to *Apprendi* to *Ring*, *Crawford,*

and *Blakeley* leaves no doubt that the Court has sought to connect Sixth Amendment jurisprudence to the historical role of juries and the intent of the Framers in adopting the Sixth Amendment. The Court's approach to the death qualification of capital juries -- based on the 1980 *Adams* decision -- is utterly incompatible with its current approach to the Sixth Amendment, as demonstrated by the cases just discussed. Unlike these recent cases -- *which specifically consider the Framers' intent when interpreting the Sixth Amendment's protections* -- the Court's earlier death-qualification decisions did not consider the Framers' intent *at all* in deciding whether the practice of death qualification violates the Sixth Amendment. Instead, the Court's death qualification decisions attempted to craft a balancing test that accommodated a State's interest in implementing its death penalty system while trying to avoid unduly stacking the deck against a defendant. While this balancing approach may be a perfectly valid approach to drafting legislation, it is plainly inconsistent with the Court's recent approach to interpreting the Sixth Amendment by tethering the protections of that amendment to a historical understanding of what it meant to guarantee a defendant an impartial jury.

It is worth noting that in the years since *Adams* was decided -- and while the Court has refined much of its Sixth Amendment jurisprudence to ensure that it aligns with the Framers' understandings -- the Court has never examined whether there is any historical support for the *Adams* death qualification standard. (*See, e.g., Lockhart v. McCree* (1986)

476 U.S. 162; *Uttecht v. Brown* (2007) 551 U.S. 1.) Indeed, in *Uttecht* the Court explicitly noted that the relevant "principles" established in the case law create a standard that seeks to "balance" the interests of the defendant against the interest of the state -- without even contemplating whether the "impartial jury" guarantee permits such "balancing." (551 U.S. at p 9.)[6]

Ultimately, as the Court's more recent pronouncements make clear, the propriety of death qualifying under the *Adams* standard in light of the Sixth Amendment depends not on whether that standard accommodates competing interests, but whether it violates the historical understanding of an impartial jury codified in the Sixth Amendment. As discussed below, it plainly does.

D. The Framers Intended The "Impartial Jury" Guarantee To Prohibit Jurors From Being Struck Based On Their Views Of The Death Penalty.

Permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an "impartial jury." When the

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[6] Whether the *Adams* standard actually does result in a jury that is "balanced" in terms of attitudes towards the death penalty is very much an open question. Justice Stevens recognized that, in fact, the *Adams* test does not result in a balanced jury at all, but results in a jury "biased in favor of conviction." (*Baze v. Rees* (2008) 553 U.S. 35, 84, Stevens, J., dissenting).

Sixth Amendment was adopted, neither prosecutors nor defense counsel were permitted to exclude a juror based on that individual's attitude toward the death penalty. Jurors were permitted to consult their conscience and, in this limited way, "find the law" in addition to "finding the facts."

Indeed, this was -- and should continue to be -- a critical component of the Sixth Amendment's "impartial jury" protection. Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the Framers considered a jury to be the conscience of the community, serving as an important bulwark against the machinery of the judiciary. The jury was free to use its verdict to reject the application of a law that it deemed unjust -- indeed, it was its duty to do so -- and this was (and should again be) at the heart of the "impartial jury" guaranteed to all criminal defendants under the Sixth Amendment.[7]

At common law, striking a juror on the basis of bias, or "propter affectum," was limited to circumstances in which the jury had a bias toward a party (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of

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[7] A juror could still be struck for cause for refusing to deliberate at all. Consistent with the Framers' understanding, however, the Sixth Amendment's "impartial jury" guarantee ensures that a criminal defendant's case is tried before a jury that, upon deliberating, can consult their consciences and consider the fairness and justice of the law and punishment the jury is asked to apply.

punishment for breaking the law. As Blackstone cogently articulated:

> "Jurors may be challenged propter affectum, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled for jurors must be omni exceptione majores." (3 William Blackstone, Commentaries on the Laws of England 363.)[8]

Chief Justice Marshall acknowledged this exact understanding of the propter affectum challenge, and its connection to the Sixth Amendment, in *United States v. Burr* (C.C.Va. 1807) 25 F. Cas.49, 50, noting that "[t]he end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality." And the limited understanding of "bias" or "partiality" is not some historical footnote: at the time of the Framers, bias as to the law was both welcomed and expected from jurors. The colonial and early American

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[8] Blackstone specified three other grounds justifying exclusion of a juror: propter honoris respectum, which allowed challenges on the basis of nobility; propter delictum, which allowed challenges based on prior convictions; and propter defectum, which allowed challenges for defects, such as if the juror was an alien or slave. (*Id.* at pp. 361-364.)

experience teaches that the right to reject the law as instructed was crucial to the role the jury played in its check against the judiciary and executive. For example, when England made the stealing or killing of deer in the Royal forests an offense punishable by death, English juries responded by committing "pious perjury," i.e., rejecting these politically motivated laws by acquitting the defendant of the charged offense. (John Hostettler, Criminal Jury Old and New: Jury Power from Early Times to the Present Day 82 (2004); *see also Sparf v. United States* (1895) 156 U.S. 51, 143 [Gray, J., and Shiras, J., dissenting] [observing that juries in England and America returned general verdicts of acquittal in order to save a defendant prosecuted under an unjust law].)

One well known example of such "pious perjury" is the 1734 trial of John Peter Zenger. The Royal Governor of New York, in an effort to punish Zenger for his criticism of the colonial administration, prosecuted Zenger for criminal libel. Andrew Hamilton, representing Zenger at trial, argued that jurors "have the right beyond all dispute to determine both the law and the fact" and thus could acquit Zenger on the basis he was telling the truth, even though the libel laws at the time did not provide that truth was a defense. (James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 78-79 (Stanley N. Katz ed., 2d ed. 1972).) Zenger was acquitted on a general verdict. This trial, and others like it, provides necessary context for understanding what animated the Framers' intent in guaranteeing a defendant the constitutional right to an impartial

jury.

Reinforcing how the Framers themselves viewed the issue, a different (and even more famous) Hamilton successfully made a similar argument seventy years later on behalf of a man accused of libeling John Adams and Thomas Jefferson. In that case Founding Father Alexander Hamilton argued:

> "It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. *But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions.* It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent." (*People v. Croswell* (N.Y. Sup. 1804) 3 Johns. Cas. 337, 346, emphasis added.)

At base, the notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust -- this was at the heart of the impartial jury as understood by the Framers. As John Adams wrote in 1771:

> "And whenever a general Verdict is found, it assuredly determines both the Fact and the Law. It was never yet disputed, or doubted, that a general Verdict, given under the Direction of the Court in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And, if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience[?]" (1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

(*See also* Akhil Reed Amar, America's Constitution 238 (2005) ["Alongside their right and power to acquit against the evidence, eighteenth century jurors also claimed the right and power to determining legal as well as factual issues -- to judge both law and fact 'completely' -- when rendering any general verdict."].)

This principle was echoed in the instructions given by Chief Judge Jay who, at the end of a trial before the Supreme Court, charged the jurors with the "good old rule" that:

> "on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.* On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. *But still both objects are lawfully, within your power of decision.*" (*Georgia v. Brailsford* (1794) 3 U.S. 1, 4, emphases added).

Indeed, the importance of this right was widely shared by those attending the Constitutional Convention. (*See* Federalist 83 (Hamilton), reprinted in The Federalist Papers 491, 499 (Clinton Rossiter ed., 1961) ["The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."].)

The current death-qualification "substantial impairment" standard reflects none of this -- and conflicts with all of it. To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience. There was no exception to this rule carved out for cases where the state sought a sentence of death. Thus, the substantial impairment test announced in *Adams* in 1980 -- designed as a way to accommodate the interests of the state -- contradicts the intent and understanding of the Framers of the Sixth Amendment and erodes the Sixth Amendment's guarantee of an impartial jury where it is needed most. Application of that test in this case violated Mr. Rices's Sixth Amendment rights and requires that the penalty judgment be reversed.

It is true, of course, that in contrast to some of the Court's Sixth Amendment cases such as *Walton* and *Roberts* -- where the Court's historical approach has already resulted

in these decisions being overruled -- the Supreme Court has not yet been asked to revisit *Adams* based on this identical approach. But this should not change the result here.

Article I, section 16 of the California Constitution, originally enacted in 1850, provides that "[t]rial by jury is an inviolate right and shall be secured to all . . . ." This Court has long recognized that the state right to a jury trial "is the right as it existed at common law, when the state Constitution was first adopted." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75-76. *Accord Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173-1274; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 287.) As this Court has noted, in assessing the scope of the state jury trial guarantee, "[i]t is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution." (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 287.)

Thus, in order to determine if the *Adams* "substantial impairment" test violated Mr. Rices's right to a jury trial under the state constitution, this Court must examine the common law. And as the above analysis of the common law shows, the substantial

impairment test is simply irreconcilable with the common law. As such, the trial court's use of that test to permit juror discharges not only violated the Sixth Amendment, but it violated the state constitution as well.

Of course, in making this argument Mr. Rices recognizes the similarity between the state and federal constitutional jury trial guarantees. But as Article 1, Section 24 of the California Constitution establishes, the "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." And as numerous justices of this Court have made clear over the years, in assessing the independent force of the state constitution, the Court "should disabuse [itself] of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire -- always following, never leading." (*People v. Cahill* (1993) 5 Cal.4th 478, 557–558 [Kennard, J., dissenting]. *Accord People v. Flood* (1998) 18 Cal.4th 470, 547 [Mosk, J., dissenting].)

It is time to lead. The historical evidence is clear. The substantial impairment test violates both state and federal law. Reversal of the penalty phase is required.

VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND VIOLATED MR. RICES'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS, BY FORCING HIM TO TRIAL IN A COMMUNITY WHERE A SUBSTANTIAL PORTION OF THE JURY POOL HAD BEEN EXPOSED TO HIGHLY INFLAMMATORY PRETRIAL PUBLICITY.

A. The Relevant Facts.

"They Should KILL Them NIGGA'S [sic]," wrote one potential juror who followed media's coverage in this case. (24 CT 6019.) "He needs to fry," wrote another. (26 CT 6393-6394.) "In my opinion these two guys should be hanged on the courthouse lawn! Also the hanging should be shown on every network T.V. station in the world," wrote yet another. (12 CT 2636.)

Like 98.8 percent of the venire, these three potential jurors lived in East San Diego County ("East County"). (12 CT 2625; 24 CT 6008; 26 CT 6382.) And in many ways, these three jurors reflected the sentiment of East County. As another East County resident told a newscaster, "They should hang him here, in front of the liquor store." (2 CT 266.)

These crimes occurred in East County. The victims in this case were Chaldean, a Catholic sect made up of people of Iraqi descent. (2 CT 195.) As the parties below

recognized, there was a large Chaldean population in San Diego County, and nearly all of them lived in East County. (2 CT 213.) The media coverage was intense.

Ten months before trial began, defense counsel for Mr. Rices moved to change venue. (2 CT 192.) Counsel attached to his initial moving papers 94 media accounts of the crimes, taken from local newspapers and news stations. (2 CT 217-348.) In these news pieces, the media described the crimes as "execution-style" murders 55 times.[9] Other media accounts repeatedly described the crimes as "brutal" and "cold-blooded," as well as "evil," "horrible," and "horrific."[10] A prominent local politician declared, "The person that did this is . . . an animal." (4 CT 220.)

Numerous articles contained references to inadmissible evidence that the jury would never hear. Thus, while the trial court ruled the state could not present evidence that Mr. Rices "bragged" about the crimes, the media did just that. (4 RT 665-666.) Counsel's venue change motion contains no fewer than 10 references to this

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[9] 2 CT 219, 221 [twice], 252, 254 [twice], 255, 258, 267, 269, 274, 275, 282, 285, 287, 288, 290, 292, 295, 305, 306, 310 [twice], 312 [three times], 313, 314, 316 [twice], 319 [twice], 322 [twice], 324, 325, 327, 328 [twice], 330 [twice], 332, 334 [twice], 335 [twice], 336 [twice], 337, 340, 341, 343, 345 [twice], 348.

[10] 2 CT 275 ["brutal"], 288 ["cold-blooded"], 303 ["cold blooded," "evil," "brutal," "cold-blooded"], 310 ["brutal"], 312 ["brutal"], 323 ["cold blood," "brutal"], 328 ["cold-blooded"], 330 ["horrific," "horrific," "horrible," "cold-blooded," "horrible"], 334 ["brutal"], 348 ["brutal"].

unsubstantiated and inadmissible "bragging" evidence.[11] Other published news articles claimed that the safety of various witnesses was in danger because of their cooperation, and that several were placed in the witness protection program; again the jury never heard any of this information. (2 CT 251, 293, 325, 327, 332.) Media accounts also questioned Mr. Rices's competency. (2 CT 292, 319, 321.)

Prior to trial, Mr. Rices pled guilty. The only thing for the jury to decide, then, was whether Mr. Rices should live or die. Media claims that Mr. Rices was an "animal," "coward[]," "dangerous," and "a danger to the community" who "[had] no conscience" thus went to the heart of the issue. (2 CT 220, 270, 275, 278, 279.)

Given the inflammatory coverage, the venue motion was supported by a survey the defense conducted of potential jurors throughout San Diego County. (2 CT 193-194.) The survey was broken up into three geographic areas: (1) East County, (2) North County, and (3) Central/South County. (*Ibid.*)

The results were stark. 70 percent of potential jurors in East County had been exposed to pretrial publicity, 28 percent of whom believed Mr. Rices was guilty. (4 CT 194.) In contrast to East County, only 46 percent of potential jurors from North County

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[11] 2 CT 250 [three times], 252, 293, 323, 324, 325, 326, 327.

had heard of the case, 16 percent of whom believed Mr. Rices was guilty. (*Ibid.*) Similarly, in Central and South County, only 49 percent of potential jurors had been exposed to pretrial publicity, 24 percent of whom believed Mr. Rices was guilty. (*Ibid.*)

Recognizing the widespread publicity, the defense moved for a change of venue. (2 CT 200-212.) In the alternative, given that the publicity was focused on East County -- where the crimes had occurred -- defense counsel asked the trial court to transfer the case to North or Central County, where far fewer potential jurors knew of the case. (2 CT 213-215.)

The risk to Mr. Rices's right to an impartial jury was not lost on the prosecutor. Indeed, recognizing that East County was far more saturated with pretrial publicity, and in an attempt to avoid having the trial moved out of county -- or to another judicial district within the county -- the prosecutor agreed "to draw jurors from the entire county of San Diego and not just the jury pool in East County." (3 CT 569.)

Of course, a countywide venire is entirely proper. (*See* Code Civ. Proc., § 198.5 ["[T]he court, in its discretion, [may] order[] a countywide venire in the interest of justice."].) But, as the parties would come to learn at the hearing on the motion to change venue, measures beyond their control made a countywide venire impossible in this case.

Prior to the hearing on the venue motion, defendant pled guilty. Doing so triggered yet another wave of pretrial publicity. (*See* 4 CT 740-758.) As with all of the other publicity, this coverage referred to the crimes as "execution-style" murders and again contained references to evidence the jury would never hear. (*See* 4 CT 742 [referencing unsubstantiated preliminary hearing testimony of Hooks and Mays, which the jury never heard], 743 [same], 744 ["execution-style"], 756 ["execution style" (twice)].) Thus, by the time the venue motion was heard, the media had referred to the crimes as "execution-style" murders at least 58 times. (*See* Footnote 9, *supra*, at p. 82.)

On November 17, 2008, the trial court heard arguments on defense counsel's motion to change venue. Counsel asked the court to transfer the case out of San Diego County. (4 RT 621-626.) But counsel also told the court that should the court deny the venue change motion, the parties had agreed on an alternative:

> "I believe the People and the defense are in agreement that we're going to ask the court to not only not -- to not draw exclusively from this area of the county, in other words, do a complete county draw in this case, and that would be, I believe, a joint request. The People address that in their responsive papers, and if we're going to stay in San Diego County, I think that the polling data that we did reflects that it would be more reasonable that an impartial jury is drawn from a countywide analysis." (4 RT 621.)

The state opposed the venue change motion, arguing that a countywide draw would offset

the widespread pretrial publicity in East County and ensure Mr. Rices received a fair trial:

> "[. . .] [A]nd because we're drawing countywide, there shouldn't be a problem. We can draw from North County, South County, East County, Central. We're getting the entire diversity of San Diego County." (4 RT 628-629.)

The trial court agreed with counsel that Mr. Rices was much better off receiving a countywide draw than one from just East County. (4 RT 630.) When the trial court discussed this matter with the jury commissioner, however, the court learned that a local "policy" presented a problem with this approach. The court summarized the problem:

> "[By the court]: And then I made an inquiry of [the Jury Commissioner], and she certainly indicated and pointed to a Civil Procedure section that allows that, if the interest of justice suggests that it be necessary. That's CCP 198.5.
>
> "But she responded [that there is] a policy that a juror summoned for jury duty can report to any courthouse on the date of the summons. If you live in San Diego, and it says report to the Central Division, and you work in the East County, you come out to East County, and you fulfill your jury obligation . . . [¶].
>
> "[The Jury Commissioner] said, 'I don't see how we could change this rule in a special draw.' So in other words, if we issued summons to North county residents, they would all be lining up in North County. 'I'm not going to drive to East County. Your rules allow me to report here.' Same with South Bay and Central Divisions probably as well. So it neutralizes the impact of the countywide draw." (4 RT 630-631.)

Despite this policy, the court believed the solution to the venue change motion was a countywide draw. Thus, the court told the parties it had "checked with our jury clerk here, and she indicated, oh, yeah. We have a lot of people that show up every Monday morning, Tuesday, whatever, who don't live in the East County." (4 RT 630-631.) The court believed "you're going to get a lot of people anyway that don't live in East County." (4 RT 631.)

In denying defense counsel's venue-related motions, the court stated it was "considering the policy of the San Diego Superior Court that allows jurors" to report at courthouses closest to their work or school, "[a]nd the anecdotal evidence presented to this court from our East County jury clerk is that jury draws in East County result in a number of jurors who report from non-East County residences." (4 RT 644. *See also* 4 RT 646 [trial court denies motion to transfer to another judicial district based in part "on the prospect that our jury panel will have a number of individuals who live in other districts [ensuring] that a fair, impartial jury can be selected"].)

As the record would show, however, the trial court's "anecdotal evidence" did not pan out. Instead, a mere 3 jurors -- 1.2% of the total venire -- were from outside of East County. Put another way, a full 98.8% of the venire was drawn from the precise area

which had been saturated with the prejudicial publicity. (*See* Appendix A.)[12]

As more fully discussed below, the trial court's refusal to grant the change of venue -- premised on the erroneous assumption that a significant number of non-East County jurors would appear -- violated both state and federal law. East County was saturated with publicity about the case. This publicity, much of which was plainly inflammatory, continued unabated from the time of the crime itself until the time of trial. It contained repeated references to inadmissible evidence that the jury would never hear. The publicity, coupled with the East County draw, made a fair trial impossible. Reversal is required.

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[12] At the hearing on the venue change motion, the parties defined East County. Thus, according to the trial court, East County included the cities of Santee, La Mesa, El Cajon, Lemon Grove, as well as nearby unincorporated areas. (4 RT 629.) According to the prosecutor, East County "extends all the way up to Julian and all the way out to the border and incorporates places like Ramona and Alpine." (4 RT 634.)

Question 4 of the juror questionnaire asked potential jurors to identify the neighborhood of El Cajon -- or the area of San Diego County -- in which they lived. Using the parties' own definitions, counsel for Mr. Rices has reviewed the answer to question 4 for each of the 242 juror questionnaires. The results are tabulated in Appendix A.

All but one of the 242 prospective jurors referenced an identifiable city or neighborhood. (*See* 14 CT 3154 ["San Diego County"].) The 241 locations capable of identification show that all but 3 were inside of East County as the parties themselves defined it. In order to avoid a footnote several pages long, the record citation showing the jurors' locations is attached to this brief as Appendix A.

B. Because The Pervasive Pre-Trial Publicity Prevented The Court From Seating An Impartial Jury, Reversal Is Required.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant's right to be tried by a fair and impartial jury. (*Groppi v. Wisconsin* (1971) 400 U.S. 505, 508.) Reversal is required when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory publicity about the crime. (*See, e.g., Rideau v. Louisiana* (1963) 373 U.S. 723, 726-727. *Accord Murphy v. Florida* (1975) 421 U.S. 794, 798-799; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 352-355, 363; *Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1361.) In this situation, a defendant need not demonstrate actual prejudice. (*Sheppard v. Maxwell, supra*, 384 U.S. at p. 352; *Rideau v. Louisiana, supra*, 373 U.S. at pp. 726-727; *Harris v. Pulley, supra*, 885 F.2d at p. 1361.)

As more fully discussed below, this test has been met here. The degree of prejudicial pre-trial publicity foreclosed any possibility that Mr. Rices would receive a fair trial. The record shows that (1) the trial venue was saturated with hostile publicity, (2) this adverse publicity included frequent references to evidence which could never come before the jury, and (3) an overwhelming percentage of East County residents eligible to serve on the jury were fully aware of this hostile publicity. Reversal is required.

1. The legal standard.

As noted above, when a defendant is convicted by a jury drawn from a community which has been saturated with prejudicial publicity about the crime, reversal may be required. (*Murphy v. Florida*, *supra*, 421 U.S. at pp. 798-799; *Rideau v. Louisiana*, *supra*, 373 U.S. at pp. 726-727.) The ultimate question is whether the record shows it is "reasonably likely" pervasive pre-trial publicity resulted in an unfair trial; if so, reversal is required. (*Sheppard v. Maxwell*, *supra*, 384 U.S. at p. 363; *People v. Williams* (1989) 48 Cal.3d 1112, 1125-1126.) As this Court has made clear on numerous occasions, "the phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 279. *Accord People v. Williams*, *supra*, 48 Cal.3d at pp. 1125-1126.)

Where a trial or reviewing court is making a pre-trial determination whether the defendant can receive a fair trial in a particular county -- courts consider a number of factors, including (1) the nature of the offense, (2) the nature and extent of the publicity, (3) the size of the community, (4) the status of the defendant in the community and (5) the status of the victim. (*See, e.g.*, *Williams v. Superior Court* (1983) 34 Cal.3d 584, 588; *Odle v. Superior Court* (1982) 32 Cal.3d 932, 937; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578.) In order to prove there is a reasonable likelihood of an unfair trial, a

defendant need *not* prove "the community was aroused to an emotional fever pitch." (*People v. Williams, supra*, 48 Cal.3d at p. 1128.) Instead, "the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in [defendant's] guilt." (*Ibid. Accord People v. Tidwell* (1970) 3 Cal.3d 62, 70; *People v. McKay* (1951) 37 Cal.2d 792, 797 [reversal required where at the time of trial, pre-trial publicity had created a "cool, widely held conviction that defendants were guilty and should be tried and sentenced to death as expeditiously as possible."].) The risk of an unfair trial from pre-trial publicity is significantly heightened when the publicity includes prejudicial information which is inadmissible at trial. (*See, e.g., Sheppard v. Maxwell, supra*, 384 U.S. at pp. 356-357. *Compare People v. Leonard* (2007) 40 Cal.4th 1370, 1396 [no risk of unfair trial where pretrial publicity did not discuss any inadmissible evidence]; *People v. Ramirez* (2006) 39 Cal.4th 398, 434 [same].) And as this Court held long ago, "when a defendant's life is at stake, the rule [is] that all doubts [must] be resolved in favor of venue change . . . ." (*Martinez v. Superior Court, supra*, 29 Cal.3d at p. 585.)

This Court has also made clear the standard of review in applying the reasonable likelihood test. "Whether raised [pretrial] or on appeal from judgment of conviction, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable." (*People v. Williams, supra*, 48 Cal.3d at p. 1125. *Accord*

People v. Alfaro (2007) 41 Cal.4th 1277, 1321; *People v. Welch* (1972) 8 Cal.3d 106, 113; *People v. Tidwell, supra*, 3 Cal.3d 68-69.) Federal reviewing courts take the same approach to ensuring fair trials, employing de novo review. (*See, e.g., Harris v. Pulley, supra*, 885 F.2d at p. 1360. *Accord Murphy v. Florida*, 421 U.S. at p. 802; *Sheppard v. Maxwell, supra*, 384 U.S. at pp. 345-349; *Irvin v. Dowd, supra*, 366 U.S. at pp. 725-726.)

Several cases show how these factors are applied in practice. In *Martinez v. Superior Court, supra*, 29 Cal.3d 574, this Court held that a capital murder defendant could not be given a fair trial because of pretrial publicity. There, defendant was charged with a single count of murder, three counts of robbery, and one count of attempted robbery. In the year before the motion to change venue was filed, there were 97 articles published about the case. As this Court noted, "[t]he press gave substantial coverage to the fact that the accused forced the patrons to lie face down on the floor during the robbery and shot the victim at close range in the back." (*Id.* at p. 579.) Many articles painted defendant as a "cold-blooded" murderer who committed an "execution-style" murder. (*Id.* at p. 582.) Based on the population of the county and the newspaper circulation, this Court believed roughly half of the venire had been exposed to this pretrial publicity, noting that "[s]uch characterizations can easily become embedded in the consciousness of the community, especially a small one." (*Id.* at p. 579, fn. 1, 585.)

Other cases, too, describe when a change of venue is proper. In *People v. Williams*, *supra*, this Court reversed a capital murder conviction and death sentence because of prejudicial pretrial publicity. There, defendant was charged with capital murder. During the nine-month period between defendant's arrest and the change of venue motion "more than 50 newspaper and radio reports appeared . . . ." (48 Cal.3d at p. 1127.) The trial court denied defendant's motion to change venue and defendant was convicted and sentenced to death. On appeal, defendant contended the record showed a "reasonable likelihood" the pre-trial publicity precluded a fair trial.

This Court performed a detailed de novo review of the media coverage, noting that many of these reports "were front-page or lead articles." (*Ibid.*) The court characterized these articles as "frequently sensational" and noted that some detailed statements "were inadmissible due to a 'Miranda' violation." (*Ibid.*) Some of the stories "focused on preliminary hearing evidence and sheriff's statements indicating that defendant was the actual 'triggerman'. . . ." (*Ibid.*) The Court concluded that the media coverage constituted "extensive, sometimes inflammatory pretrial publicity" which "suggest[ed] to the persons who were potential jurors . . . the probability that petitioner was the actual killer." (*Ibid.*) Based on the pre-trial publicity this Court held "a brutal murder had obviously become deeply embedded in the public consciousness" and "it is more than a reasonable possibility that the case could not be viewed with the requisite impartiality."

(48 Cal.3d at p. 1129.)

Rideau v. Louisiana is also an instructive case. There, defendant was charged with murder and confessed in a filmed interrogation. This confession was broadcast three times on television over the next two days. Although trial did not occur for nearly two months, defendant moved for a change of venue. The motion was denied. Ultimately, only three of the twelve seated jurors had seen the televised confession. After defendant was convicted of murder, he contended that his conviction by a jury drawn from a community exposed to this televised evidence violated Due Process. Although none of the three jurors who saw the confession declared a belief in defendant's guilt during voir dire, and each explicitly promised the court they could put the confession aside and be impartial, (373 U.S. at pp. 725, 732), the Supreme Court nevertheless concluded reversal was required "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury . . . ." (*Id.* at p. 727.) "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." (*Id.* at p. 726. *See also Sheppard v. Maxwell, supra*, 384 U.S. at pp. 356-357 [finding constitutional violation where pretrial publicity included substantial references to facts that were inadmissible at trial, such as fact that defendant exercised his constitutional right to a lawyer, that he had sexual relations with women other than his wife, and that he was alleged to be a liar; held, Supreme Court reverses, noting that

"much of the material printed or broadcast . . . was never heard from the witness stand."]; *Marshall v. United States* (1959) 360 U.S. 310, 313.)

The decision in *United States v. Skilling* (2010) 561 U.S. 358, 130 S.Ct. 2896, is useful in showing the type of publicity which will *not* result in an unfair trial. There, defendant was charged with securities fraud arising out of the Enron collapse. Based on the pre-trial publicity, he moved for (and was denied) a change of venue. The Supreme Court concluded there was no constitutional violation under the facts of the case, noting (1) defendant was tried in Houston, the fourth largest city in the country, with a population of 4.5 million, (2) 40% of people surveyed had never heard of defendant, (3) the publicity about Enron had diminished substantially in the four years between Enron's collapse and the trial, (4) very little of the publicity actually named the defendant, (5) the jury acquitted defendant on nine counts, and (6) the publicity did not contain "prejudicial information." (130 S.Ct. at pp. 2915-2916 and notes 15 and 17.)

Taken together, these cases articulate the framework for analysis of the pretrial publicity here. Ultimately, the question is whether the nature and extent of the pretrial publicity made it "reasonably likely" that Mr. Rices could not be afforded a fair trial. It is

to that question Mr. Rices now turns.[13]

2. The pre-trial publicity here created a perception that Mr. Rices was a "dangerous" "animal," and that the murders were "cold-blooded," "execution-style" slayings.

The media coverage began immediately after the crimes occurred. The crimes were immediately dubbed "execution-style" murders. (*See, e.g.*, 2 CT 221 [March 3, 2006 article].) The coverage continued during a funeral involving "hundreds" of mourners. (*See, e.g.*, 2 CT 223.) The El Cajon Police Chief declared that "[t]his crime [ ] has victimized the entire community." (*Ibid.*) The Chief declared, "I think the people of El Cajon have a right to be outraged by this . . . ." (*Ibid.*) Auday Arabo, another prominent public figure, declared, "I have a message for the cowards. There is no place you can hide. There is no place safe for you. The loss and anguish you caused this community will never be forgotten." (2 CT 224.) According to these press accounts,

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[13] As the above discussion of *Skilling* demonstrates, in addition to examining the facts of cases like *Williams*, *Tidwell*, *Maxwell* and *Rideau* -- where courts have found a reasonable likelihood that pre-trial publicity prevented a fair trial -- it is also useful to look at the facts of cases where courts have reached a contrary result. (*See, e.g.*, *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1322 [20 articles over 22 month period not considered extensive publicity]; *People v. Panah* (2005) 35 Cal.4th 395, 448 [18 articles over 12 month period not considered extensive, especially where articles ended more than one year prior to venue motion]; *People v. Vieira*, *supra*, 35 Cal.4th at p. 280-281 [no reasonable likelihood of unfair trial where publicity "quickly subsided" and was not "persistent and pervasive"]; *People v. Welch* (1999) 20 Cal.4th 701, 744 [publicity not extensive where it ended two years prior to venue motion].)

many mourners called for the death penalty:

> "They should hang him here, in the front of the liquor store. This way, he never do it again." (2 CT 266.)
>
> "Eye for an eye, tooth for a tooth." (*Ibid.*)
>
> "I don't think he have [sic] a heart. No heart, and this guy, I don't think he's gonna have a life." (2 CT 267.)

The articles were not simply objective discussions of the facts. Thus, the media described the preliminary hearing testimony of Dwayne Hooks and Debbie Mays -- "witnesses" from whom the jury would never hear -- in which both claimed that Mr. Rices said he killed Mr. Firas after the latter attempted to remove his mask. (2 CT 250, 252, 293, 295, 324; 4 CT 742, 743.) Of course, since the surveillance video showed that Mr. Rices did not wear a mask (*see* 11 RT 1648-1649), this information was entirely false. In any event, both Hooks and Mays also claimed that Mr. Rices shot Ms. Mattia after she refused to open the safe. (2 CT 250, 252, 294, 334, 335; 4 CT 742, 743.) But the store had no safe. (12 RT 1833.)

Making matters worse, like *Sheppard*, significant amounts of the pre-trial publicity focused on evidence that was plainly inadmissible. Thus, numerous articles detailed claims by Hooks and Mays that Mr. Rices "bragged" about Ms. Mattia's feet moving after

she was shot. (2 CT 250, 252, 293, 323, 324, 325, 326, 327..) The trial court explicitly ruled this "highly prejudicial" evidence inadmissible at trial. (4 RT 665-666.) But the media reported on this inadmissible evidence repeatedly.

The media and numerous politicians also repeatedly referred to Mr. Rices as being "dangerous" and "a danger to the community." (2 CT 277, 278, 279, 280.) The trial court also ruled this evidence inadmissible. (*See* 15 RT 2276-2277.)

The articles also extensively covered Mr. Rices's competency proceedings. (2 CT 292, 319, 321.) The coverage about Mr. Rices's competency continued even after a judge found him fit to stand trial, with one station playing a video of Mr. Rices's courtroom "rage" in which he was removed from the courtroom. (2 CT 291-292.) The jury would hear none of this evidence either.

The overarching narrative of this coverage -- spanning as it did over the course of two and one half years and continuing through the venue change motion -- was that Mr. Rices was a "dangerous" "animal" who committed two "horrible," "brutal," "execution style" murders, and the "outraged" community had already determined Mr. Rices deserved to die.

This case is just like *Martinez*. In *Martinez*, reversal was required where there were 97 articles about the case and 50% of the venire had been exposed to the publicity. Here, defense counsel's initial and responsive venue change papers contained more than 100 discrete news accounts of the crimes. As discussed above, the media referred to these crimes as "execution-style" at least 58 times. There were also countless other accounts of the murders as being "evil," "cold-blooded," "horrible," and so on. Mr. Rices was described as "dangerous" and "an animal." And, far worse than *Martinez*, a full 70 percent of the venire had been exposed to this publicity. (*Compare People v. Williams*, *supra*, 48 Cal.3d 1112 [reversal required where 50 articles about the case appeared in the press].)

The prosecutor did not dispute these numbers. Instead, as noted above, the prosecutor took the position that "there shouldn't be a problem" because the jury panel would be drawn "from North County, South County, East County, Central. We're getting the entire diversity of San Diego County." (4 RT 628-629.) Based on discussions with the jury commissioner and "anecdotal evidence," the trial court agreed that a substantial portion of the venire would be from outside of East County.

The record shows, however, that the court and prosecutor could not have been more wrong. 98.8 percent of potential jurors were from East County. (*See* Appendix A.)

Given that "when a defendant's life is at stake, the rule [is] that all doubts [must] be resolved in favor of venue change . . . ," (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 585), the trial court erred in leaving the matter to chance. Here, even the prosecutor himself acknowledged the risk to Mr. Rices's fair trial rights with a jury drawn from East County. Yet that is exactly what happened. The court erred in denying defense counsel's motion to change venue. Reversal is required.

VII. MR. RICES WAS DENIED HIS RIGHT TO CONFLICT-FREE COUNSEL WHEN HIS LAWYER WAS FORCED TO CHOOSE BETWEEN BECOMING A WITNESS AT TRIAL OR KEEPING THE CASE AS COUNSEL.

A. The Relevant Facts.

Mr. Rices was charged in connection with the murders in this case on November 29, 2006. (1 CT 1.) He was incarcerated in San Diego County jail to await trial.

Mr. Rices was initially represented by the San Diego County Public Defender. (2 RT 3.) In March 2007, the Public Defender declared a conflict, and the trial court appointed an attorney from the Private Conflicts Counsel panel ("PCC") to represented Mr. Rices. (2 RT 45-47.)

The county reached a fee agreement with counsel through PCC. According to paperwork filed with the court in January 2008, that agreement required the Superior Court to pay counsel $137,000 in legal fees -- separate and apart from expenses -- to represent Mr. Rices through trial. (33 Sealed CT 7749-7755.)[14] According to the judge who signed the order, this fee was to "cover attorney's fees through the end of trial." (33

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[14] The sealed documents referenced at 33 Sealed RT 7749-7755 are covered by California Rule of Court 8.47, subdivision (b)(1)(B). Pursuant to Rule 8.47, subdivision (b)(2), the state may seek a copy of this material.

Sealed CT 7754.)

The January 2008 terms of the fee agreement were plain. Counsel had already received $17,000; of the remaining $120,000, counsel was to receive $40,000 "forthwith." (33 Sealed CT 7754.) This left $80,000 of the fee outstanding; counsel was to receive $40,000 "at the commencement of pre-trial motions hearing" and the balance of $40,000 "after the jury is impaneled." (33 Sealed CT 7754.)

On April 29, 2008 -- well before either the "pre-trial motions hearing" or the jury being impaneled -- Mr. Rices brought a *Mardsen* motion to replace counsel. (3 RT 411.) The trial court held an in-camera hearing out of the presence of the prosecutor. (3 RT 415.)

Mr. Rices told the court that he wanted a new lawyer because he could no longer "work with" trial counsel and "I don't trust him." (3C RT 416, 422.)[15] Mr. Rices explained that he had been experiencing mental health problems in jail, hearing voices telling him to "kill people" in jail and "slice people's throats open." (3C RT 417.) He was seeking help; he knew he had a problem because jail inmates were telling him he did

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[15] The April 29, 2008 *Marsden* hearing is covered by Rule 8.47, subdivision (b)(1)(A). Yet again, Rule 8.47, subdivision (b)(2) permits the state to seek a copy of this hearing.

things he could not remember. (3C RT 417.) Mr. Rices recognized that if he told any jail personnel about his mental state they could become witnesses against him:

> "I felt like I couldn't tell -- I couldn't trust a deputy. I couldn't tell a deputy because, you know, that could be used against me, you know what I'm saying? Probably for my case, they tell the D.A. that I'm going around killing people." (3C RT 417.)

So Mr. Rices did what he thought was the next best thing. He told defense counsel. (3C RT 416, 417.) At the in-camera hearing, defense counsel confirmed that he did indeed speak with with Mr. Rices "and he told me basically what he told the court." (3C RT 420.)

Of course, once Mr. Rices conveyed this information to counsel, it put defense counsel in a difficult position. Generally, of course, communications from clients are privileged and confidential. (*See* Evid. Code § 954.) But Evidence Code section 956.5 states that there is no privilege "if the lawyer reasonably believes that disclosure of [a confidential communication] . . . is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual." California Rule of Professional Conduct 3-100(B) tracks this same language and permits counsel to "reveal confidential information . . . to the extent [counsel] believes the disclosure is necessary to prevent a criminal act that [counsel] reasonably

believes is likely to result in death of, or substantial bodily harm to, an individual."

Here, defense counsel had received information from his client that because of mental health issues, he was a serious danger to others in prison. Pursuant to the Rules of Professional Conduct, after Mr. Rices told defense counsel of his concerns regarding "kill[ing] people" in jail and "slic[ing] people's throats open," defense did what he could to prevent violence: he called the county jail where Mr. Rices was housed.

Mr. Rices made clear that he and counsel had "agreed for [defense counsel] to tell the watch commander that I needed to see the psych, but I didn't agree for him to disclose information of why I needed to see the psych." (3C RT 417-418.) According to Mr. Rices, deputies told him that defense counsel called the jail and "told the watch commander that [Mr. Rices] feel[s] like being violent to other people." (3C RT 418.) Mr. Rices believed the attorney-client privilege had been violated when defense counsel revealed the specifics of what Mr. Rices told him. (3C RT 418.) That is why he could no longer trust counsel. (3C RT 416, 422.)

Again, defense counsel confirmed Mr. Rices's account. Counsel advised the court that (1) he and Mr. Rices agreed counsel would call the jail staff and (2) after speaking with Mr. Rices, counsel called the watch commander in an effort to move up the date of

Mr. Rices's meeting with the jail psychiatrist. (3C RT 420.) Counsel said that he told the watch commander that Mr. Rices had the potential of "acting out." (3C RT 420.) Having heard from both parties, the trial court denied Mr. Rices's *Marsden* motion. (3C RT 421.)[16]

Several months later, Mr. Rices attacked officer James Clements in the county jail. As Officer Clements would later tell the jury, on August 8, 2008 Mr. Rices attacked him, hitting him in the head and slicing him with a shank. (15 RT 2320-2324.) Officer Clements had no idea why he was attacked; he did not have any prior confrontations with Mr. Rices and had not had any harsh words with him. (15 RT 2325.)

The state brought separate charges based on this August 2008 attack, charging Mr. Rices with attempted premeditated murder, along with a deadly weapon use allegation, an allegation that he inflicted great bodily injury and a prior strike allegation. (*See* 3 RT 492-495.) On September 4, 2008, Mr. Rices was arraigned on this separate complaint

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[16] After the *Marsden* motion was denied, Mr. Rices then shifted gears and asked to represent himself. (3C RT 422.) The court refused to rule on that separate motion, preferring to set another hearing date to discuss the request for self-representation. (3C RT 422.) The court explained its view that often a request for self-representation is simple a "kneejerk" reaction to a *Marsden* denial, and the court wanted to be sure Mr. Rices really wanted to represent himself. (3C RT 422.) The court set a hearing date on that motion for May 6, 2008. (3C RT 422.) At the May 6 hearing, Mr. Rices withdrew his separate request to represent himself. (3 RT 426.)

and his lawyer on the pending death penalty case was appointed to represent him in this separate case as well. (3 RT 447.) One month later, defense counsel had Mr. Rices plead guilty to these charges. (3 RT 492-495.)

On September 19, 2008, the state amended its notice of aggravating evidence. (3 CT 678.) The amended notice advised defense counsel in plain terms that the state would be introducing "[e]vidence of the attack on Sheriff's personnel with a razor shank on August 8, 2008." (3 CT 681.)

True to its word, the prosecution called Officer Clements to testify at the penalty phase. (15 RT 2311.) In rebuttal, defense counsel did *not* introduce any evidence suggesting this assault was related to Mr. Rices's April 2008 plea for help with the voices he was hearing telling him to harm people in jail. Defense counsel did *not* offer to testify to Mr. Rices's April 2008 plea for help. Instead, defense counsel (1) cross-examined officer Clements, (2) suggested the attack was motivated by the fact that officer Clements might have dropped a meal of Mr. Rices's while serving food and (3) argued that officer Clements's actions were "unacceptable." (15 RT 2327-2328; 19 RT 2765.)

In light of the defense position, it is perhaps not surprising that the prosecutor in closing argument relied on the attack on officer Clements in urging the jury to impose

death. (19 RT 2751-2752.) According to the prosecutor, Mr. Rices "without any provocation, without any reason whatsoever, he goes over and . . . starts slicing him up with a razor . . . trying to kill him. That's your glimpse into Jean Pierre Rices." (19 RT 2752.) He urged the jury to consider the concept of future dangerousness based on the assault on officer Clements:

> "[D]o not think for one moment that his interaction with staff in a prison setting is going to change. . . . Someone's son, someone's daughter works in our prisons. They are exposed to the people who are alive and kept alive in our prisons. They are and will be exposed to Jean Pierre Rices. . . . And based upon this defendant's violent criminal behavior, both before, during and after this crime, he is a danger to those people." (19 RT 2753.)

As more fully discussed below, and for four separate reasons, the death sentence in this case must be reversed. First, as discussed in Argument B below, through no fault of his own defense counsel was operating under a stark conflict of interest which violated both the state and federal constitutions. On the one hand, the fee agreement offered by the county gave counsel a substantial financial interest in remaining as counsel on the case. On the other hand, counsel alone was in a unique position to serve as a mitigation witness and provide (1) factor (k) evidence regarding Mr. Rices's plea for psychiatric assistance in county jail and (2) evidence which explained that the attack on officer Clements was something other than an unprovoked attack on a prison guard (as the state hypothesized) but instead was the result of voices which Mr. Rices was hearing and doing

his best to resist for months. But serving as a mitigation witness would have required counsel to terminate his work on the case. In other words, the nature of the county fee agreement required counsel to make the critical tactical decision as to what mitigating evidence to present while laboring under a patent conflict of interest. Second, as discussed in Argument C below, because the conflict in this case involved decisions made in connection with the presentation of mitigating evidence at a capital sentencing proceeding, the conflict also violated the special reliability requirements of the Eighth Amendment. Third, as discussed in Argument D below, even if the record is insufficient to establish a conflict of interest under the state and federal constitutions, a remand is required because although the trial court was aware of the facts on which the conflict was based, it made no inquiry at all into the conflict. And fourth, as discussed in Argument E below, even apart from the conflict of interest issue, reversal is required because defense counsel was under a state-law obligation to withdraw from representing defendant once it became clear he should have been a witness at the penalty phase.

B. Because The County Fee Agreement Forced Trial Counsel To Make Critical Tactical Decisions Relating To The Penalty Phase While Laboring Under A Conflict Between The Client's Interest And His Own, Reversal Is Required.

Under both the state and federal constitutions, Mr. Rices was entitled to the effective assistance of counsel in connection with the penalty phase of his trial. (*See Wiggins v. Smith* (2003) 539 U.S. 510 [granting penalty phase relief where counsel failed to provide effective assistance of counsel at penalty phase of capital trial].) Since Mr. Rices was constitutionally entitled to competent counsel at his penalty phase, it follows that he was entitled to a lawyer who would make tactical decisions at the penalty phase free from a conflict of interest. (*See Woods v. Georgia* (1981) 450 U.S. 261, 271 ["[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."].)

Of course, the right to conflict free counsel -- like the right to counsel itself -- arises under both the federal and state constitutions. (*Holloway v. Arkansas* (1978) 435 U.S. 475; *People v. Bonin* (1989) 47 Cal.3d 808, 833-834.) In the absence of a knowing and intelligent waiver, the existence of an actual conflict of interest that undermines the loyalty and performance of counsel violates both the federal and state constitutions. (*Wood v. Georgia, supra*, 450 U.S. at p. 272; *People v. Mroczko* (1983) 35 Cal.3d 86, 103-105.)

Under both state and federal law, to obtain relief because of a conflict of interest a defendant must first establish there was an actual conflict of interest. Although a conflict frequently arises in a multiple or dual representation context, a conflict of interest can arise "in a variety of situations." (*Osbourne v. Shillinger* (10th Cir. 1988) 861 F.2d 612, 624.) A conflict occurs "whenever counsel is so situated that the caliber of his services may be substantially diluted." (*People v. Hardy* (1992) 2 Cal.4th 86, 136.) Conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.'" (*People v. Cox* (1991) 53 Cal.3d 618, 653.)

Once a conflict has been established, the question becomes one of remedy. The standard for obtaining relief under state and federal law is the same and depends on whether the trial court was aware of the conflict. Where the trial court continues conflicted representation over objection, reversal is automatic. (*Holloway, supra*, 435 U.S. at p. 488; *People v. Clark* (1993) 5 Cal.4th 950, 995.) Where there is no objection, and the trial court is unaware of the conflict, defendant must show "that an actual conflict of interest adversely affected his lawyer's performance." (*Clark, supra*, 5 Cal.4th at pp. 995-966. *See People v. Doolin* (2009) 45 Cal.4th 390, 421 [holding that state and federal prejudice test for conflict of interests are the same].)

Thus, there are two questions to be resolved in connection with the conflict issue here. First, was there a conflict at all? Put another way, do the facts of this case show that defense counsel's efforts on behalf of Mr. Rices were "threatened . . . by his own interests.'" (*People v. Cox*, *supra*, 53 Cal.3d at p. 653.) If so, the second question is whether reversal is required because it was likely that the conflict impacted counsel's handling of the case.

1. The county fee agreement forced counsel to decide what mitigation evidence to present while laboring under a conflict of interest.

The first question to be resolved is whether an actual conflict exists. It is Mr. Rices's burden to prove that a conflict existed.

In 2003 -- six years *before* the penalty phase in this case -- the Supreme Court itself recognized that at the penalty phase of a capital trial, counsel is obligated "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that [might] be introduced by the prosecutor." (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 524.) And in 2005 -- four years *before* the penalty phase in this case -- the Court found defense counsel ineffective for failing to properly investigate an unrelated act of violence the state was going to admit at defendant's penalty phase. (*Rompilla v. Beard* (2005) 545 U.S. 374, 383-390.)

Here, the state gave ample notice it was going to present evidence of the August 8, 2008 attack during the penalty phase. (3 CT 681.) Pursuant to both *Wiggins* and *Rompilla*, defense counsel was therefore obligated to discover any reasonably available "evidence to rebut" the state's thesis as to the August 2008 attempted murder.

In fact, however, defense counsel was already personally aware of mitigating evidence, and evidence which could have been used to rebut the state's theory. As discussed in some detail above, in April of 2008 Mr. Rices had spoken with defense counsel and pleaded for help with a mental health issue he was having in prison. He was hearing voices which were telling him to "kill[] people" in jail and "slice" them. (3C RT 417.)

This evidence was mitigating in a number of ways. First, it showed something about Mr. Rices himself in that he was trying to address his mental health issues. Second, to the extent his mental health issues would have rendered him a danger in the future, this evidence would have shown he was willing and trying to do something about it to prevent acts of violence which could result from his disorder. (*See, e.g., Davis v. Ryan* (D.Ariz. 2009) 2009 WL 2515644 at * 3 [capital defendant's attempt to seek help for mental disorder was mitigating]; *United States v. Hammer* (M.D.Pa. 1998) 25 F.Supp.2d 518, 521 [same]. *Compare People v. Geddes* (1991) 1 Cal.App.4th 448, 457 [refusal to seek

help for mental disorder made defendant more dangerous].) Mr. Rices's statements to defense counsel could plainly have been considered mitigating evidence in and of their own right. (*See generally Smith v. Texas* (2004) 543 U.S. 37, 44 [evidence is mitigation so long as a "fact-finder could reasonably deem" the evidence to have mitigating value].)

Moreover, the evidence was also relevant mitigating evidence since it provided an alternate -- and far less sinister -- explanation for the August 8, 2008 attack. As discussed above, the state argued that the attack was entirely unprovoked and showed that Mr. Rices would be dangerous in the future. (15 RT 2325; 19 RT 2752-2753.) But evidence from defense counsel about Mr. Rices's plea for help in dealing with the voices that were telling him to "slice" people in jail would have permitted the defense to argue that in light of Mr. Rices request for help in April of 2008, the attack was the result of a battle with mental illness. And, as also noted above, absent this evidence the defense presented evidence -- and argued -- that the attempted murder occurred because officer Clements might have dropped a food tray.

Mr. Rices recognizes that there were both pros and cons to the evidence defense counsel could have presented. For purposes of the conflicts issue presented here, this does not matter. Once the state gave notice that the August 8 incident was going to be a part of the penalty phase, there was a tactical decision to be made in terms of whether

defense counsel should testify to present mitigating evidence and rebut the state's theory as to why the attack occurred. As such, Mr. Rices was constitutionally entitled to the assistance of conflict-free counsel in making this important tactical decision.

Here, however, defense counsel's decision as to how to deal with the August 8 incident -- that is, whether to provide his own mitigating testimony or forego presenting it and try a different response to the August 8 incident -- was made under a disabling conflict of interest. The state gave notice of its intent to use the August attack in the penalty phase in September 2008. (3 CT 678.) Under state law, if defense counsel had decided that the best approach was for counsel to serve as a witness in the penalty phase, ethical rules would have required him to quit as counsel. (*See* Rule of Professional Conduct 5-210 [prohibiting an attorney from acting as both a witness and an advocate in the same trial]; *People v. Dunkle* (2005) 36 Cal.4th 861, 915 ["An attorney must withdraw from representation . . . whenever he or she knows or should know he or she ought to be a material witness to the client's case."].) And if counsel quit, he would have had to forego $80,000 -- that part of his fee which had not yet been paid.

In other words, defense counsel had to make a tactical decision as to what mitigating evidence to present. If he decided to call himself as a mitigation witness, he would have to quit as counsel and forego $80,000. If he decided to forego presenting this

mitigating evidence, he could keep the $80,000 and present the "dropped food tray" explanation for the August 8, 2008 attack. Through no fault of defense counsel this was a clear conflict of interest; it is the precise situation in which "an attorney's loyalty to, or efforts on behalf of, a client are threatened . . . by his own interests.'" (*People v. Cox*, *supra*, 53 Cal.3d at p. 653.) As the Supreme Court of Massachusetts recognized more than a decade ago, "[t]he conflict lies in the fact that the client's interest would be better served by having the attorney testify while the attorney's interests would be better served by not testifying." (*Commonwealth v. Patterson* (Mass. 2000) 432 Mass. 767, 780.)

2. The conflict requires reversal because there were other strategies available to defense counsel besides the "food tray" theory, and it is reasonably likely the conflict impacted counsel's decision making process.

The next question to be resolved is whether the actual conflict between Mr. Rices and his lawyer requires reversal. It does.

As noted above, when conflicted representation continues despite a timely objection, reversal is automatic. (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 488; *People v. Clark*, *supra*, 5 Cal.4th at p. 995.) Where the trial court is unaware of the conflict -- as where there is no objection -- the defendant must show "that an actual conflict of interest adversely affected his lawyer's performance." (*People v. Clark*, *supra*,

5 Cal.4th at pp. 995-966. *See People v. Doolin, supra*, 45 Cal.4th at p. 421 [holding that state and federal prejudice test for conflict of interests are the same].) As this Court has repeatedly noted, even where a defendant must show adverse effect "it is important to recognize that 'adverse effect on counsel's performance' . . . is not the same as 'prejudice' in the sense in which we often use that term." (*People v. Clark, supra*, 5 Cal.4th at p. 995. *Accord People v. Easley* (1988) 46 Cal.3d 712, 725.)

In evaluating "prejudice" in connection with traditional ineffective assistance of counsel claims, the Court looks to see if there is a "reasonable probability that the result . . . would have been different." (*People v. Clark, supra*, 5 Cal.4th at p. 995.) In contrast, in evaluating "adverse effect" in a conflict situation, the Court looks to see if the conflict caused counsel to "pull[] his punches." (*Ibid.*) The defendant must show "some effect on counsel's handling of particular aspects of the trial is likely." (*Lockhart v. Terhune* (9th Cir. 2001) 250 F.3d 1223, 1231.) A defendant may demonstrate "that defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests. [Citations omitted.] No further showing of prejudice is necessary." (*United States v. Bowie* (10th Cir.1990) 892 F.2d 1494, 1500.)

Here, defense counsel did not object to the conflict. But the record shows the trial court was certainly aware of the facts on which the conflict was based. Mr. Rices himself let the trial court know what he had told his lawyer in a sealed *Marsden* hearing long before trial. (3C RT 415-423.) And the court was certainly aware later that the August 8 incident was going to be a part of the state's penalty phase case.

But there is no need to decide whether the trial court's awareness of the basis for the conflict, and its failure to do anything about it, brings this case within the rule of *per se* reversal. Even if the "adverse effect" rule is applied here, reversal is required.

Defense counsel had a tactical choice to make here. If he listed himself as a mitigation witness -- to testify to Mr. Rices's attempts to seek help for his mental issues and to mitigate the state's explanation for the August 8 attack -- he would forego $80,000, since he could no longer represent Mr. Rices. And after defense counsel elected not to testify, he instead presented a very different explanation for the August 8 incident, arguing that Mr. Rices stabbed the officer because the officer "unacceptably" dropped a food tray. This record suggests not only that because of the conflict "some effect on counsel's handling of particular aspects of the trial [was] likely," (*Lockhart v. Terhune*, *supra*, 250 F.3d at p. 1231) but that there was "a specific and seemingly valid or genuine alternative strategy or tactic . . . available to defense counsel, but it was inherently in

conflict with his duties to . . . his own personal interests." (*United States v. Bowie, supra,* 892 F.2d at p. 1500.) Because an adverse effect has been shown, reversal is required under the Sixth Amendment and Article 1, section 15 of the California Constitution.

C. Because The County Fee Agreement Created A Conflict Of Interest Which Prevented Counsel From Discharging The Duties Required In A Capital Penalty Phase, Mr. Rices Was Deprived Of His Federal And State Rights To A Reliable Penalty Phase.

The Supreme Court has long noted that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures which increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio, supra,* 438 U.S. at pp. 605-606; *Gardner v. Florida, supra,* 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.)

Given the fundamental role played by defense counsel in ensuring a reliable result, the Sixth Amendment right to counsel is not satisfied by the mere presence of counsel, but by the presence of counsel "who plays the role necessary to ensure that the trial is fair." (*Strickland v. Washington* (1984) 466 U.S. 668, 685.) Where a defendant is sentenced to die in a proceeding where he was represented by an attorney who was making important tactical choices as to mitigating evidence while suffering from a conflict of interest, the reliability requirements of the Eighth Amendment are uniquely threatened. This is especially true here where -- as discussed more fully below -- the trial court failed to conduct an inquiry targeted to determine whether counsel could or would effectively present mitigation. As the Supreme Court noted in *Holloway*, the risk in allowing counsel to go forward in this situation was what the conflict prevented him from doing:

> "The evil - it bears repeating - is in what the advocate finds himself compelled to *refrain* from doing[.] . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record . . . it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client." (*Holloway*, 435 U.S. at pp. 490-491.)

Because any attempt to precisely gauge the impact of defense counsel's conflict on Mr. Rices's representation during the penalty trial would require "unguided speculation"

(*Holloway, supra*, 435 U.S. at p. 491), the death verdict in this case cannot satisfy the reliability requirements imposed by the Eighth Amendment. The sentence of death must therefore be reversed for this reason as well.

D. The Case Must Be Remanded Because Although The Trial Court Should Have Been Aware Of The Conflict, The Court Failed To Conduct Any Inquiry At All.

When a trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to inquire into the matter. (*Wood v. Georgia, supra*, 450 U.S. at p. 272.) It is immaterial how the court learns of the possibility of the conflict, or whether the issue is raised by the prosecution or the defense; in either case, the trial court is obligated (1) to conduct an adequate inquiry and (2) to act in response to what it learns. (*Id.* at pp. 272-273.) The court's obligation to inquire increases where serious crimes are charged: "In discharging its duty, [a trial court] must act 'with a caution increasing in degree as the offenses dealt with increase in gravity.'" (*People v. Bonin, supra*, 47 Cal.3d at p. 837.)

The purpose of the trial court's inquiry is to "ascertain whether the risk [of conflicted counsel is] too remote to warrant [new] counsel." (*Holloway v. Arkansas, supra*, 435 U.S. at p. 484.) Accordingly, the inquiry must be both "searching" and

"targeted at the conflict issue." (*Selsor v. Kaiser* (10th Cir. 1996) 81 F.3d 1492, 1501.) When a trial court is aware of a potential conflict of interest, but fails to make an appropriate inquiry, the proper remedy is to remand the case to the trial court for a proper hearing. (*Wood v. Georgia, supra*, 450 U.S. at pp. at 272-274.)[17]

In this case, the trial court was aware that while in county jail in April of 2008 Mr. Rices had told defense counsel about (1) hearing voices telling him to kill people in jail and (2) wanting to get help for this obvious mental health issue. (3C RT 415-423.) The same trial judge was also aware that Mr. Rices was charged with stabbing a jail guard some months later -- it was the same judge who arraigned Mr. Rices on this charge. (3 RT 444-448.) The state filed a notice of aggravating evidence with the court which identified the August 8 attack as evidence it would use in the penalty phase. (3 CT 681.) And the prosecutor was clear in his opening statement that this attack was part and parcel of the penalty phase. (9 RT 1337-1338.)

On these facts, the trial court knew or reasonably should have known of the potential conflict. In this situation, even if the record itself does not establish an actual conflict which requires reversal, at a minimum the trial court was required to conduct an

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[17] Of course, as the discussion in Argument VII-B above makes clear, if the record itself reveals a conflict -- along with an adverse impact -- then reversal is required regardless of the trial court's failure to conduct an inquiry.

adequate inquiry. (*Woods v. Georgia*, *supra*, 450 U.S. at pp. 272-273; *People v. Bonin*, *supra*, 47 Cal.3d at p. 836.) The failure to do so requires a remand.

E. Because Defense Counsel Failed To Move To Withdraw From Representation, Reversal Is Required.

Even putting aside the conflict of interest which arises under the state and federal constitutions, and which requires reversal for the reasons set forth above, there is a separate state-law reason reversal is required in this case. Under state law, defense counsel was obligated to move to withdraw from this case. His failure to do so requires reversal.

California Rule of Professional Conduct 5-210 states that with certain exceptions not applicable here "[a] member shall not act as an advocate before a jury which will hear testimony from the member . . . ." This ethical rule applies whenever the attorney "knows or should know that he or she ought to be called as a witness in litigation in which there is a jury." (Rule 5-210, Discussion.) As this Court has concluded, "[a]n attorney must withdraw from representation, absent the client's informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client's cause." (*People v. Dunkle* (2005) 36 Cal.4th 861, 915.)

In assessing whether an attorney "knows or should know" he should be called as a witness, a reviewing court must "evaluat[e] all pertinent factors . . . ." (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 915.) These include "the significance of the matters to which the attorney might testify, the weight the testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established." (*Ibid.*) An attorney should "resolve any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915. *Accord People v. Dunkle*, *supra*, 36 Cal.4th at p. 915.)

Here, application of the factors identified in *Dunkle* compels a conclusion that defense counsel should have known he should have been called as a witness. With respect to the "significance of the matters to which the attorney might testify," since Mr. Rices pled guilty, the only issue for the jury was whether to impose life without parole or death. The prosecutor made future dangerousness -- and particularly, future dangerousness to prison staff -- an important part of his argument that death was appropriate. (19 RT 2752-2753.) In light of the record as it went to the jury, the prosecutor placed substantial reliance on the August 8 attack. (19 RT 2751-2752.) He relied on this attack in his rebuttal argument as well. (19 RT 2781.) The prosecutor was not subtle, nor did he have to be: on the record before the jury the August 8 attack was

"without any provocation, without any reason whatsoever . . . ." (19 RT 2752.)

Had defense counsel testified to Mr. Rices's statements of April 2008, the jury would have been presented with a dramatically different view of the August attack. Defense counsel's testimony would have shown that months before the stabbing of officer Clements, Mr. Rices told counsel he was hearing voices telling him to do just that -- "slice" people in jail. (3C RT 417.) Mr. Rices asked counsel for help in dealing with what he himself recognized was a mental health issue. (3C RT 417.) This testimony presented the potential for a very different explanation for the August attack. Given the recognized importance of rebutting aggravating evidence in general, and the specific reliance the prosecutor here placed on the unprovoked attack in making his future dangerousness argument, defense counsel's testimony would plainly have been on a significant matter.

With respect to the "weight the testimony might have," given the circumstances of the conversation between Mr. Rices and counsel, it is likely the jury would have accorded substantial weight to the testimony. Had Mr. Rices sought help from the prison staff directly, the state might be able to suggest that he was simply trying to create a mental health issue where none existed. But Mr. Rices did no such thing; he specifically did not talk to prison staff because he thought they would testify against him if he sought help

from them. (3C RT 417.) Instead, he spoke to his lawyer, presumably in confidence, and asked for help. (3C RT 417.) The circumstances around the conversation therefore undercut any suggestion that Mr. Rices was anything but sincere.

Finally, the Court must examine "the availability of other witnesses or documentary evidence by which these matters may be independently established." Here, defense counsel was the only witness to Mr. Rices's request for help. There was neither witness testimony nor documentary evidence which could have substituted for defense counsel's own testimony as to what happened.

The facts of this case stand in sharp contrast to those in *People v. Dunkle*, *supra*, where the Court held that counsel did *not* have a duty to withdraw. There, defendant was charged with capital murder. At a separate competency trial, defense counsel testified about his observations of defendant. Defendant was eventually found competent; at the subsequent penalty phase, the defense evidence focused primarily on defendant's mental state. Defense counsel was not called as a witness at the penalty phase. The defense called a psychiatrist "who reviewed voluminous reports and records and recounted at length his own observations of defendant during the course of multiple interviews." (36 Cal.4th at p. 916.) On this record -- where the defense was able to present to the jury testimony from someone else who had observed defendant -- the Court found that defense

counsel had no obligation to withdraw. (36 Cal.4th at p. 916.) The court noted the undesirability of a rule which would require counsel to withdraw after the competency phase, causing delays in trial. (*Ibid.*)

Unlike *Dunkle*, here the defense was entirely unable to present testimony from other witnesses to offer a possible alternative explanation for the August 8 attack. To the contrary, as discussed above, absent any such evidence the defense substituted the "food tray" theory of the attack which the prosecutor quite properly ridiculed in his rebuttal. (19 RT 2781.) And unlike *Dunkle*, the motion to withdraw here would have caused far less of a delay in trial; in contrast to *Dunkle* (where counsel would have had to withdraw after the competency phase but before the penalty trial), the state gave notice that it would use the August 8 attack in aggravation in September 2008 (3 CT 681) but trial did not start until nine months later in June 2009. (5 CT 1076.) Given that Mr. Rices had already pled guilty, there might have been no delay at all had a prompt motion to withdraw been filed.

In short, applying the *Dunkle* factors here, counsel should have known he ought to be a witness in the penalty phase. This is especially true if indeed an attorney should "resolve any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel," a motion to withdraw should have been filed in this case. (*See People v. Dunkle, supra*, 36 Cal.4th at p. 915; *Comden v. Superior Court,*

supra, 20 Cal.3d at p. 915.) The failure to make such a motion here resulted in the absence of important mitigating evidence during the penalty phase. Reversal is required.

VIII. ALTHOUGH THE TRIAL COURT PROPERLY APPOINTED "INDEPENDENT COUNSEL" TO ADVISE MR. RICES WHETHER HE SHOULD GO TO TRIAL WITH A LAWYER WHO THE ASSIGNING AGENCY BELIEVED WAS NOT QUALIFIED TO HANDLE A CAPITAL CASE, THE COURT ERRED IN FAILING TO HOLD A HEARING AFTER LEARNING THAT THE LAWYER IT HAD APPOINTED MAY HAVE SUFFERED FROM A DISABLING CONFLICT OF INTEREST.

A. The Relevant Facts.

As noted above, Mr. Rices was charged with two murders on November 29, 2006. (1 CT 1.) Although he was initially represented by the San Diego County Public Defender, in March 2007 the Public Defender declared a conflict and the trial court appointed counsel through the PCC panel. (2 RT 3, 45-47.) At this point, the state had not yet declared it would be seeking death. In November 2007 the state advised defense counsel it would be seeking the death penalty. (3 RT 312.)

Shortly thereafter, PCC sought a hearing with the trial court, defendant and defense counsel. (3 RT 326.) The hearing was held on December 13, 2007 and ordered sealed.

At the hearing, PCC lawyers advised the Court that defense counsel had been selected for this case "before the district attorney decided to seek death . . . ." (3A RT

331.)[18] Under PCC's view, although defense counsel was qualified to handle the case when it was a murder prosecution, he was not qualified to serve as first chair in a capital case. (3A RT 329-330.) He was, however, qualified to serve as second chair. (3A RT 330.) PCC suggested that the court appoint a lawyer to advise Mr. Rices "what his options are and what all of this means." (3A RT 332.)

For his part, defense counsel disagreed that he was not qualified. He told the court that he had advised PCC he "had done two [capital trials] before." (3A RT 332.) Counsel had also arranged for a lawyer he had worked with previously -- William Wolfe -- to serve as second chair. (3A RT 333.) Counsel believed he was qualified under both the ABA Guidelines and California Rule of Court 4.117 and explained his view that PCC "for whatever reason I'm not privy to has decided they are going to in place of the A.B.A. guidelines and California Rules of Court . . . seek to replace me as counsel." (3A RT 334.) He added that he would not serve as second chair because it would create a "conflict in this defense team." (3A RT 334.)

The PCC representatives made clear they had not considered the A.B.A. Guidelines at all. (3A RT 335.) In fact, "it had nothing to do one way or the other with

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[18] The sealed proceedings of December 13, 2007 are covered by Rule 8.47, subdivision (b)(1)(B). Thus, the state may seek a copy of this transcript pursuant to Rule 8.47, subdivision (b)(2).

us for A.B.A. guidelines." (3A RT 336.) Counsel was not qualified because "unless and until you have second chaired a capital case, we do not approve somebody to be first chair. Period." (3A RT 336.)

Defense counsel explained the two capital trials he had handled. In one he had been advisory counsel to a pro per defendant who turned to counsel and said "try the case." (3A RT 336.) Counsel did so. (3A RT 336.) In the second case, counsel was standby counsel to another pro per defendant. (3A RT 337.) Counsel did not explain if he handled any aspect of the trial in the second case. (3A RT 337.) Counsel explained that when he offered his capital experience to PCC, "that didn't seem to sway them." (3A RT 337.) He also stated he had more than 30 murder trials. (3A RT 337.)

At this point, Mr. Rices advised the court that he had developed a relationship with defense counsel and both he and his family trusted him. (3A RT 341.) He felt like he would be "losing ground" if he got new counsel. (3A RT 342.)

The court decided to appoint a lawyer to advise Mr. Rices. (3A RT 344.) The purpose was "to get you advised of your rights." (3A RT 346.) The court stated that it wanted to pick "an independent counsel" -- one who was not on the PCC board. (3A RT 349.) PCC suggested that the court appoint "someone who is a capital case qualified

attorney to advise Mr. Rices" and suggested two possibilities including Don Levine and Allen Bloom. (3A RT 350-351.) When the court indicated it did not "know the attorneys in this county who are capitally qualified" defense counsel -- who had been working on this case for more than nine months -- advised the court that "Don Levine is fine." (3A RT 351.) The court took the suggestion and appointed Mr. Levine to counsel Mr. Rices. (3A RT 352.)

As discussed below, defense counsel's advice to the court would turn out to create far more problems than it solved. The parties reconvened on January 11, 2008. (3B RT 358.)[19] Mr. Levine was in open court, as was the prosecutor. (3 RT 355.)

Before being excused from the sealed proceedings, the prosecutor noted that she did not "know what [Mr. Levine's] role is in this case" but had "just learned that it looks like he's going to be advising or speaking with Mr. Rices in some capacity." (3 RT 356.) She advised the court that Mr. Levine was representing a witness who had "come forward to provide testimony against Mr. Rices." (3 RT 357.) The prosecutor made clear her concern:

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[19] The sealed proceedings of January 11, 2008 are also covered by Rule 8.47, subdivision (b)(1)(B).

> "Given that information, I don't know what the court's position is on having Mr. Levine being involved in possibly defending Mr. Rices." (3 RT 357.)

The sealed portion of the hearing then began. The court did not ask Mr. Levine anything about what the prosecutor had said, nor did Mr. Levine offer a comment. Instead, Mr. Levine simply informed the court that he had spoken to Mr. Rices and advised him that defense counsel was "technically not . . . qualified." (3B RT 359.) He reiterated that he "discussed with [Mr. Rices] the question whether [defense counsel] qualified, technically, according to the PCC guidelines . . . ." (3B RT 360.) According to Mr. Levine, "Mr. Rices felt that [defense counsel] was sufficiently qualified to handle his case . . . ." (3B RT 360.)

The court then turned to Mr. Rices. For his part, Mr. Rices did *not* ignore the prosecutor's expressed concern. He picked up right where the prosecutor had left off and asked the court why it appointed Mr. Levine, who represented a witness against Mr. Rices. The court made clear it had been unaware of this obvious conflict:

> "The Court: Mr. Rices, did you wish to state anything, sir?
>
> "The Defendant: Why'd ya'll send somebody to me that represented a confidential informant or a cooperating witness?
>
> "The Court: Sir, I don't know what, if anything, Mr. Levine's involvement

> with any witness or potential witness in this case has been. I selected Mr. Levine because he had not represented you. As far as I knew, there was no conflict." (3B RT 362.)

The court asked Mr. Rices if he wanted to consult with another lawyer and stated he would "be happy to appoint another lawyer to talk to you about this issue . . . ." (3B RT 362.) Mr. Rices declined, but again made clear his concern that the "independent lawyer" the court had picked had a pre-existing interest in the case:

> "The Defendant: No. I don't believe I would like that. I just don't understand how ya'll didn't research good enough to find out whether he represents somebody that's cooperating against me." (3B RT 362.)

Fairly read, the record suggests that trial court became a bit defensive about not knowing Mr. Levine's connection to the case, explaining that "I don't have a police report." (3B RT 362.) The court added that "I don't know everything about this case. In fact, I know very little." (3B RT 362.) When the court stated that it had appointed Mr. Levine "based on the representations made to me, that Mr. Levine had not handled this matter as far as you were concerned," Mr. Rices repeated for a third time his concern about having been given "independent counsel" who was representing a witness against him:

> "The Defendant: Ya'll didn't check to see if he had represented someone who was cooperating?"

The court responded, providing the somewhat perplexing explanation that because she was the judge who was making rulings in the case, she was not permitted to know if the "independent counsel" she had appointed to advise Mr. Rices had a disabling conflict of interest:

> "The Court: I'm not permitted to know any of that sir, because I'm the judge who is making rulings on the case." (3B RT 362-363.)

The court again offered to "appoint some other attorney to talk to you." (3B RT 363.) Mr. Rices declined the offer and told the court that he wished to keep defense counsel. (3B RT 363.)

Throughout this entire exchange, both defense counsel and Mr. Levine remained silent. Neither advised the court whether Mr. Rices's allegation -- that Mr. Levine "represented a confidential informant or a cooperating witness" -- was true. (3B RT 362-363.) Defense counsel did not discuss with the court whether he knew of that potential conflict when he recommended Mr. Levine at the December 13 hearing. Mr. Levine did not confirm or deny the allegation at all. And despite the fact that both the prosecutor and

Mr. Rices had alerted the trial court to what the trial court itself recognized was a potential conflict of interest, the court made no inquiry of anyone. The court asked no questions of defense counsel. The court asked no questions of Mr. Levine. And the only question it asked of Mr. Rices was whether he wanted the court to appoint yet another lawyer to talk to him. And at the end of this hearing, the court denied the motion by PCC to relieve defense counsel. (3B RT 366.)

Less than nine months later, defense counsel had Mr. Rices plead guilty to the capital charges in exchange for nothing from the state. (3 RT 455-470.) That same day defense counsel had Mr. Rices plead guilty to the August 8 assault on officer Clements. (3 RT 492-495.) At the ensuing penalty phase, defense counsel elected not to present any mental health evidence to explain this August 8 incident, instead arguing that the attack on officer Clements was caused because Clements dropped a food tray. (15 RT 2327-2328; 19 RT 2765.) Moreover, although the co-defendant admitted to police that the robbery was his idea, defense counsel elected not to introduce that evidence to the jury deciding Mr. Rices's fate. (12 RT 1778, 1832-1833.)

As more fully discussed below, the only reason the court was able to say at the January 11 hearing that "[a]s far as I knew, there was no conflict" (3B RT 362) was because it made no effort at all to determine if there was a conflict. On this record, where

the prosecutor raised the conflict issue prior to the hearing, where Mr. Rices raised the issue three times during the hearing and where the court itself recognized the possibility of a conflict, the court was at least required to make an inquiry.

B. Because The Trial Court Was On Notice Of The Potential Conflict, It Was Required To Hold A Hearing.

As discussed in some detail above, when a trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to inquire into the matter. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272.) The more serious the charged crime, the more alert a trial court must be to potential conflicts. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837.) When the court does make an inquiry, it must make a sufficient inquiry directed at the conflict issue to determine whether new counsel is warranted. (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 484; *Selsor v. Kaiser*, *supra*, 81 F.3d at p. 1501.) When a trial court is aware of a potential conflict, but fails to make an appropriate inquiry, the case must be remanded for a proper inquiry. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. at 272-274.)

In this case, although there was some dispute on the matter, PCC advised the court that in its view defense counsel was not qualified to first chair a capital trial. (3A RT 329-331, 336.) Because Mr. Rices himself expressed an interest in keeping counsel, the

trial court properly ruled that the best step would be to appoint counsel to advise Mr. Rices of the pros and cons of keeping current counsel. The trial court advised Mr. Rices it was going to appoint "independent counsel" to advise him of his rights. (3A RT 346.) Based on the suggestion of both PCC and defense counsel, the court appointed Don Levine. (3A RT 350-351.)

At that point in the proceedings it is impossible to criticize the trial judge. She was doing everything possible to make sure that Mr. Rices's right to counsel was honored. The problem occurred at the January 2008 hearing when the court heard from both the prosecutor and Mr. Rices that Mr. Levine -- the "independent counsel" she had appointed to advise Mr. Rices if he should go forward with unqualified counsel -- may himself have been operating under a conflict because he "represented a confidential informant or a cooperating witness." (3B RT 362.) The prosecutor brought this to the court's attention prior to the January 11 hearing, Mr. Rices reiterated the point three times during the hearing, and the trial court made clear (1) she knew nothing about it and (2) it raised a potential conflict. (3 RT 356-357; 3B RT 362-363.)

On these facts, the trial court knew or reasonably should have known of the potential conflict. In this situation, the trial court was required to at least conduct an adequate inquiry. (*Woods v. Georgia, supra,* 450 U.S. at pp. 272-273; *People v. Bonin,*

supra, 47 Cal.3d at p. 836.) Yet the court made no inquiry at all. The court did not ask Mr. Levine anything at all about what he knew of the potential conflict. It did not find out if he represented a witness, if the witness was a penalty phase or guilt phase witness and if so, who the witness was, what information the witness provided and what arrangements the witness had made if any with the state. The court did not ask defense counsel whether he was aware Mr. Levine represented a witness or whether Mr. Levine's advice to defendant would impact how defense counsel would cross-examine Mr. Levine's client. None of this information is in the record precisely because the trial court failed to hold a hearing. That failure was error under both the state and federal constitutions.

C. Mr. Rices Did Not Waive His Right To Conflict-Free Counsel.

After the court was made aware of the potential conflict the trial court twice stated it would "be happy" to appoint a different lawyer to speak with Mr. Rices about whether he should continue with unqualified counsel. (3B RT 362, 363.) On both occasions Mr. Rices declined the offer. (3B RT 362, 363.) Respondent may argue that (1) these exchanges constitute some kind of waiver of the right to conflict free counsel for purposes of receiving advice about the decision to proceed to trial with then-appointed counsel and (2) as a consequence of the waiver, there is no need to remand for a hearing

under *Woods v. Georgia.*

It is, of course, true that a defendant may waive the right to conflict-free counsel. But such a waiver must be unambiguous, "without strings," and made "with sufficient awareness of the relevant circumstances and likely consequences." (*People v. Bonin, supra,* 47 Cal.3d at p. 837, *citing People v. Mroczko* (1983) 35 Cal.3d 86, 110; *Brady v. United States* (1970) 397 U.S. 742, 748; *see also People v. McDermott* (2002) 28 Cal.4th 946, 990.) While the trial court need not undertake any "particular form of inquiry" before it accepts such a waiver, "at a minimum, the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." (*People v. Mroczko, supra,* 35 Cal.3d at p. 110; *see also Glasser v. United States* (1942) 315 U.S. 60, 71.)

"This inquiry is to be made directly of defendants to assure that they have been adequately appraised of the nature and consequences of any conflicts faced by counsel." (*People v. Mroczko, supra,* 35 Cal.3d at p. 112.) A defendant's statement he would like to continue with current counsel is *not* a sufficient waiver when it is not accompanied by

on-the-record advice as to the dangers of continuing with the conflicted representation. (*See People v. Bonin, supra,* 47 Cal.3d at pp. 840-841 [defendant said he wanted attorneys to represent him at trial; held, waiver of right to conflict-free counsel invalid because "defendant did not even purport to make a personal, on-the-record waiver . . . [and because his statement in favor of the attorneys] was not made in light of a constitutionally adequate, on-the-record advisement of the possible dangers and consequences of conflicted representation."]; *People v. Easley, supra,* 46 Cal.3d at p. 730 [no waiver of right to conflict-free counsel where "defendant was never asked for a waiver. . . [nor was he] ever advised of the full range of dangers and possible consequences of the conflicted representation in his case"].)

A reviewing court indulges "every reasonable presumption against the waiver of unimpaired assistance of counsel." (*People v. Bonin, supra,* 47 Cal.3d at p. 840, *citing People v. Mroczko, supra,* 35 Cal.3d at p. 110, *Glasser v. United States, supra,* 315 U.S. at p. 70.) In this case, the record does not come close to rebutting the presumption.

Here, Mr. Rices was entitled to a conflict-free lawyer advising him about whether to continue with current counsel. At the January 11, 2008 hearing Mr. Rices "did not even purport to make a personal, on-the-record waiver of his constitutional right to the assistance of conflict-free counsel." (*People v. Bonin, supra,* 47 Cal.3d at p. 840.) "It is

true that [appellant] stated he [did not want a new lawyer appointed to advise him]. His statement, however, is without significance here since it was not made in light of a constitutionally adequate on-the-record advisement of the possible dangers and consequences of conflicted representation." (*Id.* at p. 841.) Because the court never inquired into whether Mr. Levine actually had a conflict, it never informed Mr. Rices of his right to conflict-free counsel, it never asked him for a waiver, and it never advised him of the dangers and possible consequences of relying on conflicted advice from Mr. Levine. (*See, e.g., People v. Easley, supra,* 46 Cal.3d at p. 730; *People v. McDermott, supra,* 28 Cal.4th at p. 990.) Indeed, precisely because the court had made no inquiry, it was in no position at all to understand the nature of the conflict or provide any advice about that conflict to Mr. Rices. Mr. Rices did not waive his right to conflict free counsel for purposes of receiving advice about the decision to proceed to trial with appointed counsel.

D. A Remand Is Required To Determine Whether Mr. Levine Was Suffering From A Conflict Of Interest.

The typical situation where a trial judge is aware of, but fails to inquire into, a potential conflict involves a conflict involving defendant's trial lawyer. (*See, e.g., Woods v. Georgia, supra,* 450 U.S. 261.) In such a situation the proper remedy is to remand the case back to the trial court for an inquiry into the conflict. If this hearing reveals a

disabling conflict of interest, the lower court can simply reverse the conviction. (*Id.* at pp. 272-274 [where trial court did not hold a hearing to inquire into conflicted representation at defendant's probation revocation hearing, Supreme Court remands and notes that if the hearing shows a "disqualifying conflict of interest" then the lower court must hold a new revocation hearing with conflict free counsel].)

Mr. Rices recognizes that as to Mr. Levine's conflict, the issue is slightly different. After all, Mr. Levine did not represent Mr. Rices at trial -- he represented him only in connection with advice as to whether to proceed with counsel who PCC believed was not qualified. But the *Woods* approach should still be followed. The case should be remanded for a hearing to determine if Mr. Levine suffered from a disqualifying conflict of interest. If so, then different counsel must be appointed to advise Mr. Rices whether it was in his interest to proceed with unqualified counsel.

Of course, there is an immediate problem. Given that trial has already occurred, any advice now given to Mr. Rices about defense counsel (and any decision Mr. Rices now indicates he would have made based on that advice) may be tainted by the knowledge that proceeding with defense counsel resulted in a death verdict. But this is a very similar problem to that faced by courts all the time addressing ineffective assistance of counsel in the guilty plea context. Specifically, defendants who reject a plea offer, go

to trial, get convicted and receive a sentence longer than the originally offered plea sometimes claim their lawyer provided ineffective assistance in connection with the rejected plea offer. In that situation courts are charged with making a retrospective determination based on the objective evidence as to whether the defendant would have accepted the plea had he received proper advice. (*See In re Alvernaz* (1992) 2 Cal.4th 924, 938.) That is essentially the same inquiry which must be made here; assuming the court on remand finds a disabling conflict of interest for Mr. Levine, the question is whether Mr. Rices would have proceeded with defense counsel had he received genuinely independent advice on the subject. The case must be remanded so that these inquiries can be made.

IX. THE TRIAL COURT ERRED IN DENYING MR. RICES'S MOTION TO REPLACE COUNSEL AFTER LEARNING THAT COUNSEL HAD, IN APPARENT COMPLIANCE WITH RULE OF PROFESSIONAL CONDUCT 3-100(B), REPORTED MR. RICES TO JAIL AUTHORITIES.

In April 2008 Mr. Rices brought a *Mardsen* motion to replace counsel. (3 RT 411.) The trial court held an in-camera *Marsden* hearing to hear Mr. Rices's concerns. (3 RT 415.)

As discussed above, Mr. Rices told the trial court he needed new counsel because he no longer could "trust" or "work with" defense counsel. (3C RT 416, 422.) Mr. Rices had been hearing voices telling him to "kill people" in jail and "slice people's throats open." (3C RT 417.) He was afraid to tell jail personnel of these voices because they would "tell the D.A." (3C RT 417.) So Mr. Rices told defense counsel. (3C RT 416, 417.) Defense counsel confirmed that Mr. Rices "told me basically what he told the court." (3C RT 420.)

As also discussed above, defense counsel was in a difficult position. He had been given information by his client which he could reasonably believe could lead to significant harm, either death or great bodily injury of people in prison. In this situation, California Rule of Professional Conduct 3-100(B) permits counsel to reveal otherwise confidential information in an effort to prevent such harm. Counsel did so and contacted

the jail. In turn, jail deputies advised Mr. Rices that his lawyer had contacted the jail; Mr. Rices told the court that deputies told him that defense counsel called the jail and "told the watch commander that [Mr. Rices] feel[s] like being violent to other people." (3C RT 418.) Believing that the attorney-client privilege had been violated, Mr. Rices told the court he no longer trusted his lawyer. (3C RT 416, 418, 422.) For his part, defense counsel confirmed that he did indeed call the jail, explaining that he told officers that Mr. Rices had the potential of "acting out." (3C RT 420.) The trial court denied Mr. Rices's *Marsden* motion. (3C RT 421.)

This was error. As discussed below, when a defense lawyer confronts a situation like that presented here -- and he receives information from a client which he reasonably believes suggest that the client may be about to commit a criminal act of violence involving death or bodily harm -- the lawyer has a choice to make. Under California's ethical rules, the lawyer may either (1) remain silent or (2) reveal the information in order to prevent the violent act. California's ethical rules are equally clear, however, that if the lawyer elects to reveal information in order to prevent the violent act, the attorney-client relationship must be terminated. Because the trial court here simply ignored this aspect of California law in ruling on Mr. Rices's *Marsden* motion, reversal is required.

When a criminal defendant seeks to replace his appointed attorney, the trial court

is under an obligation to inquire into and evaluate the specifics of the defendant's complaints. (*People v. Marsden* (1970) 2 Cal.3d 118 , 125-126; *see also People v. Smith* (1993) 6 Cal.4th 684, 690.) Where the record "clearly shows" that the relationship between the defendant and counsel has deteriorated to such an extent that continued representation is untenable, new counsel should be appointed. (*See People v. Michaels* (2002) 28 Cal.4th 486, 523.) Of course, in making this assessment a trial court is *not* required to simply accept at face value a defendant's claim that he no longer trusts his lawyer. (*Id.* at p. 523; *People v. Crandell* (1988) 46 Cal.3d 833, 860; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070.)

Here, when Mr. Rices requested new counsel pursuant to *Marsden* the trial court properly held a hearing. Mr. Rices explained that the reason he could no longer "work with" or "trust" defense counsel was that counsel had contacted the jail and conveyed the substance of conversations Mr. Rices's believed were privileged. (3C RT 416-418.)

As discussed above, given that the statements Mr. Rices made to counsel may have involved a danger of violence, defense counsel may certainly have had a good faith belief that these statements were neither privileged nor confidential. (*See* Evidence Code section 956.5 [privilege]; Rule of Professional Conduct 3-110(B) [confidentiality].) Defense counsel is certainly not to be faulted for this belief. But the Rules of

Professional Conduct are quite clear on this point; once counsel decides that he is going to reveal client communications in an attempt to prevent death or great bodily injury, *the attorney-client relationship must end*:

> "When a member has revealed confidential information under paragraph [3-100] B, in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. *Therefore, the member is required to seek to withdraw from the representation* . . . unless the member is able to obtain the client's informed consent to the member's continued representation." (Rules of Professional Conduct, Rule 3-100, Comment 11, emphasis added.)

Of course, the Rules of Professional Conduct are "adopted by the Board of Governors of the State bar . . . and approved by the Supreme Court . . . ." (Rule of Professional Conduct 1-100(A).) As such, these rules are "binding upon all members of the State Bar." (Rule of Professional Conduct 1-100(A).) And this Court, as well as courts throughout the state, rely on the comments section of the rules in applying the rule itself. (*See, e.g., Santa Clara County v. Woodside* (1994) 7 Cal.4th 525, 548; *Howard v. Babcock* (1993) 6 Cal.4th 409, 429; *Rand v. Board of Psychiatry* (2012) 206 Cal.App.4th 565, 577-578; *Gilbert v. National Corporation for Housing Partnerships* (1999) 71 Cal.App.4th 1240, 1255.)

Here, defense counsel did not make the requisite "motion to withdraw" that he was

required to make. He did not "obtain [Mr. Rices's] informed consent to the member's continued representation." Instead, when Mr. Rices himself made the requisite motion to end counsel's representation, neither the court nor counsel took any heed at all of Rule 3-100.

To avoid confusion, Mr. Rices will make clear his argument. His argument here is *not* that Rule 3-100 provides an independent basis for his *Marsden* motion. To the contrary, the basis of his argument here is a basis long acknowledged: new counsel must be appointed where the record shows that the attorney-client relationship has irremediably broken down. Rule 3-100 and its comments simply recognize the common sense proposition that where a defense lawyer makes the substantial decision to reveal client communications to a third party "the relationship between [counsel] and client will have deteriorated" so that continued representation is simply not feasible. In reaching a contrary conclusion here the trial court ignored this aspect of Rule 3-100 entirely and, as a consequence, necessarily abused its discretion. The *Marsden* motion should have been granted and reversal is required. Moreover, the trial court's refusal to appoint new counsel forced Mr. Rices to trial with a lawyer with whom his relationship had obviously deteriorated and violated his federal and state constitutional rights to the effective assistance of counsel, as well as a fair and reliable penalty phase guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

X. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT WHEN MR. RICES'S JURY WAS CALLED BACK INTO SESSION TO HEAR CO-DEFENDANT'S LAWYER PRESENT EVIDENCE IN AGGRAVATION.

A. The Relevant Facts.

Jean Pierre Rices and Anthony Miller were jointly charged with two counts of murder. (1 CT 69-70.) The state sought death for Mr. Rices and life without parole for Mr. Miller. (1 CT 78-79.)

Because Mr. Miller had made pre-trial statements to police which inculpated both defendants, Mr. Rices moved for a severance or, in the alternative, for the court to seat two juries. (3 CT 478-490.) The state conceded that two juries were appropriate. (3 CT 607-614.) That is the approach the court took, empaneling two juries.

Ultimately, Mr. Rices pled guilty to special circumstance murder. (4 CT 716-718.) Thus, the two-jury procedure would work as follows.

Mr. Miller's jury would hear the guilt phase against Mr. Miller. Mr. Rices' jury would be present for what was referred to as the "overlapping" evidence, and it would

thereby learn the circumstances of the crime. Mr. Rices's jury would *not* be present for the Miller defense evidence. After the guilt trial of Miller was completed, Mr. Rices's jury would return to hear (1) aggravating evidence offered by the state and (2) mitigating evidence offered by the defense. (*See* 4 RT 710-711.) And this is precisely what the trial court explained to the jury during voir dire. (5 RT 795.) Finally, this point was again made clear by the calendar the court provided to the jurors, which provided for both juries to be present for the overlapping evidence, followed by five days of testimony to be heard only by the Miller jury. (5 CT 1020.)

To a point, this is exactly what happened. On June 8, 2009, the prosecutor made opening statements to Mr. Rices's jury. (5 CT 1056; 9 RT 1331.) On June 9, 2009, the presentation of the state's case began before both juries. (5 CT 1077; 10 RT 1359.) The state presented evidence from nine witnesses to both juries. (5 CT 1077-1081; 10 RT 1367-1546.) The next day -- June 10, 2009 -- the state presented evidence from two additional witnesses to both juries. (5 CT 1086-1087; 11 RT 1583-1650.) The prosecutor advised the court that he would be done with the joint trial that day and "the Rices jury would be done until we -- unless Mr. Miller decides to testify, the Rices jury will be done . . . ." (11 RT 1565.) Defense counsel said nothing in response to the prosecutor's suggestion that Mr. Rices's jury would be present if Miller testified in his own defense. (11 RT 1565.)

At the end of the day, the parties discussed scheduling. The trial court suggested that Mr. Rices's jury be placed on telephonic standby because of "the prospect that Mr. Miller would testify. We would want both juries." (11 RT 1653.) Again defense counsel did not object to calling Mr. Rices's jury back to hear Mr. Miller testify in his own defense. (11 RT 1653-1655.) The court then dismissed the Rices jurors until June 18, although it placed them on telephonic standby in case they were needed earlier. (11 RT 1661-1663.)

On June 11, 2009, the Miller jury alone returned to hear two prosecution witnesses. (5 CT 1092-1094; 12 RT 1682-1838.) One of these witnesses was the "primary investigator on the case, Officer James Hoefer. (12 RT 1750.) In front of the Miller jury only, the state introduced evidence that when interviewed by police after the crime, Miller said it was his idea to rob the store all along:

> "Q: [by the prosecutor]: During the course of your interview with Mr. Miller, did you ask him who came up with the idea? In other words, who idea was it to actually victimize this store, the Granada Liquor store?
>
> "A: [by officer Hoefer] Yes I did.
>
> "Q: What did he tell you?
>
> "A: He told me in January, they were talking about locations to rob. During those conversations, he suggested Granada Liquor store because of knowledge that he had of the store.

"Q: So he said it was his idea?

"A: Yes, he did." (12 RT 1778.)

The Rices jury was not in court to hear this mitigating evidence. Shortly thereafter, the state then rested its case against Mr. Miller. (5 CT 1095; 12 RT 1839.)

Mr. Miller then began calling his defense witnesses. (5 CT 1095; 12 RT 1841.) He called two witnesses that day. (5 CT 1095; 12 RT 1841-1848.) The Rices jury was *not* present for these defense witnesses called by Mr. Miller's counsel. (5 CT 1092-1094.) This was entirely proper, since Mr. Rices had pled guilty and the only evidence relevant for his jury was evidence presented by the state in aggravation or evidence presented by Mr. Rices in mitigation. Notably, in his cross-examination, the prosecutor asked one of Miller's witnesses (1) whether she had heard the plan to rob the store was Miller's, and (2) if that fact would change her opinion of his character. (12 RT 1844.)

The Miller jury was ordered back on June 16, 2009 to hear more of the Miller defense case. (5 CT 1095.) The Miller jury returned that day, again without the Rices jury. (5 CT 1101.) Mr. Miller's counsel called five witnesses in the defense case. (5 CT 11101-1102; 13 RT 1860-1888.) Again, the prosecutor asked each of these witnesses whether they had heard it was Miller who planned the robbery, and whether that fact

would change their opinion of him. (13 RT 1865, 1868-1869, 1873-1874, 1880, 1888.) The Rices jury was *not* present for these defense witnesses either. This, too, was entirely proper since this evidence was neither (1) evidence presented by the state in aggravation nor (2) evidence presented by the defense in mitigation.

Later on June 16, 2009, Mr. Miller's counsel decided to call another witness in Mr. Miller's defense: Mr. Miller himself. (13 RT 1892.) In accord with the prosecutor's (and trial court's) suggestion of June 8, and in contrast to all the other defense witnesses called by Mr. Miller's counsel, the Rices jury *was* present in court to hear this particular defense witness called by Mr. Miller. (5 CT 1102; 13 RT 1891.) Yet again there was no objection by defense counsel for Mr. Rices to having the Rices jury there for evidence offered in the Miller defense case by Mr. Miller's counsel. (13 RT 1891.)

On direct examination, Miller told the jury that on the evening of the shooting he had planned to go bowling with Mr. Rices or perhaps see a movie. (13 RT 1899.) They drove around, stopped near the market and Mr. Rices pulled out a gun -- which Mr. Miller had never seen before -- and told him he was going to "take somebody's money for me." (13 RT 1907-1908.)

Of course, at this point the Miller jury had already heard officer Hoefer's

testimony that it was actually Mr. Miller's idea to rob the store. (12 RT 1778.) But the Rices jury had not been in court for that testimony, and would in fact never be presented with that information. Instead, Mr. Miller continued, telling the jury on direct examination by his own lawyer that (1) Mr. Rices told him to put on gloves and a mask, (2) he (Mr. Miller) did so only because Mr. Rices had a gun, (3) they went in the store and (4) during the robbery, Mr. Rices shot the victims. (13 RT 1909-1921.) Mr. Miller explained that he was scared of Mr. Rices because of his "reputation." (13 RT 1939.) While still being questioned by his own lawyer, Miller explained exactly what he meant:

> "Well, as far as streets go, street ethics and being a gang member, [Rices] has a very high status." (13 RT 1939.)

On defense counsel's immediate objection, the trial court told the Miller jury it could consider this gang evidence, but told the Rices jury it could not. (13 RT 1940.) Defense counsel for Mr. Miller then had Mr. Miller confirm that he told police officers that Mr. Rices had "a killer glaze in his eyes." (13 RT 1940.)

Defense counsel objected again. (13 RT 1941.) The trial court noted that there was a conflict between the evidence which counsel for Mr. Miller wanted to introduce to prove a duress defense -- involving acts of violence and Mr. Rices's reputation -- "which would not be offered to a jury trying only the penalty issue." (13 RT 1942.) After the

court ruled it would "not prevent" Mr. Miller's lawyer from pursuing this defense, defense counsel for Mr. Rices requested that the Rices jury be present for the prosecutor's cross-examination. (13 RT 1944.)

Defense counsel for Mr. Rices then asked for a mistrial in light of the fact that the Rices jury had been told Mr. Rices was a prominent gang member. (13 RT 1945.) The court denied the motion. (13 RT 1945.) The court asked Mr. Miller's counsel to "focus on things that don't involve Mr. Rices." (13 RT 1945.) When Mr. Miller's lawyer said that he wanted to present additional evidence regarding the relationship between Miller and Rices, defense counsel finally "request[ed] that the Rices jury be excused so that they are not present for that." (13 RT 1946.)

The prosecutor cross-examined Mr. Miller in front of both juries. (13 RT 1950.) At no point in this cross-examination did the prosecutor elicit any evidence that the idea to rob was Mr. Miller's. (13 RT 1950-1982.) Instead, and relatively quickly, the prosecutor sought to play Mr. Miller's recorded police interview in order to refresh Mr. Miller's memory. (13 RT 1951-1953.) Defense counsel for Mr. Rices objected to the Rices jury hearing this evidence. (13 RT 1953.)

The court asked defense counsel ""why is this objection coming in now?" (13 RT

1955.) Defense counsel explained that the witness was about to discuss the facts of the crime to which Mr. Rices had already pled guilty. (13 RT 1955.) The court noted that this evidence was relevant to the "circumstances of the crime portion of the trial." (13 RT 1955.) The trial court denied the request to remove the Rices jury, ruling that "so long as the examination of Mr. Miller is limited to what transpired at the store, impressions of it, what he heard, what he saw, what he claims Mr. Rices did, your objection is overruled. That's circumstances of the crime."

The prosecutor then elicited the fact that Miller told police one victim said "please don't kill me. I just want to be with my family." (13 RT 1958-1959.) The prosecutor elicited the fact that Miller told police the other victim said "I'm young. Please don't kill me. Let me live." (13 RT 1959.)

After Mr. Miller's testimony, and while still in front of both juries, Mr. Miller's lawyer called another defense witness, Sherri Miller, the defendant's mother. (13 RT 1992-1993.) After Ms. Miller's brief and unremarkable testimony, the trial court excused the Rices jury. (13 RT 1998.) At that point -- solely in front of the Miller jury -- Mr. Miller was recalled for continued direct and cross-examination. (13 RT 2000-2013.)

In his closing argument to the jury at the penalty phase of Mr. Rices's case, the

prosecutor relied extensively on the evidence elicited during Miller's testimony. Thus, he argued that Miller's statements to police about the victims' last words provided all the aggravating evidence the jury needed to impose death: "If there wasn't one shred of aggravating evidence beyond that, not one thing, you would be justified in saying, [']For that conduct, Jean Pierre Rices, you deserve to die.[']" (19 RT 2748; *see also* 19 RT 2747, 2780.) And in closing arguments for the defense, counsel for Mr. Rices was unable to cite to a single favorable point in Miller's statements or testimony, and instead spent a great deal of time trying to cast doubt on Miller's credibility. (*See, e.g.*, 19 RT 2763-2764, 2788.)

As more fully discussed below, defense counsel's failure to object when the Rices jury was seated for Miller's testimony deprived Mr. Rices of the effective assistance of counsel. While the trial court was certainly correct that Miller's testimony may have been relevant "circumstances of the crime" evidence, in capital cases -- and for sound policy reasons -- it is only the state that may present aggravating evidence against a defendant. Had a timely motion been made, the Rices jury would have been excused during Miller's testimony, and would have heard none of the extremely prejudicial testimony about Mr. Rices's gang connections, Miller's statements to police about the crime itself, or Miller's asserted reasons for committing the crime. Because the evidence that came in during Miller's testimony was extremely prejudicial, and played an important role in the

prosecutor's request for death, a new penalty phase is required.

B. Upon A Proper Objection, The Trial Court Would Have Been Required To Excuse Mr. Rices's Jury Prior To Presentation Of Miller's Defense Case.

Both the United States and California Constitutions give defendants in criminal cases a right to assistance of competent counsel. (*See* United States Constitution, Amendment 6; California Constitution, Art. 1, § 15; *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319.) When a criminal defendant seeks relief because his lawyer has provided deficient representation, he must prove two elements: (1) counsel's performance fell below an "objective standard of reasonableness" and (2) counsel's error undermined confidence in the outcome of the trial. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687, 694.) Here, both the performance and prejudice prongs of the *Strickland* test have been met.

1. Because there was no tactical reason for defense counsel to want the Rices jury to hear Miller testify, and because a timely objection would have prevented it, trial counsel's failure to object to seating of the Rices jury during Miller's testimony fell below an objective standard of reasonableness.

As noted, the performance prong of the *Strickland* test is established when defense counsel's performance falls below an "objective standard of reasonableness." (*Strickland*

v. Washington, supra, 466 U.S. at p. 687.) The failure to object to damaging and inadmissible testimony or to make appropriate motions can be the basis for a conclusion that counsel was incompetent. (*People v. St. Andrew* (1980) 101 Cal.App.3d 450; *People v. Schiering* (1979) 92 Cal.App.3d 429; *People v. Sundlee* (1977) 70 Cal.App.3d 477, 485; *People v. Coffman* (1969) 2 Cal.App.3d 681, 690.)

Here, that is exactly what happened. As explained above, the state relied extensively on evidence which came in during Miller's testimony in urging the jury to impose death. Given the significance of this evidence to the state's case there is no conceivable tactical reason which would justify a decision to allow the testimony to be heard by Mr. Rices's jury.

To be sure, counsel cannot be faulted for failing to move to excuse his client's jury prior to Miller's testimony if, in fact, such a motion would likely have been denied. After all, counsel cannot be ineffective for failing to make a motion that would be denied. But in light of California law in this area, and under the unique circumstances of this case, such a motion by defense counsel would have had to be granted.

Pursuant to California Government Code section 100, subdivision (b) all criminal prosecutions are conducted in the name of the People of the State of California and by

their authority. (*See also* Cal Pen. Code § 684.) Government Code section 26500 makes clear that it is the district attorney who "shall initiate and conduct on behalf of the people all prosecutions for public offenses." Put simply, "California law does not allow private prosecutions." (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1386.) As this Court has noted, "[t]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor . . . ." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.)

There is good reason for this rule. The public prosecutor "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266.) Special burdens of honesty and candor are routinely placed upon prosecutors in the adversary system which are not placed on other parties. The goal of all these rules is to ensure, to the maximum extent possible, a reliable result. (*See, e.g., Brady v. Maryland* (1963) 373 U.S. 83 [prosecutors have a constitutional duty to disclose exculpatory evidence]; *United States v. Bagley* (1985) 473 U.S. 667, 674 [prosecutors have a constitutional duty to disclose evidence

which impeaches state witnesses]; *Kyles v. Whitley* (1995) 514 U.S. 419 [prosecutors have a constitutional duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."]; *Napue v. Illinois* (1959) 360 U.S. 264 [prosecutors have a constitutional duty not to present false testimony from their own witnesses and to correct false testimony from their own witnesses which is elicited on cross-examination]; *In re Sakarias* (2005) 35 Cal.4th 140 [prosecutors have a constitutional duty not to present inconsistent arguments].)

The special rules which apply to prosecutors are not just constitutional in origin. Thus, Penal Code section 1054.1 provides discovery rules which apply to prosecutors in criminal cases. Generally speaking, this section requires provision to the defense of all relevant evidence, including written statements of witnesses, exculpatory evidence and impeaching evidence. It also requires the state to disclose oral statements of witnesses. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165; *People v. Campbell* (1972) 27 Cal.App.3d 849, 858.)

These special statutory and constitutional rules which apply to prosecutors ensure that the entity entrusted with prosecuting crimes will do so in as fair a manner as possible within the confines of an adversary system. For example, by limiting the prosecution of crimes to state prosecutors who are subject to *Brady*, *Bagley* and *Napue*, our court system

can state with confidence that when the prosecution calls a witness to testify against a defendant, not only will the defendant have been provided with any evidence in the state's possession which could be used to impeach the witness, but if that witness presents false testimony during either direct or cross-examination, the prosecutor will honor his duty to expose that falsehood. And the statutory rules applicable to prosecutors in the criminal system ensure that any statements made by that witness -- whether oral or written -- will have been provided to the defense. In this way, the system ensures that when a prosecution witness testifies, the defense is prepared to confront the testimony and the ultimate result will be a reliable proceeding.

It is for this reason that private parties who are not subject to these constitutional and statutory rules should never be permitted to call witnesses against a criminal defendant. Only the state prosecutor -- who is bound to follow these rules of fairness -- can prosecute in our system.

This has long been the law. Thus, private parties may not file criminal complaints. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1201; *People v. Muni Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 196-198, 200-201, 208.) Private parties may not fund investigation in criminal cases. (*People v. Eubanks* (1996) 14 Cal.4th 580.) It follows from all these authorities that private parties may not call witnesses against a defendant in

a defendant's case.

And that is exactly what section 1093, subdivision (b) provides. Section 1093 generally governs the procedure of trial and provides in relevant part, as follows:

> "The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court:
>
> . . . .
>
> (c) *The district attorney*, or other counsel for the people shall then offer the evidence in support of the charge . . . ." (Emphasis added.)

The rule is no different at the penalty phase of a capital trial Section 190.3 governs the procedures applicable to the penalty phase of a capital trial. Like section 1903, subdivision (c) this section provides that only the prosecution can offer evidence against the defendant:

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant . . . ."

But that is not what happened here. As noted above, the trial court called the Rices jury back to hear counsel for Mr. Miller present aggravating evidence from Mr. Miller. Because this witness was not called by the prosecutor, none of the procedural protections

which would have applied to this evidence had it been elicited by the prosecution applied to this evidence -- including the constitutional rules of *Brady*, *Bagley*, *Kyles*, *Napue* and *Sakarias* and the statutory rules of discovery discussed above. Yet, as discussed above, each of these rules was specifically designed to try and ensure a fair proceeding.

On the facts of this case, this was certainly not some academic point. Mr. Miller's counsel had no statutory obligation to provide *any* discovery to Mr. Rices's counsel or even notice of the witnesses he was calling in Miller's defense. Without notice, as defense counsel noted in one of his objections, matters that should have been taken care of in pre-trial rulings were being presented to the Rices jury. (13 RT 1945.)[20]

And of course Mr. Miller's counsel was not obligated under *Brady* or *Bagley* to disclose to counsel for Mr. Rices evidence which impeached Mr. Miller. Nor was Mr. Miller's counsel obligated under *Napue* to correct any falsehoods which Miller provided on cross-examination. Those obligations apply only to the prosecution. And Miller's counsel had no obligation under the discovery statutes to disclose to Mr. Rices's lawyer

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[20] In fact, counsel for Mr. Rices attempted to do just that. Prior to trial he litigated the question of whether gang evidence would come before the jury and the prosecution stated it would *not* be introducing gang evidence in aggravation. (4 RT 609.) The matter was discussed again later. (4 RT 636-641.) At no point did counsel for Mr. Miller advise the court or Mr. Rices's counsel that *Mr. Miller* was going to be introducing gang evidence. (4 RT 609-610, 636-641.)

any written or oral statements of his client.

Moreover, because the state was not calling Mr. Miller as its witness, it could avoid all the disclosure and good faith obligations which would apply to its own witnesses. Indeed, the prosecutor made this point explicitly prior to trial when he moved under Penal Code section 1054.7 to avoid disclosing statements made by "John Doe # 1." (3 CT 590-591.) After an in camera hearing, the trial court granted this motion based on the state's representation that "John Doe will not be called as a witness by the People." (4 CT 769.)

Significantly, however, in a subsequently unsealed exchange *it became clear that John Doe was actually Mr. Miller.* (12 RT 1817.) In fact, in pleadings filed in conjunction with record settlement the state has conceded that John Doe was Mr. Miller. (Respondent's Reply to Appellant's Application for Order Unsealing Portions of Record on Appeal at p. 6.) Thus, the state was able to introduce aggravating evidence through a witness at trial while at the same time keeping secret from the defense prior statements that this very same witness had made.

In short, permitting the Rices jury to hear counsel for Mr. Miller present evidence in aggravation from Miller effectively allowed aggravating evidence from a second

prosecutor, operating without any of the constraints normally imposed on the prosecution. This not only violated Mr. Rices's federal and state due process rights to a fair trial, but his Eighth Amendment right to a reliable penalty phase determination. (*See, e.g.*, *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13.)

In making this argument, Mr. Rices takes no issue with the trial court's decision to seat two juries. California courts have long recognized that seating two juries can be a viable alternative to complete severance and fully separate trials. (*People v. Harris* (1989) 47 Cal.3d 1047, 1070-1076; *People v. Wardlow* (1981) 118 Cal.App.3d 375, 383-387.) But in cases where two juries are seated, each jury should hear only evidence against the defendant presented by the prosecution, not the other defendant. (*See People v. Harris, supra*, 47 Cal.3d at pp. 1070-1076; *People v. Wardlow, supra*, 118 Cal.App.3d at pp. 383-387.)

People v. Wardlow, supra, illustrates how a dual jury trial should be conducted. There, two defendants (Wilson and Wardlow) were tried for robbery and murder. (*People v. Wardlow, supra*, 118 Cal.App.3d at p. 380.) One defendant (Wilson) made statements which incriminated Wardlow. (*Id.* at p. 383.) At Wardlow's request, the trial court empaneled separate juries to hear the cases. (*Ibid.*) At trial, both defendants testified on

their own behalf. (*Id.* at p. 382.) After the state rested its case-in-chief, the defense cases began. Wilson testified in his own defense; when Wilson testified, however -- and incriminated Wardlow -- Wardlow's own jury was *not* present. (*Id.* at p. 386.) In short, *People v. Wardlow* demonstrates the proper procedure to be used when two juries have been empaneled: where one defendant testifies in his own case and implicates a second defendant, the jury for the second defendant should not be present.

Mr. Rices has been unable to discover any California case where a trial court did what the court did here: (1) order separate juries for two defendants but (2) require the jury of one defendant to be present when the co-defendant presented adverse evidence. But one Florida case has addressed this situation. In *Watson v. State* (Fla. 1994) 633 So.2d 525, the Florida Court of Appeal addressed the very issue presented here.

In that case, defendant Watson was tried for attempted robbery along with co-defendant Tomingo. They were tried together, although they had separate juries. After the state rested its case against both defendants, Tomingo began his case-in-chief. He testified in front of both juries, incriminating Watson as the shooter during a failed robbery attempt. Trial counsel for Watson made no objection. On appeal, Watson contended this evidence was inadmissible against him. The appellate court "agree[d] that it was error to allow Watson's jury to remain in the courtroom during the taking of

testimony in Tomingo's case . . . ." (*Watson v. State, supra*, 633 So.2d at p. 525. *Compare People v. Rodriguez* (1997 Ill.) 680 N.E.2d 757, 767 [reversible error for state to have "two bites at the apple of defendant's guilt because the trial court allowed the State to first impeach its witnesses as to their initial statements, and then to have those impeachments supported by [co-defendant's] cross-examinations in the presence of defendant's jury."].) The *Watson* court noted, however, that because defense counsel had made no objection, the only potential remedy was for the defendant to establish "that his counsel was ineffective in failing to request removal of Watson's jury during Tomingo's case." (*Watson v. State, supra*, 633 So.2d at p. 526.)

For all the reasons discussed above, the rule applied in *Watson* is sound. As discussed above, permitting counsel for Mr. Miller to act as a second prosecutor violated both the state and federal constitutions. Had defense counsel made a timely motion, he could have kept the Rices jury from hearing any of Miller's testimony. And had Miller not testified, the state would have been unable to elicit his prior statements to police that Rices shot the victims while they were begging for their lives. In short, had defense counsel asked the trial court to follow the procedure applied in *Wardlow* and approved in *Watson*, the Rices jury would not have heard Miller testify.

Mr. Rices recognizes that a reviewing court will not find ineffective assistance of

counsel where the challenged failure could have been the result of an informed reasonable tactical choice rather than of neglect. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426.) In some cases, however, "there simply could be no satisfactory explanation." (*Id.* at p. 426.) This is especially true where the failure was in direct contravention of counsel's chosen defense strategy. For instance, counsel's conduct is unreasonable where "[h]aving chosen to pursue [a particular] line of defense," counsel does not introduce readily available evidence corroborating that defense. (*Hart v. Gomez* (9th Cir. 1999) 174 F.3d 1067, 1071; *Dugas v. Coplan* (1st Cir. 2005) 428 F.3d 317, 328-329; *Soffar v. Dretke* (5th Cir. 2004) 368 F.3d 441, 473; *Pavel v. Hollins* (2nd Cir. 2001) 261 F.3d 210, 219; *Harris v. Reed, supra* 894 F.2d at p. 879. *See also Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 378-379.)

That is the case here. From the beginning of this case -- when defense counsel moved for severance from Miller -- defense counsel wanted no part of Miller. As discussed, defense counsel moved to sever the trial, or, in the alternative, empanel dual juries. (3 CT 478-490.) He based this motion, primarily, on the presence of incriminating pre-trial statements made by Miller and conflicting defenses. (3 CT 481-486.) He noted that Mr. Miller's testimony would be "damaging" to the defense. (3 CT 485.) Given defense counsel's demonstrated strategy, there was no conceivable tactical reason for counsel's failure to object to the presence of the Rices jury during Miller's testimony.

Nothing more is necessary to establish that counsel's conduct was not based on a reasonable tactical judgment.[21]

2. There is a reasonable probability that absent counsel's error, the result of the penalty phase would have been different.

The only remaining question is prejudice. Where defense counsel has provided ineffective assistance, reversal is required whenever counsel's error "undermines[s] confidence in the outcome of the case." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) In *Strickland* itself the Supreme Court *rejected* the notion that the test for prejudice was an "outcome determinative standard." (*Id.* at pp. 693-694.) To the contrary, defendants are not required to show that "counsel's conduct more likely than not altered the outcome in the case" but merely "a probability sufficient to undermine confidence in the outcome of the trial." (*Ibid.*) All a defendant must show under this standard is that one juror could have reasonably reached a different result absent the error. (*See*, *e.g.*,

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[21] As noted above, after the trial court ruled that Miller's counsel could explore certain issues with Miller on direct examination, defense counsel asked that the Rices jury be present for the prosecutor's cross-examination. (13 RT 1946.) In no way, however, does this reflect some kind of tactical decision by counsel that he wanted the Rices jury to hear Miller's direct examination testimony in the first instance. Instead, it reflects defense counsel's attempt at mitigating the damage caused by the fact that the Rices jury heard Miller's direct examination. Moreover, when it became clear exactly what evidence the prosecutor was seeking to elicit on cross-examination, defense counsel moved to excuse the Rices jury. (13 RT 1953.)

Wiggins v. Smith (2003) 539 U.S. 510, 537 [finding prejudice under *Strickland* where absent counsel's penalty phase error "there is a reasonable probability that at least one juror would have struck a different balance" and voted for life].)

Here, counsel's error requires reversal. The consequences of allowing the Rices jury to hear Miller's testimony were devastating. Mr. Rices' jury was exposed to Miller's claim that Rices forced Miller to do the crime, a claim some members of Miller's jury found credible in refusing to convict. (13 RT 1899, 1907-1908, 1939, 1940.) The Rices jury also heard Miller's devastating pretrial statements to police, which only came in because the Rices jury was present for Miller's testimony. And in closing arguments, the prosecutor urged the jury to rely on these statements in returning a death verdict:

> "These kids begged for their lives. They're laying on the floor. 22-year-old girl says [']I just want to be with my family. Let me live.['] 23-year-old man says, [']I'm young. I want to live.[']
>
> "He doesn't care. He doesn't care. None of that matters to Jean Pierre Rices. So what if they had the money? So what if the victims were cooperative? So what if the victims were begging for their lives? Jean Pierre Rices wanted to kill them. There was no other reason." (19 RT 2747.)

Absent this devastating evidence, "there is a reasonable probability that at least one juror would have struck a different balance" and voted for life. (*Wiggins v. Smith, supra,*

539 U.S. at p. 537.) Reversal of the penalty phase is required.

XI. ONCE IT BECAME CLEAR THAT MILLER WAS GOING TO TESTIFY IN FRONT OF THE RICES JURY, THE TRIAL COURT'S FAILURE TO PROVIDE THE RICES DEFENSE TEAM WITH A COPY OF MILLER'S PRE-TRIAL "FREE TALK" WITH POLICE VIOLATED MR. RICES'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Introduction

As discussed in Argument X above, had Miller been called as a witness by the state, the prosecution would have been obligated under both California statutes and federal constitutional principles to disclose to counsel for Mr. Rices all relevant evidence relating to Miller's potential testimony, including (1) all oral statements Miller made, (2) all written statements he made, (3) any evidence which impeached Miller's account of events and (4) all evidence which impeached his testimony and/or credibility. (*See* Pen. Code, § 1054.1; *Kyles v. Whitley*, *supra*, 514 U.S. 419; *United States v. Bagley*, *supra*, 473 U.S. at p. 674; *Brady v. Maryland*, *supra*, 373 U.S. 83; *Napue v. Illinois*, *supra*, 360 U.S. 264.) These rules were designed to ensure fairness in the criminal justice system and avoid unfair surprise.

However, because it was the co-defendant -- not the prosecution -- who called Miller in this case, *none* of these rules applied. As discussed more fully in Argument X, it is precisely for this reason that defense counsel for Mr. Rices should have immediately

objected to the Rices jury being present for Miller's testimony. Under the facts of this case there was no conceivable tactical reason for defense counsel's failure to object. (Argument X, *supra*, at pp. 171-172.)

But there may be at least a partial explanation. Prior to trial, police and Miller had an interview several hours long. The trial court permitted the prosecution to keep this interview a secret from the defense. Without this interview, when Miller was called as a witness -- as discussed in Argument X -- defense counsel did not object. As discussed below, however, had defense counsel had this interview, he certainly would have objected to Miller testifying before the Rices jury. The trial court's ruling permitting the state to keep this interview a secret violated both state and federal law and requires a new penalty phase.

B. The Relevant Facts.

Penal Code section 1054.1, subdivision (b) imposes on the state the obligation to disclose to a defendant "[s]tatements of all defendants." In this case, it turns out that co-defendant Miller made statements to police prior to trial during a lengthy "free talk" he had with investigators. (3 CT 590-591; 12 RT 1817.) Thus, pursuant to section 1054, subdivision (b) these statements should have been disclosed.

But prior to trial the state moved to avoid disclosing to Mr. Rices any of these statements pursuant to section 1054.7. (3 CT 590-591, 689-692; 4 CT 769.) That section permits the state to keep certain material a secret where "good cause" is shown. The trial court granted the state's motion in light of the state's assurance that Miller "will not be called as a witness by the People." (4 CT 769.)

Of course, once it became clear that Miller *was* going to be a witness, there was no longer any question as to whether these secret statements should have been disclosed. Nothing in section 1054.7 permits the state to (1) obtain statements from a witness (or co-defendant) prior to trial, (2) introduce inculpatory evidence through that witness or co-defendant in its case against a defendant, and (3) nevertheless keep the pre-trial statements a secret from the defendant's lawyer. And here, although it was the co-defendant who originally called Miller, there is little doubt that the state introduced aggravating evidence from Miller and relied on that evidence in asking the jury to impose death. (19 RT 2747, 2780.) Had the free talk been disclosed to counsel for Mr. Rices, there is no doubt what the result would have been: defense counsel would have moved to excuse the Rices jury as soon as Miller was called as a witness.

In Argument X above, Mr. Rices has contended that even on the current record, trial counsel's failure to move to excuse the Rices jury from hearing Miller's testimony

requires a new penalty phase. Even putting that argument aside, however, reversal is still required. Once it became clear that Miller *was* going to testify in front of the Rices jury, there was no longer any proper justification for keeping his "free talk" a secret. At that point, the trial court was required to reconsider its ruling allowing the state to suppress the free talk interview with police. As discussed below, allowing the state to keep the statements Miller made prior to trial a secret from Mr. Rices's lawyer even after Miller became a witness at the Rices penalty phase resulted in a fundamental deprivation of Mr. Rices's right to the effective assistance of counsel. Reversal is required.[22]

C. A Trial Court's Action May Cause Even The Most Diligent Of Counsel To Provide Ineffective Assistance.

The Sixth Amendment provides that criminal defendants are entitled to the effective assistance of counsel at all critical stages of the proceedings against them. (*United States v. Gouveia* (1984) 467 U.S. 180, 187.) Given the fundamental role played by defense counsel in ensuring a reliable result, the right to counsel is not satisfied by the mere appointment of counsel, but by counsel "who plays the role necessary to ensure that

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[22] A transcript of the Miller interview was not disclosed prior to or during trial. It was finally disclosed during post-conviction record completion proceedings, and then only pursuant to a January 23, 2014 protective order permitting use in "state court appellate proceedings" but precluding general disclosure of the interview. In an order dated November 12, 2014 this Court unsealed the transcript. Accordingly, this brief refers to the material formerly covered by the trial court's protective order.

the trial is fair." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 685.)

There are two ways counsel can fail to play this critical role. First, counsel can make an error and thereby "fail [] to render 'adequate legal assistance.'" (*Id.* at p. 686.) The Court has termed this type of failure as "actual ineffectiveness." (*Ibid.*)

Alternatively, state interference can cause even the most diligent of counsel to be unable to play the role necessary to ensure a fair trial. Thus, a trial court may itself violate a defendant's right to the effective assistance of counsel by actions which interfere with the ability of counsel to respond to the state's case or conduct a defense. (*Ibid.*; *accord Geders v. United States* (1976) 425 U.S. 80 [defendant denied Sixth Amendment right to effective counsel where trial court precluded him from consulting with counsel during an overnight recess in trial]; *Herring v. New York* (1975) 422 U.S. 853 [defendant denied right to effective counsel where trial court refused to allow his counsel to make closing argument in bench trial]; *Brooks v. Tennessee* (1972) 406 U.S.605 [defendant denied Sixth Amendment right to effective counsel where trial court required that he testify first if he wished to testify at all].)

The lower federal courts have recognized some of the varied instances in which a trial court can prevent counsel from rendering effective assistance of counsel. The

general rule from these cases is that the defendant has been denied his right to effective assistance of counsel whenever a trial court's actions fundamentally interfere with the ability of counsel to contest the state's case or present a defense. (*See, e.g., Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237; *United States v. Gaskins* (9th Cir. 1988) 849 F.2d 454, 460; *United States v. Harvill* (9th Cir. 1974) 501 F.2d 295, 295-296; *Wright v. United States* (9 th Cir. 1964) 339 F.2d 578, 579; *Hintz v. Beto* (5th Cir. 1967) 379 F.2d 937, 942.)

Thus, where defense counsel makes critical tactical decisions without notice of a particular theory of culpability -- and the trial court undercuts the basis of those decisions by instructing the jury on such a theory -- the defendant has been denied his right to the effective assistance of counsel. (*See, e.g., Sheppard v. Rees, supra*, 909 F.2d at pp. 1236-1237; *United States v. Gaskins, supra*, 849 F.2d at p. 460.) The reason is simple: to effectuate the constitutional right to counsel, and to permit defense counsel to prepare an adequate defense, the defendant must be clearly informed of the charges against him and the theories of culpability upon which he will be prosecuted. (*See, e.g., Sheppard v. Rees, supra*, 909 F.2d at p. 1236.)

These authorities govern this case as well. The trial court provided Mr. Rices with a separate jury. From that point on, every decision defense counsel made in the case was

made with the knowledge and understanding that Mr. Rices would have a separate jury.

And while it is true, for all the reasons set forth in Argument X, *supra*, that defense counsel should have immediately objected to Miller testifying in front of the Rices jury, the trial court's ruling on the state's section 1054.7 motion -- and its decision not to revisit that ruling once it became clear that Miller would testify against Rices -- made the absence of an objection even more likely.

After all, Miller spoke with police during an interview which was provided to defense counsel during the discovery process. (*See* 37 CT 8389-8582.) Yet it is only in Miller's subsequent free talk with police -- *which the state kept a secret from defense counsel* -- that Miller undercut the idea that he was anything but a willing participant in the crime.

In his initial statement to police -- which *was* disclosed to defense counsel and which the prosecutor told the Rices jury was "much more reliable" (19 RT 2780) -- Miller told police that (1) the robbery was his (Miller's) idea, (2) he and Rices did other robberies before this one, (3) immediately upon getting into Rices's car that night, Rices told him that they were "about to go bust a lick" and that Miller was to drive, to which Miller responded, "[O].k.," (4) he took packs of his favorite cigarettes during the robbery

because he was "gonna grab cigarettes that" he wanted, "[n]ot what anybody else want[ed]," (5) he was friends with Ms. Mattia and her brother, Chris, (6) he and Mr. Rices talked or bragged about the murders in front of others, and (7) he saw and handled Rices's gun and bullets before the murder, and was very familiar with firearms. (37 CT 8390-8391, 8405-8406, 8412, 8416-8417, 8423, 8426-8427, 8437, 8449-8456, 8477-8482, 8495-8500, 8521, 8537, 8541-8542, 8564, 8566-8567.)

In his free talk -- kept a secret from the defense -- Miller recanted *all of this*. Thus, contrary to his "much more reliable" statements to police, Miller claimed in his free talk that (1) the robbery was *not* his idea, (2) he and Mr. Rices did *not* commit any other robberies, (3) he did *not* learn about the robbery immediately upon getting in the car, and instead first learned of it when they were parked across the street from the store, (4) he did *not* take his favorite brand of cigarettes during the robbery, (5) he was *not* friends with Heather or Chris Mattia,(6) he did *not* discuss the crime with other people, and (7) he *never* saw or handled Mr. Rices's gun before that night, and actually had no experience with guns. (40A SCT 8902, 8925-8927, 8933-8934, 8936.) In short, Miller did everything possible in the free talk to set up his duress defense and retreat from his earlier statements to police that were fundamentally inconsistent with a duress defense.

Obviously, had the trial court not kept this information a secret from defense

counsel, defense counsel would have had some inkling as to what was coming and would therefore have objected to the presence of the Rices jury as soon as Miller was called as a witness. Had counsel for Mr. Rices seen the free talk, he would have known that Miller was about to give a version of the offense which was not only very different from the version he had previously given police, but which was even more damaging to Rices.

If the Sixth Amendment right to counsel means anything, it means that counsel must be entitled to make decisions about how to contest evidence, and what objections to make, without being affirmatively mislead as to what evidence is. Moreover, keeping this evidence a secret from defense counsel resulted in the Rices jury hearing aggravating evidence which was not subject to any of the constraints normally imposed on aggravating evidence and designed to ensure reliability in violation of Mr. Rices's Fifth and Fourteenth Amendment rights to a fair penalty phase and his Eighth Amendment right to a reliable penalty phase determination. (*See Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 323; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638, n.13.)

D. The Court Induced Deprivation Of Counsel Requires Reversal.

The Supreme Court has articulated two different standards to be applied in assessing when a violation of the Sixth Amendment right to counsel will require reversal.

For both practical and policy reasons, the Supreme Court has made clear that the standard of prejudice depends entirely on the source of counsel's ineffectiveness. As discussed below, where the case involves "actual ineffectiveness" -- that is, where counsel has made errors which a reasonably competent attorney would not have made -- the burden is on the defendant to prove prejudice. As also discussed below, where counsel's ineffectiveness is caused by the state itself, prejudice need not be proven, but is presumed.

In *Strickland* itself the Court addressed for the first time the question of what standard should apply to "judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." (466 U.S. at p. 684.) The Court initially held that a defendant must prove his lawyer's performance was deficient. (*Id.* at pp. 687-691.)

The Court then addressed allocation of the burden of proof in connection with the question of prejudice. The Court was explicit that allocation of the burden of proof depended on whether the right to counsel had been impaired by state conduct, or simply by an ineffective lawyer. Thus, the Court ultimately concluded it was appropriate to impose the burden of proving prejudice on the defendant in *Strickland* itself precisely because the state was not responsible for the error in the first instance:

> "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." (466 U.S. at p. 692.)

The Court was careful to distinguish these types of ineffectiveness claims from situations where the lawyer's effectiveness was compromised because of state action. The Court noted that in cases involving "state interference with counsel's assistance" the defendant did *not* have a burden to prove prejudice, but prejudice was "presumed." (466 U.S. at p. 692.) The Court explained that the reason these types of errors were treated differently was because the state itself was "directly responsible [for these errors and as a result they were] easy for the government to prevent." (*Ibid.*)

The different treatment *Strickland* afforded state-created impediments to counsel's assistance reflected the exact position taken by the State of California as well. In *Strickland*, United States Solicitor General Rex Lee filed an amicus brief on behalf of Florida, the petitioner in that case. The California Attorney General explicitly joined that brief. (466 U.S. at p. 670.) California argued that in cases of actual ineffectiveness, it was fair to impose the burden of proving prejudice on defendants "because neither the prosecution nor the court is responsible for the alleged defects in the proceedings." (*Strickland v. Washington*, 82-1554, Brief of Solicitor General (Joined by California) at p.

28.) Emphasizing that in the typical ineffective assistance of counsel situation "there is no suggestion" that the prosecution or court were "responsible in any way" (*id.* at p. 41), California explained it would be unfair to impose a prejudice burden on the state because the court was simply not responsible for counsel's error:

> "[B]ecause neither the prosecution nor the court is responsible for the alleged errors by defense counsel, it would be unfair to require . . . that the government bear the burden on the question [of prejudice]." (*Id.* at p. 44.)

Strickland's focus on the source of the error in allocating the burden of proof was not only premised on California's own position in the case, but on a long line of Supreme Court case law holding that where the state itself created an impediment to counsel's representation in a criminal case, the defendant did not have to prove prejudice. Indeed, the Court's case law both before and after *Strickland* makes this point plain.

For example, the Supreme Court has properly held that where defense counsel in a criminal case decides not to present closing argument on a defendant's behalf, a defendant seeking to prove counsel ineffective must establish prejudice under *Strickland.* (*Bell v. Cone* (2002) 535 U.S. 685, 696-699; *see People v. Dickey* (2005) 35 Cal.4th 884, 925-926.) But where defense counsel's failure to present closing argument is caused *not* by defense counsel himself, but by the trial court, the Court has held defendant need *not*

prove prejudice. (*Herring v. New York* (1975) 422 U.S. 853.)

The difference between *Herring* and *Bell*, of course, is that the impediment in *Herring* was state-created. As the state of California argued in *Strickland*, it is entirely fair to put the prejudice burden on the state where the court is "responsible for" the error as it was in *Herring*. And the Supreme Court in *Strickland* agreed, noting that in this situation prejudice should be presumed. (466 U.S. at p. 692.) Indeed, in *Bell v. Cone* itself the Court explained the result in *Herring* by noting that it involved "government action." (*Bell v. Cone*, *supra*, 535 U.S. at p. 696, n.3.) Significantly, the Court's focus on "government action" in allocating the burden of proof in *Strickland*, *Bell* and *Herring* is entirely consistent with more than four decades of Supreme Court case law:

- Where defense counsel fails to consult with the defendant, a defendant seeking to prove counsel ineffective must establish prejudice under *Strickland*. (*See, e.g., Kleba v. Williams* (7th Cir. 1986) 796 F.2d 947, 954.) But where it is a state-created impediment that prevents counsel from consulting with defendant, the defendant need *not* prove prejudice. (*Geders v. United States*, *supra*, 425 U.S. 80.)

- Where defense counsel fails to call certain witnesses, a defendant seeking to prove counsel ineffective must prove prejudice under *Strickland*. (*See, e.g., Strickland v. Washington*, *supra*, 466 U.S. at pp. 699-700.) But where defense counsel is precluded from calling certain witnesses by a state statute, no prejudice need be shown. (*Washington v. Texas* (1967) 388 U.S. 14.)

- Where defense counsel fails to cross-examine certain witnesses, a

> defendant seeking to prove counsel ineffective must prove prejudice under *Strickland.* (*See, e.g., Higgins v. Renico* (6th Cir. 2006) 470 F.3d 624, 634-635; *Welch v. Simmons* (10th Cir. 2006) 451 F.3d 675, 706.) But where defense counsel is precluded from cross-examining a state witness by a state statute, no prejudice need be shown. (*Davis v. Alaska* (1974) 415 U.S. 308.)[23]

In each of these cases, where the impediment to effective assistance comes *not* from defense counsel's own actions, but from the trial court itself, the Supreme Court has refused to require defendants to prove prejudice under *Strickland.* Indeed, in *Bell v. Cone* the Court again explained the result in *Geders* by noting that it involved "government action." (*Bell v. Cone, supra,* 535 U.S. at p. 696, n.3.) Thus, as the Court has succinctly concluded, state interference with defense counsel's ability to represent a criminal defendant "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Id.* at p. 280. *Accord Crutchfield v. Wainwright* (11th Cir. 1986) 803 F.2d 1103, 1108 [holding that the *Strickland* harmless error standard does not "apply to situations where the state, the court, or the criminal justice system denies a defendant the effective assistance of counsel."].)

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[23] *See also Brooks v. Tennessee, supra,* 406 U.S. 605 [no showing of prejudice required where impediment to defense counsel's representation was caused by state law]; *Ferguson v. Georgia* (1961) 365 U.S. 570 [same].

Pursuant to all these authorities, a harmless error analysis is inappropriate in this case. Ultimately, however, there is no need to even address the question. Under any standard of prejudice properly applied to the Sixth Amendment violation in this case (or the related Fifth and Eighth Amendment violations), reversal would be required.

Mr. Rices will be clear about what he is and is not arguing. He is *not* contending that the trial court's initial ruling under section 1054.7 was incorrect. After all, at that point there was no indication that Miller was going to become a witness. But once it became clear Miller *was* going to be a witness, the trial court was no longer entitled to simply keep Miller's free talk with police a secret from the defense. The court's decision to do so undercut tactical decisions defense counsel made at a critical point in the case. Had the evidence been disclosed to defense counsel, at a minimum counsel would have moved to excuse the Rices jury from hearing Miller's testimony. As discussed in detail in Argument X above, had defense counsel made such a motion, it would have been granted. Given the aggravating evidence which came in from Miller, and for the identical reasons also discussed in Argument X, the court's decision to keep the free talk a secret from defense counsel for Mr. Rices requires a new penalty phase.

XII. THE TRIAL COURT DEPRIVED MR. RICES OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS WHEN, WITHOUT CONSULTING COUNSEL, THE COURT RESPONDED EX PARTE TO A QUESTION FROM THE JURY ABOUT SPECIFIC EVIDENCE IN THE CASE.

A. Introduction.

Co-defendant Miller was called to testify in front of both the Miller and Rices juries. In an effort to present a duress defense to the robbery charge (on which the felony murder prosecution was based), Miller told both juries that Rices forced him to commit the robbery at gunpoint. As to the separate guilt phase trial against Miller, this duress evidence apparently had substantial persuasive value, since the Miller jury ultimately refused to convict.

As to the Rices penalty phase, the prosecutor accurately recognized that this duress claim from Miller was aggravating evidence, and the trial court agreed. But on cross-examination in front of the Rices jury, Miller's duress claim was squarely called into doubt by Exhibits 65 and 65A, a letter offered by the state which Miller wrote to Rices *after* Miller was arrested for murder. For obvious reasons, defense counsel raised no objection to this letter and, after the close of evidence, the state offered into evidence "all of the exhibits that have been referred to and marked." Yet again defense counsel raised no objection to Exhibits 65 or 65A.

During deliberations, the Rices jury asked to see Exhibits 65 and 65A. Without advising either defense counsel or the prosecutor of the jury's question, the court fashioned a response in secret. The court told the jury that these exhibits had not been introduced into evidence at Mr. Rices's trial.

As more fully discussed below, in light of the importance of these exhibits in undercutting what the prosecutor himself recognized was aggravating evidence, the trial court's decision to respond to the jury's question in the absence of counsel (and the defendant himself) violated Mr. Rices's federal and state constitutional rights to the assistance of counsel at all critical stages of the proceedings, his rights to due process and his right to be present at trial. This resulted in preventing the jury from considering mitigating evidence, and requires that the penalty phase be reversed. Separate and apart from violation of the rights to counsel and presence caused by the trial court's action, the trial court's action also violated Mr. Rices's Eighth Amendment right to procedures which ensure a reliable penalty phase. For this reason too, reversal is required.

B. The Relevant Facts.

On June 16, 2009, the Rices jury was called back into session to hear testimony from co-defendant Miller. (13 RT 1891.) In front of both juries, Miller explained that

Rices had forced him to commit these crimes. According to Miller, he had actually planned to go bowling with Mr. Rices or perhaps see a movie. (13 RT 1899.) Miller was in the car with Rices and Nichelle Hopson; they stopped near the Granada Liquor store and Mr. Rices took out a gun and told Miller that he (Miller) was going to "take somebody's money for me." (13 RT 1907-1908.) Rices handed him a bag with a ski mask and a pair of gloves. (13 RT 1908.) Miller was "scared out of his wits." (13 RT 1908.)

In some detail, Miller explained exactly how it was that Mr. Rices forced him to commit the crime. Rices ordered Miller to put on the gloves and the mask. (13 RT 1909.) Miller complied because Rices had a gun and "I didn't think I had a choice . . . ." (13 RT 1909.) Rices approached the liquor store and Miller "followed as told." (13 RT 1910.) Once they got in the store, Rices told Miller "what to do and what to grab." (13 RT 1913.) Miller recalled that when he could not find the cash, Rices yelled at him "what the fuck are you doing?" (13 RT 1914.) Miller found the cash and put it in the bag. (13 RT 1918.) Rices then ordered him to leave the store and start the car. (13 RT 1918-1919.) Miller went back to the car and told Nichelle Hopson, who was still in the car, to start the car. (13 RT 1920.) Moments later Rices came out of the store and they drove away. (13 RT 1923.)

Miller told both juries that several days later, Rices offered him a hundred dollar bill as his "cut" from the robbery. (13 RT 1928.) Miller said he declined the money. (13 RT 1928.) He did not call police because he was "scared for [his] life." (13 RT 1928.) When he later spoke with police, Miller said that if he had tried to walk away, Rices would have shot him. (13 RT 1947.)

Of course, the obvious purpose of Miller's testimony was to convey to his jury that he was not liable for felony-murder based on the underlying robbery because he participated in the robbery only out of duress. And this evidence was obviously persuasive to some degree because -- although Miller explicitly admitted his complicity in the robbery itself -- his jury *refused* to convict and he ended up with a hung jury. (17 RT 2473-2497.)

The Rices jury, however, was not concerned with Miller's guilt. Instead, the Rices jury was concerned only with what penalty to select for Mr. Rices. And certainly evidence that Rices had forced Miller to participate in the robbery was an unusual circumstance of the crime which could reasonably be construed as aggravating. Of this there should be no doubt; the prosecutor himself recognized this exact point, noting that "if the claim is that Rices used threats against Miller, that certainly is an aggravant." (13 RT 1946.) The trial court agreed: "of course it is." (13 RT 1946.)

But evidence was presented which directly undercut this aggravating inference. Near the end of his cross-examination of Miller, the prosecutor confronted Miller with a letter he had written to Rices from jail. Page one of this letter was marked as Exhibit 65, and pages 2 through 3 were marked as Exhibit 65A. (13 RT 1981.) Defense counsel for Mr. Rices raised no objection to this evidence. (13 RT 1981.) The contents of the letter show why defense counsel had no objection to the Rices jury seeing the evidence.

In the letter Miller tells Rices that "I love you boy." (13 RT 1982.) In signing off at the end of the letter, Miller again expresses this sentiment:

> "The struggle only gets better. Until pencil meets paper again, your protégé, with love, lil bro, Ant." (13 RT 1982.)

After introducing these portions of Exhibits 65 and 65A, the prosecutor ended his cross-examination in a rhetorically powerful way:

> "Q: That letter was sent since you've been in custody facing charges on this case, correct?
>
> "A: Yes, sir.
>
> "Q: Thank you sir. I have no further questions." (13 RT 1982.)

The inference from Exhibits 65 and 65A was obvious, and directly undercut Miller's testimony that Rices forced him to commit the crime at gunpoint. After all, if Miller had genuinely been forced at gunpoint to commit the robbery, it is certainly unlikely he would have expressed the feelings he did in Exhibits 65 and 65A after having subsequently been arrested for murder in connection with that very same robbery. And the prosecutor's use of Exhibits 65 and 65A was so powerful that moments later defense counsel elected not even to cross-examine Miller on the aggravating duress evidence. (13 RT 1983.)

On June 19, 2009 -- three days after the cross-examination of Miller -- the prosecution rested its penalty phase case against Mr. Rices "pending the admission of the People's exhibits . . . ." (16 RT 2392.) Out of the jury's presence, the parties discussed admission of the exhibits. (16 RT 2393.)

The state moved into evidence all of the exhibits which had been previously marked and referenced during the trial. (16 RT 2393.) The following exchange shows that the trial court and prosecutor McAllister understood that the state was moving into evidence all exhibits which had been marked for identification and referenced at trial:

"The Court: . . . The People are offering all of the exhibits that have been referred to and marked; is that correct?

"Mr. McAllister: Yes, your honor." (16 RT 2393.)

In the ensuing discussion, defense counsel Chambers renewed earlier objections to Exhibits 88 and 89 which involved a video of certain preliminary hearing testimony. (16 RT 2394.) The court then reiterated -- without objection from the prosecutor -- that as to those exhibits (like 65 and 65A) which "had been offered in front of both juries" the state was "resting conditioned upon the court receiving those additional exhibits." (16 RT 2395.) This was the relevant portion of the colloquy:

"[Mr. Chambers:] I am unclear as too -- I believe exhibits 49 through 65A, there was a question as to which ones came in to which juries. I'm not sure we're in a position right now to discuss 50 and 52, 63, 64, 65 and 65A, but if we are --

"The Court: Now --

"Mr. Chambers: Those are from the Miller [testimony] when we had both juries. We never really got into that.

"The Court: You brought up an issue that I didn't think about. Many of those exhibits are in the jury room.

"Mr. Chambers: Perhaps I can help the court. Exhibit no. 67 through 89, we rest on our objections on those.

"The Court: Let's do this, and I think I understand where we're headed Mr. Chambers. . . . . [T]he objections are noted, but for the objection to 88, are overruled. I'm going to -- that is as to 67 though 89. They are received with 88 being under submission.

As to the balance of People's exhibits that may have been offered in front of both juries, I'm just going to reflect that the People are resting conditioned upon the court receiving those additional exhibits." (16 RT 2394, emphasis added.)

The defense case in mitigation began the next day and continued until June 23, 2009. (5 CT 1196-1197, 1199, 1207; 18 RT 2677.) After the defense rested, the parties turned once again to the admission of exhibits. (18 RT 2677, 2680.) The prosecutor stated that although all defense exhibits had been introduced there were "still . . . several People's exhibits" to be discussed. (18 RT 2680.) He stated that "there are some from several days ago, 63, some others that I am concerned about." (18 RT 2681.)

Exhibit 63 was the audio of an interview between Miller and police. (13 RT 1962.) When it was offered by the state, defense counsel for Mr. Rices had raised a standing objection. (13 RT 1962.) At the end of proceedings on June 23, prosecutors Kaplan and McAllister reminded the court that Exhibit 63 was the "one item of evidence" played in front of both juries that still remained an open question and the parties agreed to return to the question of exhibits on the next day:

"Ms. Kaplan: I'm sorry your honor. I didn't mean to interrupt. There is one item of evidence, and that was number 63, which was a C.D., that was played in front of Miller's jury and Rices's jury on the same day. It was received as to Miller's jury only. It has not been received as to Rices's jury.

"The Court: Not to delay everything. We'll take up 88, 88A, 90, 91 and 63 tomorrow. And that would resolve all of the pending issues regarding People's evidence?

"Mr. McAllister: Yes.

"Ms. Kaplan: Yes, your honor." (18 RT 2714.)

The parties did indeed discuss exhibits the next day. (19 RT 2715-2718.) The court admitted Exhibit 63. (19 RT 2722.) The parties agreed that there were no remaining issues regarding the evidence. (19 RT 2724.)

During closing arguments defense counsel for Mr. Rices repeatedly urged the jury not to rely on anything said by Miller because he was simply not credible. (19 RT 2764 ["I don't think we can rely on anything that man said on the stand."]; 2787 ["You will have to decide how much credibility you give to a man who can't give the same story twice. He can't give the same story twice."]; 2788 ["he lied to protect Nichelle Hopson, and he lied to protect himself, and the lies to protect himself kept growing, and when one didn't work, he moved on to another, until ultimately you got that package of lies that he presented to you when he came in here and testified."]; 2788 ["You should disregard everything that Anthony Miller tells you."].)

The Rices jury began deliberations on penalty at 1:35 on the afternoon of June 24,

2009. (19 RT 2798; 6 CT 1255.) The jury was obviously considering Miller's testimony; approximately 20 minutes after deliberations started, the jury asked the bailiff if they could see copies of Exhibits 65 and 65A. (6 CT 1255.) According to the settled record, the following ex parte contact occurred between the trial court and the jury:

> "[T]he Bailiff relayed the jury's request to the Court, . . . the Court advised the bailiff to tell the jury that these exhibits were not admitted into evidence in Mr. Rices' trial and . . . the Bailiff relayed this information to the jury. *Counsel for the People and counsel for the defense were not notified of the jury's note or the Court's response.*" (*People v. Rices*, Order of January 27, 2014 Settling Record at pp. 3-4, emphasis added.)

At 3:34 that afternoon -- roughly 95 minutes later -- the jury returned a verdict of death. (6 CT 1255.)

C. The Trial Court's Ex Parte Contact With The Jury Violated Due Process And The Sixth Amendment And Requires A New Penalty Phase.

The Sixth Amendment to the United States Constitution provides that criminal defendants are entitled to the assistance of counsel. The Supreme Court has long recognized that this right entitled defendants to the presence of counsel at all "critical stage[s]" of trial. (*United States v. Cronic* (1984) 466 U.S. 648, 659.) This Court has reached the same conclusion. (*See, e.g., People v. Doolin, supra*, 45 Cal.4th at p. 453 ["A

criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution . . . ."].)

Thus, there are two questions to be resolved in this case. First, was the *ex parte* communication between the trial court and the jury a "critical stage" of the trial? If so, then Mr. Rices's right to counsel at all critical stages of trial was plainly violated when the trial court responded without consulting counsel. Assuming that this was a critical stage, the second question is whether the violation of this fundamental right requires reversal in this case.

It is to these questions Mr. Rices now turns. As discussed below, not only was his right to counsel indeed violated in this case, but that violation requires a new penalty phase.

1. When a deliberating jury asks a question directly related to the facts or law involved in a case, the ensuing communication with the jury is a critical stage of the criminal trial at which counsel is required.

This Court has properly recognized that not every *ex parte* communication between a trial court and a jury in a criminal case involves a critical stage of the criminal trial. "[N]ot every communication between the judge and jury constituted a critical stage

of . . . trial." (*People v. Clark* (2011) 52 Cal.4th 856, 987.) Thus, a trial court may properly engage in *ex parte* communications which relate to "scheduling, administrative purposes or emergencies that do not deal with substantive matters." (*Ibid. People v. Avila* (2006) 38 Cal.4th 491, 613 [no constitutional violation where ex parte communication involved scheduling of further deliberations].)

But where communications from the jury involve either the facts or the law of the specific case before the court -- issues on which "counsel could have taken some action on defendant's behalf to amplify, clarify, or modify" the court's response -- then communications with the jury *do* involve a critical stage of the criminal proceedings. (*See People v. Hawthorne* (1992) 4 Cal.4th 43, 68-69.) Thus, where a trial court fashions an *ex parte* response to a jury question by providing further instructions on the law or the re-reading of testimony, the defendant's constitutional right to counsel at a critical stage has been violated. (*See, e.g., People v. Knighten* (1980) 105 Cal.App.3d 128, 132 [re-reading testimony]; *People v. Dagnino* (1978) 80 Cal.App.3d 981, 988 [re-instructing jury].) Such *ex parte* communications also violate the defendant's state statutory rights

under Penal Code section 1138. (*People v. Knighten, supra*, 105 Cal.App.3d at p. 132.)[24]

In short, *ex parte* communications between the trial court and the jury relating to the specific case -- and not involving administrative or scheduling matters -- violate the defendant's right to counsel at a critical stage of the criminal proceedings. (*See, e.g.*, *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1413; *People v. Garcia* (1984) 160 Cal.App.3d 82, 88.) As this Court has specifically noted, "[a] jury request for exhibits during deliberation is a critical stage of the prosecution during which the right to counsel applies." (*People v. Hogan* (1982) 31 Cal.3d 815, 849, disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

That is exactly the error which occurred here. The jury asked to see copies of Exhibits 65 and 65A. This was neither an administrative nor a scheduling matter. Instead, it was a matter directly related to evidence which the jury had seen during Miller's cross-examination. And given that this evidence rebutted Miller's aggravating

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[24] Section 1138 provides as follows:

> "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

testimony about Rices forcing him to commit the crime, this evidence was plainly important to the jury's assessment of the aggravating evidence. Pursuant to the above authorities, the trial court's decision to answer the jury's question without consulting defense counsel -- or even notifying him -- was a plain violation of Mr. Rices's state and federal constitutional rights to counsel at a critical stage of the proceeding, his right to due process and his rights under Section 1138. Error has occurred.

2. The error requires reversal without a showing of prejudice, but even if harmless error analysis is applied, reversal is required here given the importance of the evidence.

In 1967, the United States Supreme Court set forth a general standard to be applied in assessing prejudice from constitutional errors which occur at a criminal trial. Under this standard, when a federal constitutional error occurred at trial, the state has the burden of proving the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.)

For many years after *Chapman*, courts evaluating violations of the constitutional right to counsel -- including both this Court and the United States Supreme Court -- assumed that the general standard of prejudice set forth in *Chapman* applied to such violations. Thus, in *People v. Hogan, supra*, this Court held that where a jury asked to

see certain exhibits during deliberation, and the trial court answered the jury without ever notifying or consulting with defense counsel, defendant's right to counsel was violated and the *Chapman* standard applied to the error. (31 Cal.3d at p. 850.) In *Rushen v. Spain* (1983) 464 U.S. 114, the Supreme Court made the same assumption in a per curiam opinion, holding that a trial court's *ex parte* communication with a jury was to be evaluated under the *Chapman* standard. (464 U.S. at pp. 117-118.)

One year after *Rushen*, however, the Supreme Court decided two cases which for the first time directly addressed the question of what standard of prejudice to apply in cases where a defendant alleges that his lawyer provided ineffective assistance of counsel: *Strickland v. Washington*, *supra*, 466 U.S. 668 and *United States v. Cronic*, *supra*, 466 U.S. 648. In *Strickland*, the Supreme Court recognized that defense counsel in a criminal case can make an error -- or a series of errors -- and thereby "fail [] to render 'adequate legal assistance'" in violation of the Sixth Amendment. (*Id.* at p. 686.) In contrast to the *Chapman* standard of prejudice applied to other federal constitutional violations, however, *Strickland* held that burden would *not* shift to the state to prove the error harmless beyond a reasonable doubt. Instead, even though this was a constitutional claim, the burden would remain with the defendant to prove any error by counsel was prejudicial by establishing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

(*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

In *Cronic*, the Court recognized three situations in which the defendant would *not* have to show *Strickland* prejudice to obtain relief. Of relevance here, the Court stated that "the complete denial of counsel" would require reversal without a showing of prejudice. (466 U.S. at p. 659.) The Court was careful to explain that this rule of *per se* reversal was *not* limited to the situation where the denial of counsel occurred for the entire trial; instead, "a trial is unfair if the accused is denied counsel at a critical stage of his trial." (*Ibid. citing Geders v. United States*, *supra*, 425 U.S. 80 [defendant charged with drug offenses, trial court precluded defense counsel from consulting with defendant during overnight recess; held, Sixth Amendment right to counsel violated and conviction reversed without an analysis of prejudice]; *Herring v. New York*, *supra*, 422 U.S. 853 [defendant charged with attempted robbery, waived his right to a jury trial, trial court refused to allow defense counsel to make a closing argument: held, Sixth Amendment right to counsel violated and conviction reversed without an analysis of prejudice].) In *Bell v. Cone*, *supra*, 535 U.S. at pp. 695-696 the Supreme Court reviewed *Cronic* and recognized that *per se* reversal was required "where the accused is denied the presence of counsel at 'a critical stage' . . . a phrase we used . . . to denote a step of the criminal proceeding . . . that held significant consequences for the accused." Similarly, in *Mickens v. Taylor*, *supra*, 535 U.S. at p. 166 the Supreme Court stated that "[w]e have spared the

defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding."

In the years since *Cronic*, this Court has recognized that in light of *Cronic*, a denial of the right to counsel at a critical stage of the proceedings is presumed to be prejudicial. (*See, e.g., People v. Streeter* (2012) 54 Cal.4th 205, 232; *People v. Benavides* (2005) 35 Cal.4th 69, 86.) And at least one other court has recognized that *Cronic* may have specific application in connection with the complete denial of counsel for a trial court's *ex parte* communication with jurors on an important subject. (*See People v. Bradford, supra*, 154 Cal.App.4th 1390.)

In *Bradford*, the appellate court addressed this very issue. The court recognized that prior to 1984 (and prior to *Cronic*), courts applied *Chapman* to this type of error. (154 Cal.App.4th at p. 1417.) Citing *Cronic*, the court went on to note "[h]owever, there is authority that suggests that the deprivation of the right to counsel at a critical stage of the proceedings *is* cause for automatic reversal." (154 Cal.App.4th at p. 1417.) Ultimately, *Bradford* did not decide which standard to apply because the error there was prejudicial even under *Chapman*. (*Ibid. Cf. Delgado v. Rice* (S.D.Cal. 1999) 67 F.Supp.2d 1148, 1162 n.1 [recognizing that although *Rushen* applied the *Chapman* test to

this type of error in 1983 (one year before *Cronic*), the appropriate standard of prejudice was an open question in light of subsequent authority regarding structural errors].)

In sum, this case involves a total deprivation of Mr. Rices's right to counsel at a critical stage of the proceedings. In light of the recognition in *Cronic*, *Bell* and *Mickens* that no prejudice analysis is required where a defendant is completely denied the presence of counsel at a critical stage, no analysis of prejudice is required and the penalty phase must be reversed.

In making this argument, Mr. Rices is aware that in several cases after *Cronic*, this Court has continued to apply the *Chapman* standard of prejudice even when defendant was totally deprived of his right to counsel for this critical stage involving a court's responses to the jury. (*See, e.g., People v. Jennings, supra*, 53 Cal.3d at pp. 383-384; *People v. Wright* (1990) 52 Cal.3d 367, 403.) In each of these cases, however, the Court has cited the Supreme Court's 1983 decision in *Rushen v. Spain*. But as discussed above, because the per curiam 1983 decision in *Rushen* precedes the Court's 1984 decision in *Cronic*, as well as the subsequent decisions in *Bell* and *Mickens*, it can no longer be relied on as valid authority on this point.

In the final analysis, however, and just like the *Bradford* decision discussed above,

the Court may not need to reach this issue. Even if the *Chapman* standard applies to this error, the trial court's refusal to allow defense counsel for Mr. Rices to participate at this critical stage of the criminal trial cannot be deemed harmless.

In great detail, Miller explained to both juries how Rices forced him to commit the robbery at gunpoint. (13 RT 1907-1928, 1947.) The prosecutor and trial court both recognized this was aggravating evidence against Rices. (13 RT 1946.) The prosecutor then presented both juries with evidence undercutting this aggravating evidence -- Exhibits 65 and 65A -- which was a letter written by Miller himself after his arrest for robbery and murder. (13 RT 1981-1982.) Of course, defense counsel did not object to these exhibits.

When the state rested its case against Mr. Rices, the prosecutor made clear he was "offering all of the exhibits that have been referred to and marked . . . ." (16 RT 2393.) Pursuant to this plain statement, defense counsel would have understood that Exhibits 65 and 65A were being offered into evidence since both exhibits had been "referred to and marked." This view was confirmed moments later when the trial court made clear that "[a]s to the balance of People's exhibits that may have been offered in front of both juries, I'm just going to reflect that the People are resting conditioned upon the court receiving those additional exhibits." (16 RT 2394.)

Less than 30 minutes into deliberations, the jury asked to see Exhibits 65 and 65A. Had the trial court contacted defense counsel -- instead of formulating an answer in secret -- defense counsel could have explained that these two exhibits were (1) marked by the prosecutor and (2) shown to Miller in open court and referenced by the prosecutor during cross-examination. Defense counsel could have explained that as a consequence, these exhibits were properly considered among the "referred to and marked" exhibits the prosecutor *explicitly* said he was offering into evidence at page 2393 of the Reporter's Transcript. Defense counsel could have reminded the court that counsel had *not* objected when the prosecutor offered Exhibits 65 or 65A, either at the time they were shown to Miller during cross-examination or later when the prosecutor offered into evidence "all of the exhibits that have been referred to and marked." Finally, defense counsel could have explained not only that the prosecution had offered them into evidence without defense objection, but that when the state rested, it was conditioned on the court receiving "the balance of People's exhibits that may have been offered in front of both juries." In short, defense counsel would have asked that these exhibits be given to the jury. This is precisely what should have happened and would have permitted the jury to consider

evidence which obviously undercut Miller's theory that Rices threatened to kill him unless he participated in the robbery.[25]

On this record, the state cannot prove the trial court's violation of the right to counsel harmless beyond a reasonable doubt. It resulted in the jury being precluded from considering exhibits which contained evidence directly undercutting what the prosecutor and trial court alike recognized was aggravating evidence from Miller. The jury had asked for this evidence less than 30 minutes into deliberations, so it may have been of some importance. If this evidence caused even a single juror to change his or her mind, the state would have been unable to obtain a death verdict. (*Cf. Wiggins v. Smith, supra,* 539 U.S. at p. 537 [penalty phase error was prejudicial where absent the error "there is a reasonable probability that at least one juror would have struck a different balance" and voted for life].) And as discussed elsewhere in this brief, in light of Jean Pierre Rices's extremely difficult upbringing, this was certainly not a case without mitigation. Even if the court applies a harmless error analysis to the violation of Mr. Rices's right to counsel at all stages of the case, reversal is required here.

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[25] The clerk's minutes show that the clerk did not place Exhibits 65 and 65A in the jury room for deliberation because she thought they had not been introduced. (6 CT 1255.) The minutes do not explain why the clerk believed these exhibits -- which had been referred to and marked during trial -- were not covered by the explicit statement that the prosecutor was offering into evidence "all of the exhibits that have been referred to and marked." (16 RT 2393.)

D. The Trial Court's *Ex Parte* Contact With The Jury Violated Mr. Rices's State And Federal Constitutional Rights To Presence.

For the same reasons as just discussed, the trial court's refusal to notify the defense about the jury's request also violated Mr. Rices's federal and state constitutional right to presence. The state and federal constitutional rights to presence are generally coextensive. (*People v. Butler* (2009) 46 Cal.4th 847, 861; *People v. Harris* (2008) 43 Cal.4th 1269, 1306.) The constitutional rights to presence exist when the defendant's presence "has a relation, reasonably substantial, to the fullness of [defendant's] opportunity to defend against the charge." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106. *Accord Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [the right to be present exists at any "stage . . . that is critical to [the] outcome" and where the defendant's "presence would contribute to the fairness of the procedure."]; *People v. Price* (1991) 1 Cal.4th 324, 407-408.)

Here, had defendant been notified of the jury's question, and appeared with counsel, he too might have been able to point out to counsel -- for communication to the judge -- the importance of having the jury consider Exhibits 65 and 65A, and the facts that (1) the state had offered this into evidence at page 2393 and (2) there was no objection from the defense. Thus, his right to presence was violated.

This Court has held that violations of the right to be present are subject to the *Chapman* standard of prejudice. (*People v. Ayala* (2000) 24 Cal.4th 243, 268-269.) As such, and for the identical reasons set forth in the *Chapman* analysis above, the presence violation also requires a new penalty phase.

E. The Trial Court's Failure To Notify Defense Counsel Of The Jury's Question Violated The Reliability Requirements Of The Eighth Amendment.

As discussed above, had the trial court notified defense counsel about the jury's request to see Exhibits 65 and 65A, it is likely that both exhibits would have been given to the jury. Accordingly, the court's refusal to notify defense counsel not only violated Mr. Rices's right to counsel, his right to be present and his due process rights, but also his right to a reliable penalty phase procedure.

In this regard, the Supreme Court has recognized that the death penalty is a qualitatively different punishment than any other. (*See, e.g., Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (*See, e.g., Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama, supra*, 447 U.S. at p. 638, n.13.)

Procedures which risk undercutting this heightened need for reliability violate the Eighth Amendment. (*See, e.g., Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118-119 (O'Connor, J., concurring); *Lockett v. Ohio* (1978) 438 U.S. 586; *Gardner v. Florida* (1977) 430 U.S. 349, 362.) The case law shows a myriad of ways that the special reliability concerns of the Eighth Amendment can be violated in any case.

For example, the reliability of a death judgment can be undercut when a state's capital punishment scheme itself precludes a defendant from presenting mitigating evidence which could call for a sentence less than death. (*Lockett v. Ohio, supra*, 438 U.S. 586.) Even where all mitigating evidence is admitted, a trial court's refusal to instruct the jury properly on how it can consider that mitigating evidence may also result in a death judgment too unreliable for Eighth Amendment purposes. (*See Penry v. Lynaugh* (1989) 492 U.S. 302; *Eddings v. Oklahoma, supra*, 455 U.S. 104.) A prosecutor's misleading closing argument at the penalty phase may also undercut the reliability concerns at the heart of the Eighth Amendment. (*Caldwell v. Mississippi, supra*, 472 U.S. 320.)

Here, the jury was deciding whether Mr. Rices would live or die. It was important for this jury to consider both the aggravating and the mitigating evidence. Exhibits 65

and 65A were both relevant precisely because they undercut some of the aggravating evidence presented by Miller in his testimony. Telling the jury that "these exhibits were not admitted into evidence in Mr. Rices' trial" precluded the jury from considering this mitigating evidence. After all, the court (1) told the jury that in deciding whether Mr. Rices should live or die it could only consider the "evidence" it had been presented and (2) defined "evidence" as including only those "exhibits *admitted into evidence* . . . ." (6 CT 1216.) Thus, telling the jury that Exhibits 65 and 65A had not been admitted effectively told jurors they could not consider this evidence. And as the case law discussed above shows, the Supreme Court has repeatedly recognized that the special reliability concerns of the Eighth Amendment are implicated when a capital sentencer is precluded from considering mitigating evidence. For this reason, the trial court's conduct in this case violated not only the state and federal right to counsel, but the Eighth Amendment as well.

No separate harmless error analysis is required. For the same reasons as discussed in connection with the *Chapman* analysis above, the state will be unable to prove the trial

court's violation of Mr. Rices's Eight Amendment rights harmless beyond a reasonable doubt. A new penalty phase is required.[26]

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[26] The Eighth Amendment component of this claim stands independently of whether the Court find that Mr. Rices's rights to counsel, presence or due process have been violated. The Court has repeatedly noted that the special reliability concerns of the Eighth Amendment may be violated by procedures even when those same procedures do *not* violate other constitutional provisions. (*See, e.g., Beck v. Alabama, supra,* 447 U.S. at pp. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Fifth Amendment Due Process Clause may not require such instructions]. *See Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the Due Process Clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."].) *Compare Furman v. Georgia* (1972) 408 U.S. 238 [standardless capital sentencing violates the Eighth Amendment] *with McGautha v. California* (1971) 402 U.S. 183 [standardless capital sentencing does not violate Due Process].)

XIII. THE PROSECUTOR VIOLATED THE EIGHTH AMENDMENT IN ASKING THE JURY TO SENTENCE MR. RICES TO DIE BASED, IN PART, ON PRIOR FELONY CONVICTIONS AND CRIMINAL CONDUCT COMMITTED WHEN MR. RICES WAS A CHILD.

A. Introduction.

Penal Code section 190.3, subdivision (b) provides that at a capital penalty phase, the state is authorized to introduce evidence showing "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . ." The purpose of permitting this evidence is to allow the penalty phase jury to assess the "character and history of a defendant" and thereby determine the appropriate punishment. (*People v. Tully* (2012) 54 Cal.4th 952, 1029.)

Penal Code section 190.3, subdivision (c) provides that at a capital penalty phase, the state is authorized to introduce evidence showing "[t]he presence . . . of any prior felony conviction." The purpose of permitting this evidence "is to show the capital offense was the culmination of the defendant's habitual criminality -- that it was undeterred by the community's previous criminal sanctions." (*People v. Malone* (1988) 47 Cal.3d 1, 46. *Accord People v. Gurule* (2002) 28 Cal.4th 557, 636.)

Of course, for prior conviction evidence under section 190.3(c) to serve the

identified purpose it does not matter if the prior conviction was suffered when the defendant when he was a child or an adult. In either case, the evidence shows he was undeterred by the prior sanctions. Accordingly, there has been no bar on the use of juvenile convictions under subdivision (c). (*See, e.g., People v. Pride* (1992) 3 Cal.4th 195, 256-257.) Similarly, for prior criminal acts evidence under section 190.3(b) to serve the identified purpose it does not matter if the prior acts were committed when the defendant was a child or an adult. (*See, e.g., People v. Cox* (1991) 53 Cal.3d 618, 689.)

The prosecutor here took full advantage of these rules, introducing one prior conviction which Mr. Rices suffered as a juvenile, as well as two incidents of prior criminal conduct Mr. Rices committed when he was a juvenile. (15 RT 2307 [conviction on August 11, 1999]; 15 RT 2197-2201 [prior conduct of February 10, 1999]; 15 RT 2202-2205 [same]; 15 RT 2208-2213 [prior conduct of March 7, 1999]; 15 RT 2214-2220 [same].) The court instructed the jury on this evidence. (19 RT 2735-2736, 2741.) And the prosecutor urged the jury to rely on this evidence in sentencing Mr. Rices to die. (19 RT 2748-2749.)[27]

As discussed more fully below, the rules permitting the use of juvenile convictions

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[27] Defendant was born on August 22, 1981. (6 CT 1337.) Thus, he turned 18 on August 22, 1999. Convictions and prior conduct which occurred before August 22, 1999 occurred when he was still a juvenile.

and uncharged conduct in aggravation of a capital sentence must change in light of a trio of cases from the United States Supreme Court addressing application of the Eighth Amendment to harsh penalties imposed on children: *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011 and *Miller v. Alabama* (2012) ___ U.S. ___, 132 S.Ct. 2455. In each case, the Court has recognized that there are substantial differences between children and adults, differences which preclude applying traditional concepts of deterrence and punishment to juveniles. In light of this recognition, the prosecutor's reliance on Mr. Rices's criminal conduct as a juvenile violated the Eighth Amendment and a new penalty phase is required.

B. Evolving Standards Of Decency, And Recent Supreme Court Authority, Preclude The State From Asking A Jury To Sentence A Defendant To Die Based On Acts He Committed When He Was A Child.

In *Roper v. Simmons*, *supra*, 543 U.S. 551, the Court held that the death penalty could not be imposed on defendants who were under the age of eighteen at the time of the crime. In reaching this result, the Court noted that as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." (*Id.* at pp. 569-70.) Based on these basic differences, the Court concluded that "it is unclear whether the death penalty has a significant or even

measurable deterrent effect on juveniles . . . ." (*Id.* at p. 571.) This was "of special concern" to the Court precisely because "the same characteristics that render juveniles less culpable than adults suggest as well the juveniles will be less susceptible to deterrence." (*Ibid.*) The Court noted what every parent knows -- "the likelihood that the teenage offender has made . . . [a] cost-benefit analysis . . . is so remote as to be virtually nonexistent." (*Id.* at p. 572.)

In *Graham v. Florida*, *supra*, 130 S. Ct. 2011, the Court again recognized that traditional concepts of deterrence do not apply to juveniles. There, the Court addressed the question of whether juveniles could receive a life without parole term for a non-homicide offense. The Court cited scientific studies of adolescent brain structure and functioning which again confirmed the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. Because "their characters are 'not as well formed,'" the Court found that "it would be misguided to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.) The Court held that deterrence did not justify a life without parole sentence because -- in contrast to adults -- "juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions . . . .'" (*Id.* at p. 2028.)

Finally, in *Miller v. Alabama* (2012) 132 S.Ct. 2455 the Court again addressed the concept of deterrence in connection with juveniles. There, the Supreme Court addressed the question of whether a life without parole term imposed on a juvenile constituted cruel and unusual punishment even for a homicide. Ultimately, the Court "[did] not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . ." (132 S.Ct. at p. 2469.) Instead, the Court reversed the life without parole terms imposed in both of the cases before it by finding that the schemes under which they were imposed were improperly mandatory. (*Id.* at p. 2460.)

But in reaching this more limited decision, it is important to note that the Court fully embraced the view of deterrence expressed in both *Roper* and *Graham*. As it had in both *Roper* and *Graham*, the Court again recognized that because of the the "immaturity, recklessness and impetuosity" with which juveniles act, they are less likely than adult to consider consequences and, as such, deterrence cannot justify imposing a life with parole term on a juvenile. (*Id.* at p. 2465.)

The Court's rationale in these cases directly undercuts the use of juvenile convictions and conduct to aggravate penalty in a capital case. As noted above, the reason prior felony convictions are permitted in aggravation at a penalty phase is to show

"the capital offense was . . . undeterred by the community's previous criminal sanctions." (*People v. Malone*, *supra*, 47 Cal.3d at p. 46.) This is entirely sensible when the prior conviction was committed by an adult. But the opinions in *Roper*, *Graham* and *Miller* establish that juveniles and adults should not be treated the same when it comes to assumptions about deterrence.

To the contrary, in light of what the Supreme Court has said regarding children and deterrence, there are two reasons the traditional rationale for admission of prior felony convictions at a capital penalty phase makes little sense when applied to juvenile convictions. First, in connection with a juvenile conviction, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2028.) Second, *Roper*, *Graham* and *Miller* all recognize that expecting deterrence from a conviction imposed on a juvenile -- as the state may legitimately expect from an adult -- is a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.)

Similarly, prior criminal conduct is admitted at the penalty phase to permit an assessment of the "character and history of a defendant to determine" the appropriate

punishment. (*People v. Tully, supra*, 54 Cal.4th at p. 1029.) Given the Supreme Court's recognition that because of their brain structure, teenagers show "[a] lack of maturity and an underdeveloped sense of responsibility," "are more vulnerable or susceptible to negative influences and outside pressures" and their character "is not as well formed" (*Roper, supra*, 543 U.S. at pp. 569-570), it seems both unfair and unreliable to permit decisions made and conduct taken as a juvenile to so heavily impact a jury's subsequent decision as whether defendant should live or die. To treat adults and juveniles the same in this instance -- that is, to treat prior conduct committed as a juvenile the same as prior conduct committed as an adult for purposes of a capital sentencing phase -- runs square into the Supreme Court's admonition that "it would be misguided to equate the failings of a minor with those of an adult." (*Graham v. Florida, supra*, 130 S. Ct. at p. 2026.)

It is true, of course, that the *current* crime in this case was committed by defendant when he was an adult. But that does not change the equation in any constitutionally significant way. Aggravating the capital murder here by relying on the fact that when he was a child, defendant was not deterred from committing crimes by the criminal sanction available for that crime, or by conviction for those crimes, implicates the precise concerns about ignoring the impact of youth on the "lack of maturity and . . . underdeveloped sense of responsibility" which juveniles possess and which renders them "less culpable than adults . . . [and] less susceptible to deterrence." (*Roper v. Simmons, supra*, 543 U.S. at p.

569-572.)

In assessing an Eighth Amendment challenge to a practice, the Supreme Court "looks beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2021. *Accord Roper v. Simmons*, *supra*, 543 U.S. at p. 561; *Trop v. Dulles* (1958) 356 U.S. 86, 101.) In making this assessment, a reviewing court must look to "objective indicia of society's standards, as expressed in legislative enactments . . . ." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2022. *Accord Roper v. Simmons*, *supra*, 543 U.S. at p. 563.) With these objective indicia in mind, the court must then bring its independent judgment to bear on the constitutional question. (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2022; *Roper v. Simmons*, *supra*, 543 U.S. at p. 563.)

The objective criteria consistently point in the same direction. Legislation from around the country establishes a clear nationwide consensus recognizing that because of their more limited decision-making capabilities in weighing future consequence, juveniles must be protected from making decisions that can adversely impact the rest of their life.

There are many examples. As the Supreme Court noted in *Roper* itself, "[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every

State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569.) Every state precludes juveniles under the age of 18 from drinking alcohol. (*See, e.g., Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 589 [noting that "every state prohibits the sale of alcohol to those under 21 . . . . "].) Every state precludes juveniles from using tobacco products. (*See Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D. 483, 486 [noting that every state prohibits sale of tobacco products to minors].) Similarly, the vast majority of states do not even permit juveniles under 18 to decide whether to get a tattoo.[28]

There is a basic, common strand -- a national consensus -- reflected by these consistent legislative judgments. Legislatures throughout the country recognize that as a

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[28] *See* Ala. Code § 22-17A-2; Alaska Stat. Ann. §08.13.217; Ariz. Rev. Stat. Ann. § 13-3721; Ark. Stat. Ann. § 5-27-228; Cal. Penal Code § 653; Col. Rev. Stat. Ann. § 25-4-2103; Conn. Gen. Stat. § 19a-92g; Del. Code Ann. Title 11, Ch 5 § 1114(a); Fla. Stat. § 877.04; Ga. Code §16-5-71; Hawaii Rev. Stat. § 321-379; Idaho Code § 18-1523; Ill. Pub. Act 094-0684; Ind. Code Ann. § 35-42-2-7; Iowa Code § 135.37; Kan. Stat. Ann. § 65-1953; Ky. Rev. Stat. § 211.760; La. Rev. Stat. Ann. § 14:93.2; Me. Rev. Stat. Ann. Title 32, Ch. 63 § 4203; Mich. Comp. Laws Ann. § 333.13102; Minn. Stat. § 609.2246; Miss. Laws § 73-61-1; Mo. Rev. Stat. § 324.520; Mont. Code Ann. § 45-5-623; Neb. Rev. Stat. § Sec. 427 71-3; N.J. Stat. Ann. § 2C:40-21; N.C. Gen. Stat. § 14-400; N.D. Cent. Code § 12.1-31; Ohio Rev. Code Ann. § 3730.06; Okla. Stat. Title 21 § 842.1, 842.2; Pa. Cons. Stat. Title 18 § 6311; RI General Laws § 11-9-15; S.C. Code Ann. § 44-34-60; S.D. Codified Laws Ann. § 26-10-19; Tenn. Code Ann. § 62-38-207; Texas Health and Safety Code Ann. § 146.012; Utah Code Ann. § 76-10-2201; Vt. Stat. Ann. Title 26 § 4102; Va. Code § 18.2-371.3; Wash. Rev. Code § 26.28.085; W. Va. Code § 16-38-3; Wis. Stat. § 948.70; Wyo. Stat. § 14-3-107.

class, juveniles are simply not developed enough to make the kinds of decisions which can impact the remainder of their life -- such as the decision to take up smoking, to drink, to marry, or even to get a tattoo. In turn, *Roper* and *Graham* recognized that the common concerns about maturity which animated these otherwise diverse legislative enactments are a key factor in assessing the constitutionality of a practice that involves juveniles.

Significantly, *Roper* and *Graham* do not stand alone in recognizing the special fragility of juveniles and the implication of this recognition in assessing the protection juveniles should be given. (*See, e.g., J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2403 ["[T]he common law has reflected the reality that children are not adults" and has erected safeguards to "secure them from hurting themselves by their own improvident acts."]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 ["Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults."].)

In sum, allowing the state to aggravate a capital sentence by relying on actions the defendant took as a juvenile violates not only the principles animating the Court's decisions in *Miller*, *Graham*, and *Roper*, but a national consensus recognizing that juveniles are simply not mature enough to make decisions which impact the rest of their lives. The practice cannot be squared with the Eighth Amendment.

In making this argument Mr. Rices recognizes that this Court has rejected the argument that *Roper* itself precludes consideration of juvenile convictions in penalty phase aggravation. (*See People v. Bivert* (2011) 52 Cal.4th 96, 123; *People v. Lee* (2011) 51 Cal.4th 620, 648-649; *People v. Taylor* (2010) 48 Cal.4th 574, 653-654; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) Although none of these cases considered the impact of either *Graham* or *Miller*, Mr. Rices concedes that the rationale on which they reject his position is certainly broad enough to include those cases as well.

The essential rationale is expressed by this Court's decision in *People v. Bramit, supra*, 46 Cal.4th at p. 1239. There the Court concluded that reliance on the holding in *Roper* was "badly misplaced" because "[a]n Eighth Amendment analysis hinges upon whether there is a national consensus in this country against a particular punishment. (*Roper v. Simmons, supra*, 543 U.S. at pp. 562–567. . . . Defendant's challenge here is to the admissibility of evidence, not the imposition of punishment."

Mr. Rices agrees that the actual holdings of *Roper*, *Graham* and *Miller* do not control this issue. They are, after all, simply holdings about whether there is a national consensus against certain punishments for juveniles -- the death penalty and life without parole. And since the claim here is that evidence of juvenile convictions is not admissible, the actual holdings of *Roper*, *Graham* and *Miller* are properly distinguished.

But the principles animating that trio of cases should not be so easily brushed aside. After all, the entire reason prior crimes evidence is permitted under section 190.3, subdivision (c) is that it shows the current crime was undeterred by the prior sanctions imposed on the defendant. (*People v. Gurule* (2002) 28 Cal.4th 557, 636; *People v. Malone* (1988) 47 Cal.3d 1, 46.) But *Roper*, *Graham* and *Miller* all recognized that the concept of deterrence simply does not work the same way with children as it does with adults. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 571 [noting that juveniles "will be less susceptible to deterrence]. *Accord Graham v. Florida*, *supra*, 130 S.Ct. at p. 2028; *Miller v. Alabama*, *supra*, 132 S.Ct. at p. 2465.) Each of these three cases recognizes that because of the differences between adults and children in connection with the impact of deterrence, they should not be treated the same way as one another.

That same principle applies here, even if the narrow holdings of *Roper*, *Graham* and *Miller* are distinguishable. It is precisely because prior felony convictions are permitted in aggravation to show "the capital offense was undeterred by previous criminal sanctions" that the Supreme Court's rationale in *Roper*, *Graham* and *Miller* applies here. That rationale -- that juveniles and adults should not be treated the same in connection with deterrence -- directly undercuts the use of juvenile convictions to aggravate penalty in a capital case. While it may make perfect sense to prove that a defendant was not deterred from the capital crime by convictions imposed on him as an adult, *Roper*,

Graham and *Miller* make clear that that same purpose is *not* achieved when the prior convictions were committed as a juvenile. To the contrary, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2028.) And expecting deterrence from a conviction imposed on a juvenile -- as the state may legitimately expect from an adult -- is nothing but a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.)

Thus, while this Court has held that the narrow holding of *Roper* does not itself preclude admission of juvenile convictions to aggravate, the principles on which *Roper*, *Graham* and *Miller* were decided directly supports such a conclusion. This Court should interpret section 190.3, subdivision (c) in light of the rationale of *Roper*, *Graham* and *Miller*. (*See United States v. Graham* (6th Cir. 2010) 622 F.2d 445, 465, 469 [Merrit, J., dissenting] [relying on rationale of *Graham v. Florida* to reject reliance on juvenile conviction to enhance adult conviction and impose life sentence].)

C. The Erroneous Admission Of Acts Committed When Mr. Rices Was A Child Was Not Harmless Beyond A Reasonable Doubt.

Because the erroneous admission of this evidence at the penalty phase violated Mr. Rices's Eighth Amendment rights, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*See Chapman v. California, supra*, 386 U.S. at p. 24 [federal constitutional errors require reversal unless the state can proven the error harmless beyond a reasonable doubt].) For many of the same reasons discussed above, the state will be unable to carry its burden here.

Although the state did present substantial aggravating evidence in this case, the fact of the matter is that (1) defendant here acknowledged wrongdoing at an early stage of the proceedings by pleading guilty and (2) there was significant mitigation evidence presented regarding defendant's childhood. Considered either alone, or in conjunction with the trial court's errors in refusing to allow mitigating evidence regarding the impact of an execution on defendant's family, and the court's incorrect ruling permitting future dangerousness to be used as a non-statutory aggravating factor, there is at least a reasonable possibility that in the absence of error at least one juror could reasonably have voted for life. A new penalty phase is therefore required. (*See Wiggins v. Smith, supra*, 539 U.S. at p. 537; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520.)

XIV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE PROSECUTOR TO RELY ON NON-STATUTORY AGGRAVATION IN URGING THE JURY TO SENTENCE MR. RICES TO DEATH.

A. The Relevant Facts.

Penal Code section 190.3 authorizes the jury to consider three categories of evidence: "the circumstances of the crime of which the defendant was convicted in the present proceeding[,] . . . the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . [and] the presence . . . of any prior felony conviction." (Pen. Code § 190.3, subd. (a)-(c).) This Court has made clear for many years that subject areas irrelevant to these three specific aggravating factors *cannot* be considered in aggravation at the penalty phase of a capital trial. (*See, e.g.*, *People v. Wright* (1991) 52 Cal.3d 367, 425; *People v. Burton* (1989) 48 Cal.3d 843, 859; *People v. Boyd* (1985) 38 Cal.3d 762, 774.)

Here, pursuant to Penal Code section 190.3, subdivision (b) the prosecutor introduced evidence showing that Mr. Rices had committed acts in prison which involved either the use of force or violence, or the threat of force or violence. (*See* 15 RT 2267-2268, 2272, 2294-2295, 2320-2321.) Pursuant to section 190.3, subdivision (b) the prosecutor was fully entitled to urge the jury to consider this evidence in the sentencing

calculus as a factor favoring death because of what it showed about defendant's past.

But the prosecutor went further. The prosecutor not only asked the jury to consider this evidence for what it showed about defendant's *past* (which was fully authorized by section 190.3, subdivision (b)) but he asked the jury to consider this evidence as a factor favoring death because of what it showed about defendant's *future*. During his closing argument, the prosecutor argued that this evidence showed defendant was going to be a future danger to other prisoners and to prison staff. (19 RT 2752-2753.) The trial court overruled defense counsel's immediate objection to this argument. (19 RT 2753.)

As more fully discussed below, the trial court's ruling violated both state and federal law. More than 30 years ago, this Court held that future dangerousness was not an aggravating factor under the California death penalty scheme. The court's contrary ruling here violated both state law and federal law. A new penalty phase is required.

B. Pursuant To *People v. Murtishaw* (1981) 29 Cal.3d 733, Evidence Of Future Dangerousness "Is Not Relevant To Any Of The [Aggravating] Factors" Listed In The California Death Penalty Scheme.

The trial court's ruling violated state law. As noted above, subdivisions (a), (b)

and (c) of section 190.3 limit a penalty phase jury to considering three categories of evidence: "the circumstances of the crime," "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence" and "the presence . . . of any prior felony conviction." Under California law, the state may not rely on non-statutory aggravation -- defined as aggravation not covered by subdivisions (a), (b) or (c) -- in a capital trial. (*People v. Boyd, supra*, 38 Cal.3d at p. 774.) The question to be resolved in this case is whether evidence and/or argument regarding future dangerousness is relevant to the statutory aggravating factors set forth in section 190.3.

This Court specifically resolved this issue *People v. Murtishaw, supra*, 29 Cal.3d 733. There, the state was permitted to introduce expert testimony from a mental health expert that if sentenced to life without parole, defendant would commit violent acts in prison. This Court held that such evidence was impermissible "for two reasons." (29 Cal.3d at p. 771.) First, the Court concluded that expert predictions of future dangerousness were too unreliable to permit in penalty phase proceedings. (29 Cal.3d at p. 771.) Second, and of more importance here, the Court concluded that the subject of future dangerousness was "not relevant" to any of the aggravating factors specified by the Legislature:

> "The Legislature has listed specifically the factors which the jury must consider in deciding whether to impose the death penalty. The testimony of

> Dr. Siegel [on the subject of future dangerousness] *is not relevant to any of the listed factors*." (29 Cal.3d at p. 772, emphasis added.)

Several years after *Murtishaw* was decided, this Court held that matters which are irrelevant to the factors listed in section 190.3 -- matters known as non-statutory aggravation -- "are not entitled to any weight in the penalty determination." (*People v. Boyd, supra*, 38 Cal.3d at p. 773.) Prosecutors may not introduce evidence of non-statutory aggravation, nor may they argue non-statutory aggravation. (*People v. Boyd, supra*, 38 Cal.3d at p. 775 [evidence]; *People v. Lucas* (1995) 12 Cal.4th 415, 491-495 [argument].)

Here, to the extent that the prosecutor introduced and relied on Mr. Rices's prior conduct under section 190.3, subdivision (b) in asking the jury to impose death based on this prior conduct, there was no error. But when the prosecutor asked the jury to impose death because of the future danger to prisoners and staff, his argument on future dangerousness -- just like the future dangerousness evidence in *Murtishaw* was "not relevant to any of the listed factors." (*People v. Murtishaw, supra*, 29 Cal.3d at p. 772.)

In making this argument Mr. Rices is aware that on a number of occasions this Court has held that although expert testimony of future dangerousness may not be admitted under *Murtishaw*, prosecutors are nevertheless free to raise the issue of future

dangerousness in closing argument. (*See, e.g., People v. Ervine* (2009) 47 Cal.4th 745, 797; *People v. Payton* (1992) 3 Cal.4th 1050, 1063-1064; *People v. Hayes* (1990) 52 Cal.3d 577, 636; *People v. Poggi* (1988) 45 Cal.3d 306, 337; *People v. Miranda* (1987) 44 Cal.3d 57, 111.) At their root, all of these cases either cite this Court's plurality decision in *People v. Davenport* (1985) 41 Cal.3d 247 or cite cases which cite cases which ultimately rely on *Davenport.* As a consequence, in evaluating Mr. Rices's claim here, it becomes important to examine *Davenport.*

In *Davenport,* the defendant was charged with capital murder. At his penalty phase, the prosecutor argued that defendant would be dangerous in prison if sentenced to life without parole. (41 Cal.3d at p. 277.) On appeal, defendant contended this violated *Murtishaw.* (41 Cal.3d at p. 288.) Three justices of the Court addressed this issue, distinguishing *Murtishaw* by noting that it was based on the unreliable and extremely prejudicial nature of expert testimony regarding future dangerousness. (41 Cal.3d at p. 288.) They went on to note that argument on future dangerousness did not violate the federal constitution. (41 Cal.3d at p. 288.)

Davenport's observation about federal law was accurate, but has nothing to do with the state law component of the claim. And as the above discussion of *Murtishaw* shows, the *Davenport* plurality's description of *Murtishaw*'s state-law holding was

incomplete. As noted above, *Murtishaw* itself gave *two* reasons why the future dangerousness evidence in that case was inadmissible. The first reason -- focused on in *Davenport* -- was that expert evidence on the point was unreliable and extremely prejudicial. (29 Cal.3d at p. 771.) The second reason was that such evidence was simply irrelevant to any of the enumerated aggravating factors. (29 Cal.3d at p. 772.) This latter reason -- which *Davenport* did not reference at all -- assumes even greater importance after *Boyd*, which made clear that aggravation unrelated to one of the enumerated factors simply may not be considered.

At least one justice of this Court has noted that *Davenport*'s discussion of *Murtishaw* was incomplete and -- as a result -- has harshly criticized that decision (*Davenport*). In his concurring opinion in *People v. Taylor* (1990) 52 Cal.3d 719, the late Justice Mosk noted the entirely separate basis for the *Murtishaw* opinion -- the fact that future dangerousness had "little relevance to any of the factors the jury must consider in determining whether to impose the death penalty." Accordingly, Justice Mosk concluded that the distinction drawn by the *Davenport* plurality of *Murtishaw* was "ineffective[]" and he criticized *Davenport* for failing to acknowledge the rule from *Boyd* that non-statutory aggravation may not be considered. (52 Cal.3d at p. 752, n.1.) In light of both *Murtishaw* and *Boyd*, Justice Mosk concluded that "future dangerousness is simply immaterial under the 1978 death penalty law." (*Ibid.*)

As a matter of statutory construction, and fidelity to *Murtishaw*, Justice Mosk was correct. Taken together, *Murtishaw* and *Boyd* compel a conclusion that under the California death penalty scheme, the subject of future dangerousness is immaterial as an aggravating factor. It does not matter in what form the evidence or argument is presented; in any form such evidence or argument simply does not relate to the specific statutory aggravating factors California juries are permitted to consider.

As noted above, Mr. Rices recognizes that in reliance on the plurality decision in *Davenport*, this Court has rejected similar argument on a number of occasions. And the concept of *stare decisis* certainly supports following these decisions even though, as Justice Mosk concluded, they are inconsistent with both *Murtishaw* and *Boyd*.

But as the United States Supreme Court has noted in this exact context on many occasions, "[a]lthough the doctrine of stare decisis is of fundamental importance to the rule of law, our precedents are not sacrosanct." (*Ring v. Arizona* (2002) 536 U.S. 584, 609. *Accord Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 172; *Welch v. Texas Dept. of Highways and Public Transp.* (1987) 483 U.S. 468, 494.) Prior decisions should be overruled "where the necessity and propriety of doing so has been established." (*Patterson, supra*, 491 U.S. at p. 172.) This Court has agreed, noting that "[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not

shield court-created error from correction." (*People v. Cuevas* (1995) 12 Cal.4th 252, 269. *Accord People v. Latimer* (1993) 5 Cal.4th 1203, 1212–1213; *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.)

Here, it is time to either reconsider *Davenport* and its progeny or reconsider *Murtishaw* and *Boyd*. As Justice Mosk noted, the two lines of authority cannot rationally be reconciled; the *Davenport* result "does not acknowledge" *Boyd* and ignores the relevancy holding of *Murtishaw*.

For many of the same reasons as discussed above, the error requires a new penalty phase. This Court has stated that in determining if a new penalty phase is required due to the admission of aggravating factors unauthorized by state law, the question is whether there is a reasonable possibility of a different result absent the error. (*See, e.g., People v. Brown* (1988) 46 Cal.3d 432, 449.) In fact, however, because Mr. Rices had a state created right to a penalty phase free from non-statutory aggravation, the plain violation of this right also trampled his federal Fifth and Fourteenth Amendment Due Process rights. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant had a state created right to a jury determination of the appropriate sentence, trial court violated this right; held, violation of state created right not only violated state law, but defendant's federal constitutional due process rights as well].) Moreover, since reliance on non-statutory

aggravation can also impact the reliability of the sentencing proceeding, the admission of such evidence here also violated Mr. Rices's Eighth Amendment right to reliable procedures at sentencing.

Here, under either standard a new penalty phase is required. As discussed above, although the state did present aggravating evidence in this case, the fact of the matter is that not only did defendant acknowledge wrongdoing at an early stage of the proceedings by pleading guilty, but there was significant mitigation evidence presented regarding defendant's childhood. On this record there is at least a reasonable possibility that in the absence of a reference to future dangerousness, at least one juror could reasonably have voted for life. A new penalty phase is therefore required. (*See Wiggins v. Smith, supra,* 539 U.S. at p. 537; *People v. Soojian, supra,* 190 Cal.App.4th at p. 520.)

XV. THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT IN PRECLUDING DEFENSE COUNSEL FROM ASKING THE JURY TO CONSIDER THE IMPACT OF AN EXECUTION ON THE DEFENDANT'S FAMILY.

A. The Relevant Facts.

In *Payne v. Tennessee* (1991) 501 U.S. 808 the Supreme Court recognized that "evidence about . . . the impact of [a] murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 826.) A major premise of *Payne*'s rationale was that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. (501 U.S. at pp. 820-826.)

Defense counsel sought to give voice to this premise. At the time of trial, Mr. Rices had a young son named Demu. (17 RT 2538.) Mr. Rices's father appeared as a mitigation witness, as did his aunt, his maternal uncle, his grandfather, his grandmother and his great uncle. (17 RT 2447, 2461, 2500, 2514, 2517, 2536.) During the mitigation testimony of Gloria Brook (Mr. Rices's grandmother), defense counsel asked her "what the impact would be on Jean Pierre's family if he was to be executed?" (16 RT 2538.) The trial court sustained the prosecution's immediate objection. (16 RT 2538-2539.)

At the subsequent instructional conference, defense counsel asked the court to instruct with standard CALCRIM instruction 763. The last sentence of that requested instruction reads as follows:

> "[Y]ou may consider evidence about the impact the defendant's execution would have on (his/ her) family if that evidence demonstrates some positive quality of the defendant's background or character."

Having successfully objected to evidence of execution impact, the prosecutor opposed provision of this instruction because "we just don't believe there's been any of that." (18 RT 2693.) Defense counsel contended that there was demeanor evidence from numerous family members which would support the instruction. (18 RT 2693.) The trial court refused to provide the instruction. (19 RT 2719.) In fact, the court specifically instructed the jury it was *not* to consider sympathy for the defendant's family. (6 CT 1228.)

As more fully discussed below, the trial court's exclusion of execution impact evidence was improper for two reasons. First, in 1978 the electorate enacted Penal Code section 190.3 to govern admission of evidence at penalty phases in California capital cases. The language used in section 190.3 was not pulled from thin air. Instead, the critical language used to describe the type of evidence admissible at such hearings had

been used in the 1977 death penalty law and, in turn, other sentencing statutes as well, and had a well-recognized meaning which *permitted* consideration of sentence impact in selecting an appropriate sentence. Under well-established principles of statutory construction, there is a strong presumption that the electorate intended this language to have the same meaning in section 190.3 as well. The defense was entitled to rely on that intent, and the trial judge had neither power nor discretion to act as a super-legislature and preclude consideration of this fact in mitigation. Second, even if the electorate had not intended sentence impact evidence to be admissible, the Eighth Amendment itself requires that such evidence be admissible in mitigation during the sentencing phase of a capital case. Because the trial court here completely precluded the defense from introducing execution impact evidence, and relying on this argument in mitigation, the death sentence must be reversed.

B. Because The Legislature Intended That Capital Defendants Be Permitted To Rely On The Impact Of An Execution On Their Loved Ones, The Trial Court's Order Forbidding Such Argument In This Case Was Fundamentally Improper.

The current law fixing the penalty for first degree murder -- Penal Code section 190.3 -- was enacted by voter initiative in November of 1978. Once a defendant has been convicted of special circumstances murder, section 190.3 provides for a separate penalty phase to determine the appropriate penalty as between life without parole and death.

Section 190.3 goes on to describe the evidence admissible at the penalty phase:

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

Thus, under the plain terms of this statute, the parties are permitted to introduce "any matter relevant" to three distinct areas: (1) aggravation, (2) mitigation and (3) sentence. Under the express language of section 190.3, this "includ[es] but [is] not limited to" a number of areas, including "the defendant's character, background, history, mental condition and physical condition."

As discussed below, and for two separate reasons, basic principles of statutory construction compel a conclusion that the effect of a death penalty on the defendant's family is admissible under this section of the Penal Code. First, section 190.3 permits defendants to introduce "any matter relevant to . . . mitigation . . . ." At the time the 1978 law was enacted, the term "mitigation" had been used in previous sentencing statutes and had been recognized to include the impact of sentence on the defendant's family. Under

well accepted principles of statutory construction, the electorate is deemed to have intended "mitigation" as used in section 190.3 to have the same meaning as it had in these other statutes.

Second, section 190.3 also permits introduction of "any matter relevant to . . . sentence." Assuming the electorate's use of the phrase "any matter relevant to . . . mitigation" was insufficient to authorize the use of sentence impact information, such information was plainly admissible as a matter relevant to sentence.

1. Because the term "mitigation" used by the electorate in section 190.3 had a then-recognized meaning permitting consideration of the impact of a sentence on the defendant's family, the electorate is presumed to have intended the same meaning in section 190.3.

The primary goal of statutory construction is to determine the Legislature's intent and so effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.) Of course, this principle applies with equal force to statutes passed by the electorate through the initiative process. (*See, e.g., People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.)

In determining the intent behind any particular statute, a court looks first to the words of the statute. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at p. 387.)

Where the language of a statute includes terms that already have a recognized meaning in the law, "the presumption is almost irresistible" that the terms have been used in the same way. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216. *See Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133.) This principle too applies to legislation adopted through the initiative process. (*In re Jeanice D., supra*, 28 Cal.3d at p. 216.)

In this case, as noted above, the statute governing admission of evidence at the penalty phase of a capital trial was passed by the electorate in 1978. It provides that the parties may introduce evidence "as to any matter relevant to aggravation, mitigation, and sentence . . . ."

Significantly, the term "mitigation" as used in the 1978 statute was not new to the 1978 statute. In fact, prior to the 1978 law, the same term had been used repeatedly in sentencing statutes and court rules governing sentencing. For example, at the time the electorate voted on the 1978 law, Penal Code section 1203, subdivision (b) provided that where a person had been convicted of a felony, the probation officer would prepare a report to "be considered either in aggravation or mitigation." Subdivision (c)(3) of that section went on to provide that a grant of probation was appropriate if the trial court found "circumstances in mitigation . . . ." Similarly, Penal Code section 1170, subdivision (b) -- which governed a trial court's selection of sentence between upper,

middle and lower terms of imprisonment when probation was denied -- provided for a middle term of imprisonment unless there were circumstances in "aggravation or mitigation."

There is little dispute as to the meaning of the phrase "mitigation" in the context of these other statutes. At the time the electorate enacted section 190.3 in 1978, both section 1203 and 1170, subdivision (b) had court rules drafted to implement them. Rule of Court 414 set forth "criteria affecting probation," designed to implement the inquiry into aggravation and mitigation mandated by section 1203. Rule 414 provided that in deciding if there was mitigation for purposes of whether to grant probation, the court was required to consider a number of factors, including the impact of the sentence "on the defendant and his or her dependents." Courts have long relied on this mitigating factor in determining an appropriate sentence. (*See, e.g., People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 834 and n.15.)

Similarly, Rules of Court 421 and 423 set forth aggravating and mitigating factors designed to implement the inquiry into aggravation and mitigation mandated by section 1170. The advisory committee note to Rule 421 made clear that "the scope of 'circumstances in aggravation or mitigation' under section 1170(b) is . . . coextensive with the scope of inquiry under the similar phrase in section 1203." As this note shows,

aggravation and mitigation have the same meaning under both section 1203 and 1170.

In describing the type of evidence admissible at a penalty phase trial, the 1978 electorate used the very same term that was used in sections 1203 and 1170. As noted above, at the sentencing phase of a capital trial, section 190.3 permits the admission of "any matter relevant to . . . mitigation . . . ." Pursuant to the principles of statutory construction discussed above, "the presumption is almost irresistible" that the phrase "mitigation" as used in section 190.3 was intended to have the same meaning as the identical term had in sections 1203 and 1170. (*See In re Jeanice D.*, *supra*, 28 Cal.3d at p. 216.) Indeed, at least one court has recognized that "the mitigating and aggravating circumstances set forth in the determinate sentencing guidelines are also proper criteria" in selecting a sentence under section 190.3. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149.) Because the term "mitigation" in sections 1203 and 1170 included the impact of a sentence "on the defendant and his or her dependents," it should be given the same meaning in section 190.3.

Many California courts have construed section 190.3 in this exact way. (*See, e.g.*, *People v. Weaver* (2001) 26 Cal.4th 876, 986 [jury told it could consider in mitigation "sympathy or pity for the defendant or his family"]; *People v. Osband* (1996) 13 Cal.4th 622, 705 [jury told it could consider in mitigation "the likely effect of a death sentence on

[defendant's] family, loved ones and friends."]; *People v. Mickle* (1991) 54 Cal.3d 140, 194 [trial court properly admitted evidence of impact of execution on defendant's family and friends].) Mr. Rices was entitled to the that same construction here.

To be sure, Mr. Rices recognizes that in *People v. Ochoa* (1999) 19 Cal.4th 353, this Court held that neither the Due Process Clauses of the federal and state constitutions, nor the Eighth Amendment, required a capital sentencer to consider in mitigation the impact of an execution on the defendant's family. (19 Cal.4th at pp. 454-456. *Accord People v. Smithey* (1999) 20 Cal.4th 936, 999-1000 [holding there was no Eighth Amendment violation in telling jury that sympathy for the defendant's family was not to be considered]; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856 [same].) The trial court here relied on *Ochoa*. (18 RT 2694.)

But as this Court has often noted, cases are not authority for propositions neither presented nor considered. (*See, e.g., People v. Williams* (2004) 34 Cal.4th 397, 405.) It is clear from both *Ochoa* and *Bemore* that this Court was not presented with, nor did it resolve, the statutory construction argument presented here. As discussed above, applying well-established principles of statutory construction to section 190.3 compels a conclusion that the electorate intended to permit defendants in capital cases the same ability that defendants in non-capital cases had to rely on the impact of a particular

sentence on the defendant's family. The trial court's contrary ruling in this case was error.[29]

2. Section 190.3's explicit provision that a defendant can introduce "any matter relevant to . . . sentence" independently permits a defendant to rely on the impact of a death sentence on the defendant's family.

Even if the phrase "mitigation" did not have a well-recognized meaning at the time section 190.3 was passed by the electorate, or even if this Court were to hold that the electorate intended the term "mitigation" in section 190.3 to mean something distinct from "mitigation" in sections 1203 and 1170, the trial court's ruling in this case would still be erroneous. That is because section 190.3 does not merely permit evidence as to

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[29] In rejecting the argument that defendants were constitutionally entitled to rely on the impact of an execution on the defendant's family, *Ochoa* noted that state law permitted only "an individualized assessment of the defendant's background, record and character, and the nature of the crimes committed . . . ." (19 Cal.4th at p. 456.) With all due respect, that is **not** what section 190.3 says.

Section 190.3 authorizes evidence relevant to "aggravation, mitigation and sentence including *but not limited to* the nature and circumstances of the present offense . . . and the defendant's character, background [and] history . . . ." In other words, *Ochoa*'s observation that mitigation is limited to defense evidence regarding a defendant's "background, record and character" ignores section 190.3's explicit provision that penalty phase evidence is *not* limited to the "character, background [and] history" of the defendant. It also ignores section 190.3's explicit reference to mitigating evidence regarding the "sentence." Under the plain terms of section 190.3, a defendant is **not** limited to presenting evidence which impacts his "character, background, history, mental condition and physical condition."

"aggravation" and "mitigation." Instead, by its very terms, it broadly permits evidence "as to *any* matter relevant to aggravation, mitigation, *and sentence* . . . ." (Emphasis added.)

In determining what the electorate intended by authorizing evidence "as to any matter relevant to . . . sentence," it is important to note that the electorate must have intended this to mean something different from evidence relating to "aggravation" or "mitigation." "Otherwise, the clause would be mere surplusage and serve no purpose, in direct contravention of our rules of statutory construction." *(State Farm Mut. Auto Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1046. *Accord Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided"].)

It is also important to note the breadth of the statutory language. The statute does not purport to narrowly define the type of evidence which can be presented in connection with the sentence. Instead, the statute broadly permits "any matter" relevant to the sentence.

As discussed above, at the time section 190.3 was enacted, the law generally permitted consideration of sentence impact on the family members of a defendant in

selecting an appropriate sentence for that defendant. Assuming that use of the phrase "any matter relevant to . . . mitigation" was not intended to incorporate this same flexibility into section 190.3, such evidence would fall squarely within the phrase "any matter relevant to . . . sentence." After all, as the case law, statutes and court rules had recognized prior to 1978, the impact of a sentence on the defendant's family was not only relevant to the sentence, *it was a factor which court rules themselves specifically required the trial court to consider.* (*See* Rule 414.) And, as noted above, section 190.3 goes on to state that the evidence admissible at a penalty phase is "not limited to . . . the defendant's character, background [and] history." (Section 190.3.)

Moreover, in deciding the intent behind this particular provision of section 190.3, there is another principle of construction which is relevant. When a criminal statute is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. (*See e.g.*, *People v. Garcia* (1999) 21 Cal.4th 1, 10; *People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Here, given the background against which section 190.3 was enacted in 1978 (which required consideration as to the impact of a sentence on the defendant's family) and the electorate's use of the extremely broad phrase "any matter relevant to . . . sentence," it is certainly reasonable to assume that the electorate intended to permit defendants to rely on such evidence in capital cases as well as non-capital. Indeed, as noted above, several trial

courts have apparently reached this very result, instructing the jury that in deciding if defendant should live or die, it *can* consider the impact of defendant's execution on the defendant's family. (*See, e.g., People v. Weaver, supra*, 26 Cal.4th at p. 986; *People v. Osband, supra*, 13 Cal.4th at p. 705; *People v. Mickle, supra*, 54 Cal.3d at p. 194.) Here, Mr. Rices was seeking nothing more than the same right given to Mr. Weaver, Mr. Osband and Mr. Mickle in their respective capital trials.[30]

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[30] Interpreting section 190.3 to permit sentence impact would also avoid a construction of the statute raising a serious constitutional question. In this regard, when a statue is susceptible of two or more interpretations, one of which raises constitutional questions, the court should construe it in a manner that avoids any doubt regarding its validity. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394.) Here, in selecting an appropriate and reliable sentence in the *non-capital* context, California law explicitly requires the sentencer to consider the impact of a sentence on the defendant's family. (*See* Rule 414.) Accepting the trial court's approach in this case would mean that only as to capital cases is consideration of this same information in fashioning an appropriate and reliable sentence precluded.

This approach is squarely contrary to the thrust of the Supreme Court's capital jurisprudence. Recognizing the qualitatively different punishment involved in a capital case, the Court has repeatedly concluded that the protections afforded a capital defendant must be *more* rigorous than those provided non-capital defendants. (*See Ake v. Oklahoma* (1984) 470 U.S. 68, 87 [Burger, C.J., concurring]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18 [O'Connor, J., concurring]; *Lockett v. Ohio* (1978) 438 U.S. 586, 605-06.) Accepting the trial court's approach in this case would mean that the current California scheme adopts precisely the opposite approach, singling out capital defendants for *less* protection. As such, embracing the trial court's interpretation of section 190.3, subdivision (b) to preclude sentence impact testimony in capital cases would raise serious equal protection concerns. Such an interpretation of section 190.3 should be avoided.

C. The Eighth Amendment Requires That In Cases Where The State Is Permitted To Rely On The Impact Of A Murder In Asking For Death, The Defendant Should Be Permitted To Rely On The Impact Of An Execution In Asking For Life.

Even if the electorate did not intend sentence impact to be a proper consideration in the capital sentencing process, there is an independent reason such information is properly considered by the sentencer. As the Supreme Court has long noted, a state may not preclude the sentencer in a capital case from considering any relevant evidence in support of a sentence less than death. (*Skipper v. South Carolina* (1986) 476 U.S. 1; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) "[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce . . . ." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 809.)

Indeed, it was precisely because of the broad latitude afforded capital defendants that the Supreme Court reversed its opposition to victim impact evidence and held that "evidence about . . . the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 826.) In *Payne*, the Court overruled *Booth v. Maryland* (1986) 482 U.S. 496 and held that testimony as to the impact of the murder on the victim's surviving family was relevant and admissible. (501 U.S. at p. 826.) As noted above, the underlying premise of the majority decision in *Payne* is that the sentencing

phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. (501 U.S. at pp. 820-826.) Indeed, in his concurring opinion, Justice Scalia explicitly noted that since the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors." (501 U.S. at p. 833.)

Equally important, the *Payne* majority explained that the impact of the victim's death on his surviving family members was essential for the jury to understand the victim's "uniqueness as an individual human being." (501 U.S. at p. 823. *Accord Id.* at p. 831 [O'Connor, J., concurring] and pp. 835, 837 [Souter, J., concurring].) Significantly, *Payne* also explained that the Court's broad rulings requiring admission of "any mitigating evidence" were also premised on the need to ensure the jury understood the defendant as a "uniquely individual human being." (501 U.S. at p. 822.)

In other words, the Supreme Court has ruled that the impact of a victim's death on the victim's family is essential for the jury to understand the *victim* as a unique human being. It follows that the impact of the defendant's death on his own family is equally essential for the jury to understand the *defendant's* uniqueness as a human being. Indeed, the Supreme Court's Eighth Amendment jurisprudence has long recognized that evidence

showing the defendant's uniqueness as a human being may not be excluded from a capital penalty phase. (*See, e.g., Lockett v. Ohio, supra*, 438 U.S. at p. 605; *Eddings v. Oklahoma, supra*, 455 U.S. at p. 110.)

Courts throughout the country have reached this precise result, recognizing that a defendant's execution impact evidence is relevant to the sentencing decision. (*See, e.g., State v. Mann* (Ariz. 1997) 934 P.2d 784, 795 [noting mitigating evidence of "the effect on [defendant's children] if he were executed"]; *State v. Simmons* (Mo. 1997) 944 S.W.2d 165, 187 [noting mitigating evidence that defendant's "death at the hands of the state would injure his family"]; *State v. Rhines* (S.D. 1996) 548 N.W.2d 415, 446-447 [noting mitigating evidence of "the negative effect [defendant's] death would have on his family]; *State v. Benn* (Wash. 1993) 845 P.2d 289, 316 [noting mitigating evidence of "the loss to his loved ones if he were sentenced to death"]; *State v. Stevens* (Oregon 1994) 879 P.2d 162, 167-168 [concluding that the Supreme Court's mandate for unfettered consideration of mitigating circumstances required consideration of the impact of an execution on the defendant's family]; *Lawrie v. State* (Del. 1993) 643 A.2d 1336, 1339 [noting that defendant's "execution would have a substantially adverse impact on his seven year-old son . . . and on [defendant's] mother"]; *Richmond v. Ricketts* (D. Ariz. 1986) 640 F.Supp. 767, 792 [noting trial court's consideration of testimony relating "the impact of the execution" on defendant's family], *rev'd. on other grounds, Richmond v.*

Lewis (1992) 506 U.S. 50. *Compare State v. Wessinger* (La. 1999) 736 So.2d 162, 192 [rejecting defendant's argument that an instruction precluded the jury from considering the impact of a death sentence on the defendant's family].)

In light of *Payne v. Tennessee*, *supra*, and these other authorities from around the country, it seems clear that the jury in this case should have been permitted to consider the impact of a potential death sentence on the defendant's family. *Payne* held that the impact of the victim's death on his surviving family was relevant precisely because it showed the victim's "uniqueness as an individual human being." (501 U.S. at p. 823.) What is sauce for the goose should be sauce for the gander; the impact of defendant's death on his surviving family was a powerful way of showing defendant's "uniqueness as an individual human being." The articulated rationale of *Payne* -- that there should be parity between the type of evidence available to the state and the defendant at the sentencing phase of a capital case -- compels a conclusion that sentence impact considerations are equally relevant. And as noted above, several California trial judges have reached this very conclusion, permitting the jury to consider sentence impact evidence in mitigation. (*See, e.g.*, *People v. Weaver*, *supra*, 26 Cal.4th at p. 986; *People v. Osband*, *supra*, 13 Cal.4th at p. 705; *People v. Mickle*, *supra*, 54 Cal.3d at p. 194.)

Mr. Rices recognizes that this Court has on several occasions rejected arguments that the federal constitution required consideration of sentence impact. (*See, e.g., People v. Ochoa, supra*, 19 Cal.4th at p. 454-456; *People v. Smithey, supra*, 20 Cal.4th at pp. 999-1000; *People v. Bemore, supra*, 22 Cal.4th at pp. 855-856.) Of course, as also noted above, because these cases did not consider the statutory construction arguments made above, they do not control the state law aspects of this case. But even in connection with the Eighth Amendment argument, these cases are not controlling.

The trials in both *Ochoa* and *Bemore* occurred before *Payne v. Tennessee* had overruled *Booth v. Maryland*. (*People v. Ochoa, supra*, 19 Cal.4th at p. 873, n.21; *People v. Bemore, supra*, 22 Cal.4th at p. 455, n.9.) Thus, it was not possible for the juries in those cases to consider "sympathy for the victim or his family." (19 Cal.4th at p. 873, n.21.) As a consequence, the parity concerns of *Payne* -- which are implicated when the law *permits* victim impact evidence but *precludes* sentence impact evidence -- were plainly not implicated in those cases.[31]

But just as plainly, these parity concerns are implicated in this case. Here,

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[31] The text of *Smithey* does not reveal whether it too was a pre-*Payne* trial. An examination of the record in *Smithey* shows that the jury returned a verdict of death on June 22, 1989. (*People v. Smithey*, No. S011206, CT 1117-1118, 1120, 1150.) *Payne* was decided on June 27, 1991. Thus, *Smithey* too was a pre-*Payne* case and the parity concerns of *Payne* were not present.

pursuant to *Payne* the prosecutor was fully entitled to introduce victim impact testimony. And assuming *Payne*'s concern with parity between the defense and the state is to mean anything at all, in cases where victim impact evidence is admissible to show the victim as a unique human being, sentence impact evidence should be equally admissible to show defendant's uniqueness as a human being.

In addition, not only did the trials in *Ochoa*, *Bemore* and *Smithey* pre-date *Payne*, but the appellate opinions in those cases all pre-dated a series of United States Supreme Court cases emphasizing the "low threshold for relevance" imposed by the Eighth Amendment. (*Smith v. Texas* (2004) 543 U.S. 37, 44; *Tennard v. Dretke* (2004) 542 U.S. 274, 287.) As those cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 287.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Smith v. Texas*, *supra*, 543 U.S. at p. 44.)

Execution impact evidence is plainly relevant under *Smith* and *Tennard*. As the Supreme Court has concluded, victim impact evidence is relevant because it shows the "uniqueness" of the victim. For the very same reasons, execution impact evidence is relevant because it shows the uniqueness of the defendant. This evidence satisfies the

"low threshold for relevance" precisely because a juror deciding whether Mr. Rices should live or die "could reasonably deem" the evidence to have mitigating value. *Ochoa*, *Bemore* and *Smithey* -- which were all decided prior to *Smith* and *Tennard* -- do not control this case.[32]

D. The Trial Court Exclusion Of Evidence And Argument About The Impact Of An Execution On Mr. Rices's Family Requires A New Penalty Phase.

Capital defendants have a constitutional right to present to the sentencer any mitigating evidence demonstrating the appropriateness of a penalty less than death. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 5; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) They have a corollary right to have the sentencer consider the mitigating evidence under instructions which permit the sentencer to give a reasoned, moral response to the mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319-320; *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 113-114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

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[32] Mr. Rices recognizes that the Attorney General will certainly take a contrary position here. Yet it is worth noting that in asking the Supreme Court to overrule *Booth* and admit victim impact testimony, the Attorney General formally took the position that "[i]f the death penalty is constitutional, as the Court has repeatedly held, it cannot be unconstitutional to permit the *pros and cons* in the particular case to be heard." (*Payne v. Tennessee*, No. 90-5721, Brief of Amicus Curiae, State of California at p. 10, 1991 WL 11007883 at * 13, emphasis added.) Just as "victim impact" represents the "pro" in a particular case (from the state's perspective), the devastating impact of an execution on the family of a defendant is one of the "cons."

Here, these rights were violated. The trial court precluded the defense from introducing evidence regarding the impact of an execution on defendant's family. The trial court refused to give any instructions on this issue which, as a practical matter, meant that defense counsel could not argue it. (*See* 6 CT 1212 [telling jurors that if either attorney said anything inconsistent with the court's instructions, the court's instructions prevailed].)

The trial court's error requires a new penalty phase. Indeed, in this context the United States Supreme Court has *never* held that errors which prevent the jury from considering mitigating evidence can be found harmless by a reviewing court. (*See, e.g.*, *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296 [instructional error precludes full jury consideration of mitigating evidence at defendant's penalty phase; held, death sentence reversed without application of a harmless error test]; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 247-265 [same]; *Penry v. Johnson* (2001) 532 U.S. 782, 796-803 [same]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328 [same]; *Eddings v. Oklahoma, supra*, 455 U.S. 104 [sentencer refuses to consider evidence regarding defendant's childhood; held, death sentence reversed without application of a harmless error test]; *Lockett v. Ohio, supra*, 438 U.S. 586 [state statute precluded sentencer from considering mitigating evidence; held, death sentence reversed without application of a harmless error test].) Lower federal courts too have recognized that this type of error is

not subject to harmless error review. (*See, e.g., Nelson v. Quarterman* (5th Cir. 2006) 472 F.3d 287, 314; *Wright v. Walls* (7th Cir. 2002) 288 F.3d 937, 942-946; *Hargrave v. Dugger* (11th Cir. 1987)(en banc) 832 F.3d 1528, 1533-1535. *See generally Allen v. Buss* (7th Cir. 2009) 558 F.3d 657, 667 [when a class of mitigating evidence is excluded "*Eddings* . . . mandate[s] relief."].)

The Supreme Court's decision in *Penry* is particularly instructive. In that case, defendant first contended that the state's use of a psychiatrist's report violated his Fifth Amendment rights. (532 U.S. at pp. 793-796.) The Supreme Court rejected the claim and, in an alternative holding, found any error harmless. (532 U.S. at p. 796.) As to defendant's second claim involving mitigating evidence, the Court agreed there was constitutional error and reversed without any harmless error analysis at all. (*Id.* at pp. 796-803.)

In making this argument, Mr. Rices is aware that in a case which pre-dated *Penry*, this Court charted a different course, applying harmless error analysis to the exclusion of mitigating evidence. (*See, e.g., People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.) Numerous subsequent decisions of this Court have reached the same conclusion, many citing *Lucero*. (*See, e.g., People v. Smith* (2005) 35 Cal.4th 334, 368; *People v. Mickle* (1991) 54 Cal.3d 140, 193.)

In this case, there is no need to resolve the tension between these two lines of authority. Even assuming this Court applies harmless error analysis to the trial court's errors here, the error cannot be found harmless for three reasons.

First, the trial court here did not just preclude evidence on the subject, it also refused to instruct the jury on the issue and thereby precluded argument as well. As the Supreme Court has observed, the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (*United States v. Cronic*, *supra*, 466 U.S. at p. 655.) The essence of the Sixth Amendment is contained in the Supreme Court's observation that "[t]ruth . . . is best discovered by powerful statements on both sides of the question." (Ibid.)

Here, the entire adversary system ceased to function in connection with this mitigating evidence. The defendant was precluded from presenting this information to the jury by way of argument or instruction, and he was prevented from urging the jury to spare his life on the basis of this evidence. Under these circumstances, defendant did not have "partisan advocacy on both sides of [his] case . . . ." At every turn defendant was barred from presenting his "side of the case" to the jury on this point. Nor could a reliable judgment emerge from the existence of "powerful statements on both sides of the

question." Because of the trial court's ruling, defense counsel was not allowed to make any statement at all on his side of this important issue.

Second, although the circumstance of this crime were concededly tragic, this case does not involve the type of particularly heinous defendant the Court often sees in death penalty cases. (*See, e.g., People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant convicted of murder in 1985 had killed his three children in 1964 and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].) Here, while defendant had been convicted of crimes prior to the charged crimes -- a robbery, a drug possession offense and possession of a weapon in jail -- these offense pale by comparison to the prior offenses in cases like *Ray*, *Nicolaus* and *Hendricks*.

Third, although the state presented a case in aggravation which included other offenses as well as assaults in custody, this was certainly not a case bereft of mitigation. In fact, as noted in the statement of facts above, the mitigation case in this case started before defendant was even born.

There is no need to repeat the mitigation evidence here in detail. Jean Pierre was

born to a prostitute who was addicted to PCP. Her own family members recalled that she "was always calling him stupid." (17 RT 2465.) She abandoned Jean Pierre when he was only five years old on the streets of Los Angeles outside a Jack-in-the-Box. (17 RT 2431-2441.) She yelled at him, cursing and screaming that she did not want him and threw rocks and a beer can at him to get him to leave her. (17 RT 2432.) The response of little five-year old Jean Pierre was typical; he called out to his mother "Mama, I want to go, I want to go. Mama!" (17 RT 2431.) His mother walked away and "never turned around to look back." (17 RT 2433-2434.) Mr. Rices never saw his mother again.

Jean Pierre was not provided with services of any kind -- no treatment or therapy. (17 RT 2550; 18 RT 2665.) Expert witness Barbara Duey testified that treatment and therapy are important because a very high number of abused, dependant children can become delinquent. (17 RT 2555, 2557-2558.)

By the time Jean Pierre was 11 or 12 years old he had not only been abandoned by his mother and father, but abandoned his grandparents and his aunt as well. And although he found some success at a group home when he was befriended by Bobby Sparks, when Mr Sparks left the home, Jean Pierre went south again. (17 RT 2525-2528.)

Despite all this, Mr. Rices had numerous family members come and testify on his

behalf at sentencing. As noted above, Mr. Rices's father appeared as a mitigation witness, as did his aunt, his maternal uncle, his grandfather, his grandmother and his great uncle. (17 RT 2447, 2461, 2500, 2514, 2517, 2536.) But the defense was precluded from presenting evidence to show the impact of an execution on any of these family members. Even assuming a harmless error analysis could be applied to this error, given the mitigating evidence which was presented, the state will be unable to prove that at least one juror could not reasonably have voted for life had such evidence be presented. As such, because California law requires a unanimous jury for a death verdict, reversal of the penalty phase is therefore required. (*Compare Wiggins v. Smith*, *supra*, 539 U.S. at p. 537 [where state law requires unanimous verdict, relief required where absent the error one juror could have reached a different verdict]; *People v. Soojian*, *supra*, 190 Cal.App.4th at p. 520 [relief required under state-law standard of prejudice where one juror could have reached a different verdict].)

XVI. THE DEATH SENTENCE MUST BE REVERSED BECAUSE THE JURY WAS PERMITTED TO (1) RELY ON ACCOMPLICE ANTHONY MILLER'S PRIOR STATEMENTS TO POLICE ABSENT ANY CORROBORATION AT ALL AND (2) CORROBORATE MILLER'S IN-COURT TESTIMONY WITH HIS OWN PRE-TRIAL STATEMENTS.

A. The Relevant Facts.

As discussed above, the Rices jury was called back into session to hear evidence in aggravation from Anthony Miller. (5 CT 1102; 13 RT 1891.) Mr. Rices has already explained why defense counsel's failure to object to this procedure requires a new penalty phase.

But even putting that issue aside, reversal of the penalty phase is required. Miller was plainly an accomplice to the crime. During his examination, Miller testified about the crime itself. He told jurors that he had planned to go with Rices to a movie that night, and had no idea what was going to happen until they stopped near the market when Mr. Rices pulled out a gun and told Miller he was going to "take somebody's money for me." (13 RT 1899, 1907-1908.) Miller testified that Rices ordered him to put on gloves and a mask and he did so because Rices had a gun. (13 RT 1909.) Miller said he was scared of Mr. Rices because he had a "reputation;" "as far as streets go, street ethics and being a gang member, [Rices] has a very high status." (13 RT 1939.) The trial court told the

Miller jury it could consider this gang evidence, but the Rices jury it could not. (13 RT 1940.) Miller then confirmed that Rices had "a killer glaze in his eyes." (13 RT 1940.)[33]

But Miller's actual testimony was not the only evidence in aggravation introduced during Miller's time on the stand. In addition to Miller's testimony, the jury heard aggravating evidence in the form of Miller's pretrial statements to police. Thus, the prosecutor played specific portions of Miller's prior statements to police in which he detailed the last words of the two victims:

> "Q: [by the prosecutor] Do you remember having a specific memory when you talked to [police] about what it was Heather Mattia said when you came into the store?
>
> "A: [by Mr. Miller] Yes I do.
>
> "Q: What did she say?
>
> "A: Well, what I had said, as you just played on the tape was, I believe, it was 'help me." Or something along the lines 'don't kill me.'" (13 RT 1958.)

The prosecutor was obviously aware of the power this evidence had. He continued asking Mr. Miller about his prior statement to police:

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[33] The Miller jury obviously found this evidence of duress worth believing. Duress was Miller's only defense and his jury hung on the murder charges. (17 RT 2490-2491.)

"Q: Mr. Miller, do you remember telling detectives that you heard her say 'Please don't kill me. I just want to be with my family"?

"A: Yes, I remember telling the detective that.

"Q: Is that your recollection of what happened now?

"A: No, it is not." (13 RT 1958-1959.)

The prosecutor then turned to Miller's statements to police about what he heard from the second victim:

"Q: How about Firas Eiso; did Firas Eiso beg for his life?

"A: No sir.

"Q: Do you remember telling detectives that Firas Eiso said 'I'm young. Please don't kill me. Let me live.'

"A: No, I do not remember that." (13 RT 1959.)

The prosecutor then showed Miller a transcript of his statements to police to refresh his recollection. (13 RT 1959-1960.) He then returned to Miller's statements about what Mr. Eiso said:

"Q: Do you remember telling detectives 'faroos, faroosh, whatever, he was just begging for his life, too, at one point,' and being asked by detective Hoefer, 'What was he saying?' You responded, 'I don't

know. Just please, you know, please let me go. I'm young.' Do you remember that?

"A: Yes I do." (13 RT 1960.)

As discussed above in Argument X, this evidence in aggravation from Mr. Miller assumed a central role in the prosecutor's argument for death. Thus, relying on Miller's statements to police, the prosecutor urged the jury to impose death because "Heather and Firas did everything they were told to do. They didn't resist. They laid down on the floor. They begged for their lives." (19 RT 2747.) In the prosecutor's view Miller's statements to police were reliable and the jury should fully credit them:

> "You remember I impeached him with his prior statement to law enforcement, which you are entitled to consider as evidence for the truth of the matter. And that is that they begged for their lives. These kids begged for their lives. They're laying on the floor. 22-year-old girl says [']I just want to be with my family. Let me live.['] 23-year-old man says, [']I'm young. I want to live.[']
>
> "He doesn't care. He doesn't care. None of that matters to Jean Pierre Rices. So what if they had the money? So what if the victims were cooperative? So what if the victims were begging for their lives? Jean Pierre Rices wanted to kill them. There was no other reason." (19 RT 2747.)

In his rebuttal argument, the prosecutor returned to this same theme. He again asked the jury to consider Miller's statements about the victims's last words. (19 RT

2780.)

The trial court properly advised the jury that Miller was an accomplice. (6 CT 1221.) In instructing jurors what evidence from Miller should be viewed with caution, the trial court specifically referenced *both* Miller's testimony and his prior statements to police, telling jurors that "any *statement or testimony* of Mr. Miller that tends to incriminate the defendant . . . should be viewed with caution." (6 CT 1221, emphasis added.) However, in instructing jurors what evidence from Miller required corroboration, the court singled out Miller's testimony alone, telling jurors that "the testimony of Anthony Miller[] requires supporting evidence . . . ." (6 CT 1220.)

The inference from these two instructions together was plain. In back-to-back instructions jurors had been told that (1) Miller's "statement[s] [and] testimony" should be viewed with caution but (2) only Miller's "testimony" required supporting evidence. (6 CT 1220-1221.) A logical and certainly reasonable reading of these instructions is that Miller's pre-trial statements did *not* require supporting evidence.

In fact, the trial court never did instruct jurors that just as with Miller's testimony, they could not find any fact in aggravation true based on Miller's pretrial statements to police absent corroborating or supporting evidence. (6 CT 1220-1221.) Moreover, as to

Miller's testimony -- which the trial court *did* advise jurors required supporting testimony -- the court never explained that the supporting evidence had to be independent of Miller's testimony or statements.

As more fully discussed in Argument XVI-B, below, because Miller was an accomplice there are two distinct instructional errors. First, the trial court had a *sua sponte* obligation to instruct jurors not just that they could not rely on Miller's testimony absent supporting evidence, but that the supporting evidence had to be independent of Miller's statements or testimony. Second, and again because Miller was an accomplice, the trial court had a *sua sponte* obligation to instruct jurors that this corroboration requirement applied not just to Miller's testimony, but to both Miller's testimony *and* his pretrial statements to police. The trial court's failure to give proper instructions on these points violated state law. But as discussed in Argument XVI-C, this was not just a violation of state law. Given the recognized unreliability and dangers of accomplice testimony, the failure to give proper corroboration instructions also violated federal law, including Mr. Rices's Eighth Amendment right to a reliable penalty phase as well as his right to a fair and reliable sentencing proceeding under the Fifth, Sixth and Fourteenth Amendments.

Ultimately, though, as discussed in Argument XVI-D, it does not matter whether

this is viewed as state or federal error. Because there was simply no corroboration of Miller's testimony or pretrial statements to police about the victims' last words, and because Miller's prior statements were central to the state's argument for death, the absence of proper corroboration instructions requires a new penalty phase. Finally, as discussed in Argument XVI-E, even if the trial court had no *sua sponte* duty to give proper corroboration instructions, trial counsel's failure to request such instructions violated Mr. Rices's right to the effective assistance of counsel and itself requires a new penalty phase.

B. Under State Law, The Trial Court Erred In Failing To Instruct The Jury That It Could Not Find Aggravation Based On (1) Miller's Testimony Absent Corroboration Independent of Miller And (2) Miller's Prior Statements To Police Unless They Were Corroborated.

1. The trial court was obligated to instruct the jury that it could not rely on Miller's testimony absent corroboration which was "independent of Miller's statements or testimony."

Penal Code section 1111 governs the treatment of accomplice testimony, providing that a conviction may not be based upon such testimony unless it is corroborated:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not

> sufficient if it merely shows the commission of the offense or the circumstances thereof."

Consistent with this principle, trial courts have a *sua sponte* duty to instruct the jury on pertinent principles of accomplice testimony if the accomplice was "liable for prosecution for the identical offense charged against [the defendant]." (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, *citing People v. Guian* (1998) 18 Cal.4th 558, 579, n.1. *See also People v. Gordon* (1973) 10 Cal.3d 460; *People v. Bevins* (1960) 54 Cal.2d 71; *People v. Warren* (1940) 16 Cal.2d 103.) This Court has repeatedly required instructions on the necessity of accomplice corroboration instructions in connection with evidence from accomplices offered in aggravation at the penalty phase of capital cases. (*See, e.g.*, *People v. Mincey* (1992) 2 Cal.4th 408, 461; *People v. Varnum* (1967) 66 Cal.2d 808, 814-815; *People v. McClellan* (1969) 71 Cal.2d 793, 807-808; *People v. Miranda* (1987) 44 Cal.3d 57, 100.)

Proper corroboration instructions in the penalty phase will inform jurors of two main points. First, such instructions will advise jurors that before they may rely on an accomplice's testimony it must be "supported by other evidence that you believe." (CALCRIM 335.) Second, it will advise jurors that the supporting evidence "must be independent of the accomplice's statement and/or testimony." (*Ibid.*)

Here, there should be no dispute that Miller was an accomplice. After all, he was charged with the same crimes and the trial court itself recognized (and told the jury) that Miller was an accomplice. (6 CT 1221.) Pursuant to the above authorities, complete and accurate corroboration instructions as to Miller's testimony should have been given.

But they were not. The trial court advised the jury in substance as to the first of the points covered in the standard accomplice corroboration instructions. (6 CT 1220 [advising jurors that Miller's testimony "require[d] supporting evidence" before it could be relied on to "prove any fact."].) But the court failed to instruct the jury at all on the second of these requirements -- that the corroboration be independent of the accomplice's own testimony or prior statements. Error has occurred.

2. The trial court was obligated to instruct the jury that it could not rely on Miller's pretrial statements to police absent corroboration.

By its own terms, section 1111 -- enacted in 1872 -- imposes the corroboration requirement only as to "the *testimony* of an accomplice." That section does not refer to prior *statements* of an accomplice.

This made sense. In fact, there was no reason for the Legislature to reference anything other than testimony in section 1111. After all, at the time section 1111 was

drafted, when prior statements were admitted at trial they were only admitted to impeach a witness's testimony, and not for the truth of the matter asserted in the prior statements. (*People v. Belton* (1979) 23 Cal.3d 516, 525.) Since an accomplice's prior statements were admissible only to impeach, and not for the truth of the matter asserted, there was no reason to extend the scope of section 1111 to those statements.

But this changed with the 1967 enactment of Evidence Code section 1235. Section 1235 permitted prior statements of witnesses not only for impeachment, but also for the truth of the matter asserted in those statements. (*Ibid.*) As a result, this Court has invoked "the basic principle that legislative intent prevails over literal construction" to hold an accomplice's prior statement is testimony within the meaning of section 1111. (*People v. Belton* (1979) 23 Cal.3d 516, 526.) Thus the corroboration requirement of section 1111 applies not just to accomplice testimony, but also "to an accomplice's out-of-court statements when such statements are used as substantive evidence . . . ." (*People v. Andrews* (1989) 49 Cal.3d 200, 214.)) "In both the guilt and penalty phases of trial, the court ordinarily must instruct the jury sua sponte [on the corroboration requirement] when out-of-court statements to police by accomplices are admitted into evidence." (*People v, Carter* (2003) 30 Cal.4th 1166, 1223.)

Here, as noted above, the trial court itself recognized that Miller was an

accomplice. As such, an instruction telling the jury that the accomplice corroboration requirement applied to Miller's statements to police was entirely proper.

No such instruction was given here. The trial court instructed the jury that absent supporting evidence, it could not rely on Miller's "testimony" to find any fact. (6 CT 1220.) As also noted above, this instruction conveyed the need for supporting evidence in connection with Miller's testimony, but not his prior statements.

Defense counsel here did not request a modification of CALCRIM 301 to include a separate reference to Miller's pretrial statements. *Andrews* and *Carter* establish that such a modification was entirely proper. Since defense counsel made no such request, in order to determine if the trial court erred in failing to give this instruction, the question is whether the trial court was under a *sua sponte* duty to provide the instruction. For two separate reasons the answer is yes.

In the early cases in which this Court settled the law -- and held that the accomplice corroboration requirement did indeed apply both to an accomplice's pretrial statements as well as his in-court testimony -- the Court went on to hold that the trial court had no *sua sponte* duty to modify the standard instructions to reflect this. (*People v. Andrews*, *supra*, 49 Cal.3d at pp. 214-215 [trial in mid-1980s]; *People v. Lawley* (2002)

27 Cal.4th 102, 148, 160-161 [trial in 1989]; *People v. Friend* (2009) 47 Cal.4th 1, 10, 42 [trial in 1992].) This does not mean, however, trial courts have no such duty for all time. (*See People v. Flannel* (1979) 25 Cal.3d 668, 682 [holding that although the trial court in that case had no *sua sponte* duty to instruct on imperfect self-defense, after the Court's decision recognizing the rule, future courts should consider imperfect self-defense "a general principle for purposes of jury instruction[s] . . . ."].)

This Court recognized in *Flannel* that as the law develops and changes, so too does the *sua sponte* duty of trial courts. As a result, this Court proposed a general rule to be used in determining if a particular legal rule has achieved sufficient clarity to be considered a "general principle of law," explaining that courts must look to see if the rule has been clearly stated in published cases and has received headnote status. (*People v. Flannel, supra*, 25 Cal.3d at p. 682.)

Here, since this Court's 1989 decision in *Andrews* -- and well before the 2009 trial in this case -- the rule that the accomplice corroboration instruction applies to prior statements of the accomplice (and not just testimony) has been clearly stated in many published cases. (*See, e.g., People v. Brown* (2003) 31 Cal.4th 518, 555; *People v. Williams* (1997) 16 Cal.4th 153, 245; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1131.) It has also achieved headnote status. (*See, e.g., People v. Brown, supra*, 31 Cal.4th 518

[headnote 53].)

Moreover, in the standard CALCRIM jury instructions published prior to trial (which the trial court here used), the use note specifically tells the trial court that because "the out-of-court statement of a witness may constitute 'testimony' within the meaning of Penal Code section 1111," trial courts should determine whether to modify the standard instruction to state that "testimony within the meaning of . . . section 1111 includes . . . all out of court statements of accomplices . . . ." (CALCRIM 334 (2006 edition) at p. 82; *accord* CALCRIM 335 (2006 edition) at p. 85 ["If the court concludes that the corroboration requirement applies to an out of court statement, use the word 'statement' throughout the instruction."].) In short, for the reasons this Court identified in *Flannel* -- at least as for trials like this which began after 2009 -- there is no longer any reason this basic principle of accomplice corroboration should not be a *sua sponte* obligation.

But there is a second, case-specific reason there was a *sua sponte* duty to instruct the jury that the accomplice corroboration requirement applied to Miller's pre-trial statements. Here -- in contrast to cases like *Andrews*, *Lawley* and *Friend* -- the trial court did not simply give a general instruction telling jurors that the testimony of accomplices needed supporting evidence or corroboration. Instead, the court gave *two* instructions on accomplice testimony, instructions which taken together here may have affirmatively

misled jurors into thinking that Miller's statements could be relied on absent any supporting evidence.

In this regard, the trial court affirmatively drew a distinction between Miller's testimony and his pre-trial statements. When the court advised jurors what accomplice evidence they must view with caution, it specifically identified both Miller's "statements" *and* his "testimony." (6 CT 1221.) But when the court advised jurors what accomplice evidence needed supporting evidence, it specifically identified only Miller's "testimony." (6 CT 1220.) As noted above, from this combination of instructions jurors could have logically understood that the trial court's decision not to include "statements" in the supporting evidence instruction was not an accident, but meant they could rely on Miller's statements in the absence of supporting evidence. Thus, even if the trial court had no *sua sponte* duty to explain the accomplice instructions in terms of both pre-trial statements and in-court testimony, once the court elected to instruct on these areas it was required to do so correctly. (*See People v. Castillo* (1997) 16 Cal.4th 1009, 1015; *People v. Montiel* (1993) 5 Cal.4th 877, 942; *People v. Cummings* (1993) 4 Cal.4th 1233, 1337; *People v. Malone* (1988) 47 Cal.3d 1, 49.) On the facts of this case, the trial court was obligated to instruct the jury that it could not rely on Miller's pre-trial statements absent some corroboration. The failure to do so violated state law.

3. The exception to the accomplice corroboration requirement set forth in *People v. Easley* (1988) 46 Cal.3d 712 and its progeny does not apply to this case.

In arguing that the trial court failed to properly instruct the jury in connection with Miler's testimony and his prior statements, Mr. Rices is aware that the Court has recognized an exception to the general rule requiring proper instructions on accomplice corroboration. Simply stated, accomplice corroboration instructions are not required when the accomplice's penalty phase testimony relates to an offense of which the defendant has already been convicted. (*People v. Easley* (1988) 46 Cal.3d 712, 734.) Where a defendant has already been found guilty beyond a reasonable doubt of an offense, the testimony and prior statements of an accomplice that defendant committed that crime need not be corroborated.

This exception makes perfect sense. If an accomplice testifies or gives a statement that defendant committed a crime, no corroboration is necessary where that crime has already been fully adjudicated and a jury has found that defendant committed the crime beyond a reasonable doubt. The same would presumably be true where, as here, the defendant entered a plea and admitted committing the crime. Thus, if the prosecutor here had only sought to introduce Miller's testimony or prior statements that Mr. Rices committed the charged crimes, no corroboration would be necessary because Mr. Rices

had admitted this by pleading guilty. That would be a logical and sound application of the *Easley* exception.

But that is not what happened here. The aggravating evidence from Miller's testimony and prior statements went well beyond simply proving that Mr. Rices committed the crime. Instead, the evidence presented specific facts in aggravation about how the murders were committed, facts which Mr. Rices had *not* admitted in his guilty plea. In fact, none of these facts in aggravation had been previously adjudicated by Mr. Rices's plea.

This Court has addressed similar situations on several occasions. In *People v. Carter* (2003) 30 Cal.4th 1166, the defendant was convicted of capital murder in the shooting death of two victims. At the penalty phase, the prosecution introduced evidence from an accomplice that defendant was the actual shooter in both cases. No accomplice instructions were given. On appeal, defendant recognized that he had already been convicted of these two offenses and made the same argument Mr. Rices makes here: the *Easley* exception did not apply because the jury which found him guilty had not necessarily resolved the specific facts of the crime and may have convicted him as an accomplice. (30 Cal.4th at p. 1223.) The Court rejected the argument, noting that the jury had *not* simply found defendant guilty of murder but it had gone further and found

that defendant personally used the weapon which killed the victims. (*Ibid.*) Under this situation, the *Easley* exception was fairly applied since the accomplice's penalty phase testimony did not introduce any facts which had not been found true beyond a reasonable doubt. (*Ibid. See also People v. Mincey, supra*, 2 Cal.4th at p. 462 [no prejudicial error in failing to give accomplice corroboration argument as to penalty phase aggravating evidence provided by accomplice where the accomplice's testimony did not go beyond jury's guilt phase findings that defendant was the actual killer and the murder involved torture].)

This case stands in sharp contrast to both *Carter* and *Mincey*, and the differences explain why the *Easley* exception should not apply here. Here, in contrast to both those cases, Mr. Rices's guilty plea did *not* involve findings on the very aggravating evidence offered by the accomplice. If it had, then like those cases, the *Easley* exception would be fully applicable. But because the aggravation provided by Miller's testimony and statements to police went well beyond what was inherent in Mr. Rices's guilty plea, the *Easley* exception should not apply.

It bears noting that the policy behind requiring the accomplice corroboration instruction is directly implicated in this case. The reason trial courts have a *sua sponte* duty to instruct on the requirement of corroboration for the testimony and statements of

accomplices is because of the Legislature's recognition that accomplices often provide unreliable information to police. (*See People v. Najera* (2008) 43 Cal.4th 1132, 1137; *People v. Cuevas* (1995) 12 Cal.4th 252, 261.) Here, that reason is directly implicated.

Miller's entire defense was predicated on convincing the jury that he participated in the crime because Mr. Rices forced him to. Thus, he plainly had a motive to lie when he testified to both juries that Mr. Rices forced him to do the crime -- testimony which at least the Miller jury found believable enough to force a hung jury. (13 RT 1907-1909, 1309-1321.) But Miller's motive to lie was equally evident in his statements to police. In fact, Miller *acknowledged* lying to police specifically about things the victims said:

> "Q: [by the prosecutor]: Mr. Miller, do you remember telling the detectives that you heard her say [']Please don't kill me. I just want to be with my family?[']
>
> "A: [by Miller]: Yes, I remember telling the detectives that.
>
> "Q: Is that your recollection of what happened now?
>
> "A: No, it is not.
>
> "Q: Why would you say that to the detectives back then if it weren't true?
>
> "A: At that point, I had so many things going though my head, the most important thing was to try to get the detectives to believe me. So I said whatever I had to say." (13 RT 1958-1959.)

Again, Mr. Miller made clear that he was lying to police -- trying to give them information which would make other parts of his story more believable:

> "Q: [by prosecutor]: Why would you say [the victims were begging]?
>
> "A: [by Miller]: To be believed.
>
> "Q. For what purpose?
>
> "A. By your detectives." (13 RT 1967.)

This theme was repeated throughout Miller's testimony. (*See* 13 RT 1934 [Miller said he lied when he told police he was the getaway driver and Nut-Nut was there], 1935 [lied about not going into the store], 1935-1936 [lied about going to Sunshine's house], 1936 [lied about doing other robberies], 1936-1937 [lied about having a gun to his head in the past], 1961 [lied about taking his brands of cigarettes during the robbery], 1965 [lied about when he first saw the gun], 1968 [lied about when he first knew of the planned robbery], 1969 [lied about hanging out with Heather Mattia], 1970-1971 [lied about when he first put gloves on], 1984 [lied about knowing victim's brother, Chris Mattia].) Miller concisely summed up his strategy in telling police these lies:

> "How can I put this? I would have liked to have been believed by the officers, so I said a lot of things that were false [para.] but sounded believable." (13 RT 1960.)

On this record, the trial court should have instructed jurors that before they could rely on Miller's testimony and prior statements as aggravating evidence that evidence had to be properly corroborated. The exception carved out in *Easley* does not apply to this case; the trial court's failure to provide proper instructions violated state law.

C. The Trial Court's Failure To Instruct The Jury It Could Not Rely On Miller's Testimony And Prior Statements In Aggravation Unless They Were Properly Corroborated Also Violated Federal Law.

The trial court's failure to give proper accomplice corroboration instructions also violated federal law. Because state law entitled Mr. Rices to instructions explaining that the jury could not rely on Miller's testimony and prior statements in aggravation unless the evidence was properly corroborated, the trial court's failure to give these instructions also violated due process. (*See Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [arbitrary deprivation of state law right violates Due Process].) In addition, since state law permitted Mr. Rices to urge the jury to reject Miller's testimony and statements because they were uncorroborated, the trial court's failure to instruct on this line of defense affirmatively interfered with Mr. Rices's ability to present a defense to the jury that was fully recognized by state law, in violation of the Fifth Amendment right to present a defense and the Sixth Amendment right to a jury trial. (*See, e.g.*, *Simmons v. South*

Carolina (1994) 512 U.S. 154 [at penalty phase of capital trial, jury was instructed not to consider parole; held, instruction violated due process where defense theory was that defendant would never be paroled]; *People v. Mize* (1889) 80 Cal. 41, 44-45 [defendant charged with murder, defense presented evidence of self-defense, jury instructed it could find culpable mental state simply by finding defendant shot victim; held, instruction improper because it undercut the defense presented]; *People v. Medrano* (1978) 78 Cal.App.3d 198, 214 [instruction which withdraws a principal defense from the jury is error], overruled on other grounds in *Vista v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307.)

The trial court's failure to give a proper corroboration instruction also violated the Eighth Amendment, which imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [plurality opinion of Stewart, Powell, and Stevens, JJ.]; *see also Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) The Eighth Amendment requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," (*Gregg v. Georgia* (1976) 428 U.S. 153, 190 [joint opinion of Stewart, Powell, and Stevens, JJ.]), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination."

(*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Pursuant to these principles, the trial court's failure to give proper corroboration instructions violated the Eighth Amendment. Under state law, and precisely because of concerns about reliability, the jury was not entitled to rely on Miller's testimony and prior statements in aggravation unless this evidence was properly corroborated by evidence independent of Miller. The trial court's failure to explain this to the jury violated the Eighth Amendment precisely because it undercut the reliability of the evidence which resulted in the jury's subsequent death sentence. State and federal error has occurred.

D. Because Of The Significance Of Miller's Aggravating Evidence To The State's Case, The Failure To Provide A Corroboration Instruction Requires A New Penalty Phase.

Whether the error is analyzed under state law, the Fifth Amendment, the Sixth Amendment or the Eighth Amendment is of no import. Under any framework, the error is subject to the so-called *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California, supra*, 386 U.S. at p. 24 [federal errors require the state to prove the error harmless beyond a reasonable doubt]; *People v. Brown* (1988) 46 Cal.3d 432, 448 [articulating prejudice standard for state law errors at the penalty phase]; *People v. Gonzales* (2011) 51 Cal.4th 894, 953

[concluding that the state law test for prejudice at the penalty phase is the same as the federal *Chapman* standard].)

"[T]he failure to instruct on accomplice testimony pursuant to section 1111 is harmless where there is sufficient corroborating evidence in the record." (*People v. Miranda* (1987) 44 Cal.3d 57, 100.) Here, through Miller's testimony and prior statements the jury heard the following facts in aggravation: (1) Mr. Rices ordered Miller to put on gloves and a mask, (2) Miller did so only because Rices had a gun, (3) Miller was scared of Rices because of his "reputation," (4) Miller told police Rices had "a killer glaze in his eyes," (5) the last words of one of the victims were "please don't kill me. I just want to with my family" and (6) the last words of the other victim were "I'm young. Please don't kill me. Let me live." (13 RT 1939-1940, 1958-1959.) The fact of the matter is that the trial record below contains no independent corroboration at all *for even a single one of these aggravating facts*. Not one. On this record, under state law, the jury simply could not rely on these uncorroborated statements in its calculus to determine whether death was appropriate. But the jury was never told this.

And the prosecutor's argument exacerbated the error. As noted above, the prosecutor relied extensively on Miller's pretrial statements. As discussed above, the prosecutor relied on Miller's statements to police in rhetorically powerful fashion in both

his opening argument for death, and his closing argument for death. (19 RT 2747, 2780.) The prosecutor was not subtle; after describing the statements for a second time the prosecutor frankly told the jury how important these statements were to the state's case for death:

> "If there wasn't one shred of aggravating evidence beyond that, not one thing, you would be justified in saying, [']For that conduct, Jean Pierre Rices, you deserve to die.[']" (19 RT 2748.)

Of course, the prosecutor's emphasis on this evidence demonstrates the importance of it to the state's case "and so presumably [to] the jury." (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence].)

Moreover, as explained elsewhere in this brief, this was not a case where the defendant failed to present mitigation. Here the defense presented substantial mitigation evidence regarding his childhood. On such a record as this, where no evidence corroborated Miller's testimony and statements in aggravation, and where the prosecutor heavily relied on this evidence to urge the jury to impose death, the state cannot prove the error in failing to instruct on accomplice corroboration harmless. Reversal of the penalty

phase verdict is required.[34]

E. Even If The Trial Court Had No *Sua Sponte* Duty To Give Proper Corroboration Instructions, Trial Counsel's Failure To Request Such Instructions Constituted Ineffective Assistance of Counsel.

The federal and state constitutions guarantee criminal defendants the right to the effective assistance of counsel. In order to obtain relief because counsel provided ineffective assistance, a defendant must show both (1) deficient performance (performance below an objective standard of reasonableness) and (2) prejudice. (*Strickland v. Washington, supra*, 466 U.S. at pp. 688, 693.) Here, counsel's failure to request proper corroboration instructions as to Miller violated both prongs of *Strickland.*

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[34] As noted, the court told jurors Miller's testimony required supporting evidence. (6 CT 1220.) Respondent may suggest that this instruction renders any error harmless.

This argument should not long detain the Court. The court's instruction did indeed convey to the jury the need for supporting evidence. But this instruction (1) specifically limited this requirement to Miller's testimony and (2) did not cover Miller's devastating statements to police about the victims' last words. And even as to Miller's testimony, this instruction failed to tell the jury that the supporting evidence had to be independent of Miller's own testimony and statements. As a result, this instruction does not alter the prejudice calculus in any appreciable way. A new penalty phase is required.

1. Counsel's failure to request proper corroboration instructions constituted deficient performance.

In applying the deficient performance prongs to counsel's failure to request limiting instructions, it is important to recall that the responsibility of ensuring the jury is fully instructed on the principles applicable to the defense theory of the case does not fall upon the trial judge alone. Although the trial court's duty in this area is considerable, defense counsel too has an obligation to ensure that the trial court does not omit critical instructions. (*See People v. York* (1966) 242 Cal.App.2d 560, 575.)

This Court has underscored this dimension of defense counsel's obligation to his client: "We deem it appropriate to emphasize that the duty of counsel to a criminal defendant includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense rests." (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, n.7 *overruled on other grounds in People v. Breverman* (1974) 19 Cal.4th 142, 172-173.) And as the Eighth Circuit Court of Appeals has recognized, there can be no tactical reason for failing to request an instruction that can only benefit the defendant. (*Woodward v. Sargent* (8th Cir. 1986) 806 F.2d 153, 157.) Not surprisingly, then, the failure to request certain instructions can be the basis for a conclusion that counsel was incompetent. (*See Freeman v. Class* (8th Cir. 1996) 95 F.3d 639, 641-642.)

To be sure, counsel cannot be faulted for failing to request particular instructions if those instructions would have been refused. But for the reasons identified in Argument XVI-B, above, the trial court here could not properly have refused a request to instruct the jury (1) Miller's testimony could not be corroborated by Miller's own statements or (2) the corroboration requirement applied not only to Miller's testimony, but to his pretrial statements as well. (*See* CALCRIM 335 [corroboration must be independent of accomplice]; *People v. Andrews*, *supra*, 49 Cal.3d at p. 214 [the corroboration requirement of section 1111 applies not just to accomplice testimony, but also "to an accomplice's out-of-court statements . . . ."].)

In this case, counsel should have taken steps to ensure that the jury did not rely on Miller's testimony or pretrial statements to police absent corroboration. Prior to trial, defense counsel moved for severance in large part because of these prior statements, as well as a concern about conflicting defenses. (3 CT 478-490.) Thus, there was no reasonable explanation for counsel wanting the jury to consider Miller's testimony or pretrial statements. And defense counsel himself made this clear, when he strenuously objected to the prosecutor's plan to play Miller's statements before both juries, telling the trial court Miller's claims that the victims were begging was "overtly prejudicial evidence" that would create an "insurmountable" obstacle. (13 RT 1953-1957.) Finally, in his closing argument to the jury, defense counsel referenced the trial court's partial

accomplice instruction in arguing that the jury should not believe Miller:

> "We saw Anthony Miller testify. And, you know, I have been doing this for 18 years, and I tried to keep track of what Anthony Miller was doing, and I have no idea. And I guess it's helpful and that's why the court gives you these kind of instructions, that because he is an accomplice, things that he says that tend to criminalize Jean Pierre, you know, you can't arbitrarily disregard them, but you really, really have to look closely at what they say." (19 RT 2763-2764.)

Clearly, given defense counsel's stated position, his failure to request proper instructions was anything but a reasonable tactic. Proper corroboration instructions as to Miller's testimony and prior statements could only have benefitted Mr. Rices. Counsel's failure to seek such an instructions fell below an objective standard of care.

2. Reversal of the penalty phase is required because there is a reasonable probability that but for counsel's error, at least one juror would have voted for life.

In assessing whether counsel's error requires reversal, the question is whether the error "undermine[s] confidence in the outcome of the case." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) In the context of prejudice, if absent the error even one juror could have reached a different result -- resulting in a hung jury -- that is a "more favorable verdict" and reversal is required. (*See Wiggins v. Smith*, *supra*, 539 U.S. at p.

537 [finding prejudice under *Strickland* where absent counsel's error at the penalty phase of a capital trial "there is a reasonable probability that at least one juror would have struck a different balance" and voted for life].)

Here, for the very same reasons set forth in Argument XVI-D above, the absence of proper corroboration instructions as to this critical aggravating evidence undermines confidence in the outcome of the penalty phase and requires a new trial. Not only did the jury hear Miller's uncorroborated duress defense -- which was powerful enough to result in a mistrial from Miller's jury -- the jury also heard his devastating (and uncorroborated) statements about the victims's last words. Moreover, as discussed above, the prosecutor took full advantage of this evidence, telling the jury that this alone merited death. (19 RT 2748.) Reversal of the penalty is required.

XVII. THE TRIAL COURT'S ERRONEOUS DENIAL OF THE NEW TRIAL MOTION REQUIRES A NEW PENALTY PHASE.

A. The Relevant Facts.

1. The gang evidence prior to and at trial.

Prior to trial, defense counsel moved to exclude any reference to Mr. Rices's alleged past membership or association with any gangs. (3 CT 703-705.) Defense counsel explained that the past contact, if any, was too remote to be relevant to the determination of whether Mr. Rices should live or die. (*Ibid.*) Additionally, counsel explained that this particular type of evidence was highly prejudicial and would undermine the jury's ability to fairly determine the penalty. (*See* 3 CT 705.)

For its part, the state made clear that it did not plan on introducing this type of evidence. Thus, the prosecutor assured defense counsel and the court that "[w]e don't plan to elicit any gang evidence as far as the defendant being in a gang." (4 RT 609.) The trial court confirmed that the state did "not have an objective of attempting to establish that any of the incidents . . . include an overt gang affiliation." (4 RT 610.) The trial court repeated that "there is not going to be an objective of establishing any form of gang affiliation." (*Ibid.*)

All of that changed, however, when the state elected to call Mr. Rices's jury to appear for the direct and cross-examination of codefendant Anthony Miller. Under direct-examination, Miller told both juries that he and many other people were afraid of Mr. Rices because Mr. Rices was "[a] gang member [of] a very high status." (13 RT 1939.)

Defense counsel immediately objected. (13 RT 1939.) The trial court instructed the Rices jury that it could not consider this evidence. (13 RT 1940.) Simultaneously, however, the court instructed the Miller jury that it *was* free to consider this evidence. (*Ibid.*)

Defense counsel then moved for a mistrial. (13 RT 1945.) Counsel made clear that this evidence violated the court's in liminae ruling, and he explained that the highly prejudicial nature of gang evidence made this one bell that could not be unrung. (*Ibid.*) The trial court denied the motion. (*Ibid.*)

2. The "bragging" evidence prior to and at trial.

Police first heard Mr. Rices's name from Dwayne Hooks. (*See* 2 CT 236-237.) Hooks was arrested for robbing a Washington Mutual bank. (1 PRT 55-56.) When he

was arrested, Hooks had a Crimestoppers card in his wallet. (1 PRT 81-82; 2 CT 201.) Hooks was aware there was a $100,000 reward in the Granada liquor store murders. (1 CT 96.)

Hooks eventually told police that Mr. Rices discussed the liquor store murders at Hooks's baby shower in late June 2007. (1 PRT 39.) Hooks claimed that the manner in which Mr. Rices described the crime was "braggadocious." (1 PRT 42.)[35]

Defense counsel made clear that he based his penalty phase strategy on keeping this evidence out. (15 RT 2367.) Thus, he explained that he agreed to enter into stipulations with respect to the testimony of the two witnesses who would testify to the bragging issue -- Debbie Mays and Dwayne Hooks. (*Ibid.*)

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[35] In exchange for his cooperation, Mr. Hooks received more than just the promise of reward money. First, Hooks was sentenced to one day in jail with credit for time served for his role in robbing a bank. (1 PRT 59-60.)

But Hooks also had a prior conviction for lewd and lascivious acts against his younger sister. (1 PRT 47.) Additionally, Hooks attempted to forcibly sodomize his cellmate at the California Youth Authority. (1 PRT 46-47.) As such, Hooks was subject to both lifetime sex offender registration, as well as mandatory placement on the Megan's Law website. (*See* Pen. Code §§ 290, subd. (c), 290.46, subd. (b)(2)(G)-(H).) However, the prosecutor arranged for Hooks to be removed from the Megan's Law website altogether. (1 PRT 65-66. *See* Pen Code § 290.46, subd. (a)(1) [mandating placement on Megan's Law website].)

The trial court refused to allow this "bragging" evidence to come in at the penalty phase. (4 RT 655.) Rebuffing the state's repeated arguments that this evidence was germane to an alleged "lack of remorse," the trial court was clear:

> "I'm disagreeing with the People and their argument that regardless of how much time elapsed, the words themselves reflect an attitude at the time of the shooting. I'm making a finding that too much time has elapsed for [the alleged bragging] to be automatically characterized as overt remorselessness that would be immediately a part of the crime." (4 RT 665.)

The court indicated this evidence might become admissible if lingering doubt became an issue, something that counsel for Mr. Rices assured the court would not occur. (4 RT 664-666.) Trial counsel for Mr. Rices followed through on this promise; he made clear in his opening statements that Mr. Rices was guilty. (9 RT 1350.)

Notwithstanding the court's straightforward in limine ruling, the bragging evidence -- like the gang evidence discussed above -- made its way into trial. In fact, the jury heard references to this evidence directly from Detective James Hoefer.

Hoefer first testified before Mr. Miller's separate jury. (12 RT 1750.) He was later called before the Rices jury. After describing portions of the surveillance video in which it appeared Ms. Mattia's feet moved after she was shot, the following exchange

occurred:

"[Prosecutor]: And that was information that you then later heard from other people, such as Dwayne Hooks?

"[Hoefer]: Yes. We eventually received information from witnesses who stated that Mr. Rices bragged about --

"[Prosecutor]: Mr. Hoefer --

"MR. WOLFE: Motion to strike, your honor.

"THE COURT: Hold on just a second. [para.] This is difficult, ladies and gentlemen. I'm going to ask [the prosecutor] to lead the investigator. There's certain things that I've excluded in terms of his description of what other people have said because it's technically hearsay. [para.] Mr. [Prosecutor], I'm striking the word that you cut him off on, 'bragged.' It is to be disregarded." (15 RT 2361-2362.)

Hoefer then went on to confirm that the surveillance video of the crime confirmed the "stipulations of Debbie Mays and Dwayne Hooks and of Rodney Hodges . . . that Mr. Rices said the female victim's feet flew into the air . . . ." (15 RT 2362.)

Defense counsel again moved for a mistrial. (15 RT 2366.) Counsel explained that "Detective Hoefer has been here since the beginning of the trial," and "he should have been well aware that bragging was not to come in before the Rices jury." (*Ibid.*) Counsel explained:

> "[Hoefer] is the lead detective in this investigation. He is a district attorney investigator. He has been present during the whole trial, and he knew not to talk about brag. That's been clear. All the stipulations that were generated in this case were generated with [--] one of the things in mind was to remove the issue of bragging from the Rices jury." (15 RT 2367.)

To his credit, the prosecutor apologized to the court. (15 RT 2367.) The prosecutor acknowledged that Hoefer's outburst was "unfortunate," but he claimed it did not merit a mistrial. (*Ibid.*)

The trial court found that Hoefer's reference to this previously excluded evidence was "unintentional" and denied the mistrial motion (15 RT 2368-2369.)

3. The new trial motion.

Following the death verdicts, defense counsel for Mr. Rices moved for a new penalty phase trial. (6 CT 1296-1325.) Among other things, counsel argued that a new penalty phase was required because of the improper references to both Mr. Rices's alleged gang connections and the alleged bragging. (6 CT 1310-1316.)

The state opposed the new trial motion. As to the gang reference, the state argued that gang evidence was not specifically listed among the list of factors the jury could

consider in aggravation, and thus the jury could not consider it. (6 CT 1371.) Further, the state argued that the trial court should presume the jury followed its instruction not to consider this evidence. (*Ibid.*) Finally, citing the testimony of defense expert Dr. Minagawa about Mr. Rices' past gang affiliation, the state argued the trial court should deny the new trial motion because it was Mr. Rices who elected to "elicit[] such testimony." (6 CT 1372-1373.)

As to the bragging references, the state argued again that the court's admonition "obviated any harmful effect." (6 CT 1374.) The state further argued that because Hoefer was cut off, "there was no context or understanding on the jury's part what it was Rices was bragging about." (*Ibid.*) Finally, the state claimed that because this evidence would have been admissible had Mr. Rices not pled guilty, "it [ ] would not have been so prejudicial as to warrant a new trial." (6 CT 1375.)

The trial court denied the new trial motion. The trial court ruled that the "fleeting" references to the gang and bragging evidence "did not deprive [Mr. Rices] of a fair trial." (20 RT 2807-2808, 2813.)

As discussed below, the trial court got it wrong. Defense counsel's motion for a new trial should have been granted. Reversal of the penalty phase is required.

B. Standard Of Review.

When a trial court *grants* a new trial motion, and the state appeals, the appropriate standard of review is the deferential abuse of discretion standard. (*See People v. Ault* (2004) 33 Cal.4th 1250, 1265.) This makes perfect sense. After all, the trial court is most "familiar with the evidence, witnesses and proceedings, and is therefore in the best position to determine whether, in view of all the circumstances, justice demands a retrial." (*Id.* at p. 1261.) It would make little sense then for a reviewing court, which is necessarily *less* "familiar with the evidence, witnesses and proceedings," to disturb this ruling when a main role of the reviewing court is "determine whether a miscarriage of justice occurred." (Cal. Const., art. VI, § 13. *See People v. Ault, supra*, 33 Cal.4th at pp. 1260-1261.)

Review of an order *denying* a new trial motion is a different matter. Subjecting the trial court's denial of a new trial motion to the deferential abuse of discretion standard would function as an abrogation of a reviewing court's duty to "conduct an independent examination of the proceedings to determine whether a miscarriage of justice occurred." (Cal. Const., art. VI, § 13.) While this Court has never explicitly resolved the question, recent decisions indicate this Court should engage in independent review to determine the propriety of the trial court's ruling denying the new trial motion. (*See People v. Nesler*

(1997) 16 Cal.4th 561, 582, fn. 5 [applying de novo review to assess trial court's denial of new trial motion]; *See also People v. Ault, supra*, 33 Cal.4th at pp. 1260-1262 [collecting cases].)

Even when an abuse of discretion standard is employed, there are limits. This Court has noted that "[d]iscretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Other courts have written that discretion is abused only when the trial court's ruling was "arbitrary, whimsical or capricious." (*See, e.g., People v. Linkenauger* (1995) 32 Cal.App.4d 1603, 1614.)

With respect, neither of these phrasings is particularly helpful or, indeed, even accurate. While "exceed[ing] the bounds of reason," or making an "arbitrary, whimsical or capricious" ruling will certainly be sufficient for a reviewing court to conclude a trial court has abused its discretion, these are certainly not the necessary requirements for a conclusion that discretion has been abused. Indeed, some courts have criticized these colorful descriptions of the abuse of discretion standard in search of principles that can actually be used in practice. (See *People v. Jacobs* (2007) 156 Cal.App.4th 728, 736; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [criticizing the "arbitrary, whimsical or capricious" test as "pejorative boilerplate"].) Putting aside colorful

descriptions and "pejorative boilerplate," the ultimate question is whether the trial court's decision was unreasonable in light of the governing law and the facts presented. (*People v. Jacobs*, *supra*, 156 Cal.App.4th at pp. 737-738.)

But there is really no reason to decide the issue here. Even under the more deferential abuse of discretion standard, the trial court erred in denying the new trial motion.

C. The Trial Court's Improper Denial Of Defense Counsel's New Trial Motion Requires A New Penalty Phase.

1. The gang evidence.

Mr. Rices will begin with the improper reference to the gang evidence. As discussed above, codefendant Anthony Miller claimed that Mr. Rices was "[a] gang member [of] a very high status." (13 RT 1939.) The trial court told the Rices jury to disregard this comment. (13 RT 1940.) But the court simultaneously told the Miller jury that it could consider this comment as valid evidence. (*Ibid.*) Given that the Miller jury was allowed to consider this evidence, there was no reason for the Rices jury to believe the evidence was somehow inherently unreliable.

There is, of course, no doubt that admission of the gang evidence was improper. After all, counsel for Mr. Rices made very clear during in limine motions that he objected to any gang evidence. (3 CT 703-705.) And the state had agreed not to elicit such evidence. (4 RT 609.) So there is no doubt that injection of the gang evidence was error.

As the state correctly noted in responding to the new trial motion, however, the trial court told jurors to disregard this evidence. (6 CT 1371.) According to the state, this rendered any error harmless. (6 CT 1371.) The state is wrong.

To be sure, of course, jurors are normally presumed to follow such limiting instructions. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878.) But as the United States Supreme Court has concluded in a similar context, the law is a bit more nuanced. While courts can generally assume a jury will follow a trial court's instruction to ignore certain information, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Bruton v. United States* (1968) 391 U.S. 123, 135.)

Where a jury has seen or heard something that could be highly prejudicial to a defendant, courts have long recognized that curative instructions may not be sufficient.

(*See, e.g., United States v. Hale* (1975) 422 U.S. 171, 175, n.3 [introduction of evidence that defendant remained silent was not cured by jury instruction telling jurors to ignore the evidence]; *Bruton v. United States, supra*, 391 U.S. at pp. 125-126 [where evidence against defendant was "not strong," reviewing court could not rely on instruction advising jurors to ignore prejudicial and inadmissible evidence]; *Jackson v. Denno* (1964) 378 U.S. 368, 387-388 [refusing to assume jury would follow instruction advising it to disregard involuntary confession of defendant].)

The Supreme Court has proposed a commonsense guide: in deciding the effect of a curative instruction which advises a jury to disregard what it has seen or heard, the question is "plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) California courts have applied this test in practice; when information about prior criminal conduct is conveyed to the jury, a curative instruction -- asking jurors to simply ignore information they heard -- is an inadequate basis on which to presume jurors would ignore what they had been told. (*See, e.g., People v. Jacobs* (1984) 158 Cal.App.3d 740, 745-746; *People v. Galloway* (1979) 100 Cal.App.3d 551, 562; *People v. Young* (1978) 85 Cal.App.3d 594, 602-603; *People v. Glass* (1975) 44 Cal.App.3d 772, 781; *People v. Schiers* (1971) 19 Cal.App.3d 102, 114; *People v. Laursen* (1968) 264 Cal.App.2d 932, 938.)

This principle has even more application here, where although the trial court told the Rices jury it could not consider the gang references as evidence, it told the Miller jury -- in the presence of the Rices jury -- that it *could* consider this very same evidence. Given the inherently prejudicial nature of this evidence, and the fact that the Rices jury knew that the evidence was reliable enough for the Miller jury, the trial court's admonishment to the Rices jury was insufficient to cure the error.

And there should be no dispute as to the inherently prejudicial nature of the improper remark. After all, "[t]he word 'gang' . . . connotes opprobrious implications . . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) As this Court has recognized, gang evidence is often "so extraordinarily prejudicial . . . that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *see also People v. Cox* (1991) 53 Cal.3d 618, 660.) In short, irrelevant gang evidence has no place in a criminal trial. (*See* The Constitutional Failure of Gang Databases (Nov. 2005) 2 Stanford J. Civ. Rights & Civ. Liberties 115. *Cf. People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) This is particularly true in a capital trial where, because death is different, the procedures which lead to a death sentence must meet an enhanced level of reliability. (*See, e.g., Beck v. Alabama, supra,* 447 U.S. at p. 638; *Gardner v. Florida, supra,* 430 U.S. at p. 357.)

The state also argued there could be no harm from the gang reference because the jury was provided with a list of aggravating factors and "[n]o gang reference was included." (6 CT 1371.) This argument misses the mark.

As this Court has recognized, gang evidence can be relevant to factor (a), the circumstances of the crime. (*People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6, overruled on another point in *People v. Combs* (2004) 34 Cal.4th 821, 860.) Indeed, as the United States Supreme Court has recognized, "[t]he 'circumstances of the crime' factor can hardly be called 'discrete.' It has the effect of rendering all the specified factors nonexclusive . . . ." (*Brown v. Sanders* (2006) 546 U.S. 212, 222.) Put simply, the jury was more than able to consider the gang evidence under the "nonexclusive" instructions it had been given.

Finally, this Court should also reject the state's argument that the gang evidence did not merit a new penalty phase because a defense expert in mitigation referenced the evidence. This argument ignores a doctrine this Court has recognized for nearly a century: the defensive acts doctrine. Under the defensive acts doctrine, a lawyer who receives an adverse ruling from a trial court does not undercut or waive his objection to that ruling by taking defensive acts to make the best of a bad situation. (*See, e.g., People v. Turner* (1990) 50 Cal.3d 668, 704-705 n.18; *People v. Scott* (1978) 21 Cal.3d 284, 291;

People v. Sam (1969) 71 Cal.2d 194, 207-208; *Jameson v. Tully* (1918) 178 Cal. 380, 384. *See People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1064; *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 209; *Hoel v. City of Los Angeles* (1955) 136 Cal.App.2d 295, 310.)

Pursuant to this doctrine, a reviewing court can properly consider a defendant's objection to the admission of certain evidence even though as a defensive act the defendant himself introduces the evidence. (*People v. Turner, supra*, 50 Cal.3d at pp. 704-705, n.18.) Similarly, a reviewing court can properly consider a defendant's objection to the admission of certain evidence even though as a defensive act the defendant himself relied on this evidence in closing argument to contend he was not guilty. (*People v. Scott, supra*, 21 Cal.3d at p. 291.)

Here, the trial court had overruled defense counsel's request for a mistrial when the gang evidence was presented to the Rices jury. (13 RT 1945.) The defense expert's testimony was not introduced until *after* the trial court's ruling. (18 RT 2654) Under the defensive acts doctrine this does not impact consideration of this claim.

In the final analysis, the inflammatory gang evidence undermined what the trial court itself found to be "very persuasive" evidence in mitigation. (20 RT 2817.) The

gang evidence cannot be deemed harmless. (*See Lisenba v. California* (1941) 314 U.S. 219, 236 [irrelevant evidence can violate due process]; *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.) But there is more.

2. The bragging evidence.

As discussed above, defense counsel based his trial strategy to a large extent on keeping the bragging evidence out. (15 RT 2367.) Thus, he stipulated to the testimony of two prosecution witnesses to try and avoid this prejudicial testimony. (*Ibid.*) And on defense counsel's motion, prior to trial the court refused to allow the state to present this evidence. (4 RT 655.) But all of that changed when Detective Hoefer told the jury that Mr. Rices was "bragging" about the victim's feet moving after the shooting.

Like any other party to litigation, prosecutors may not try to introduce evidence which a trial court has specifically ruled inadmissible. (*See People v. Aragon* (1957) 154 Cal.App.2d 646, 658.) It is also clear that prosecutors have a duty to warn their witnesses against offering such inadmissible and prejudicial testimony. (*See People v. Stinson* (1963) 214 Cal.App.2d 476, 481.) Thus, it is entirely improper for prosecution witnesses to inject evidentiary harpoons into a case. This is so regardless of whether the testimony is volunteered by the witness during direct or cross examination. (*See, e.g., People v.*

Stinson, supra, 214 Cal.App.2d at pp. 480-481; *White v. State* (Fla. 1978) 365 So.2d 199, 200; *Bruner v. State* (Okla. 1980) 612 P.2d 1375, 1378-1379; *Wilson v. State* (Ala. 1980) 386 So.2d 496, 500; *State v. Dugan* (Ariz. 1980) 508 P.2d 771, 774.) And of course, prosecutorial misconduct in failing to "guard against" prejudicial testimony "need not be intentional to be harmful." (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1171; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688. *See also People v. Bentley* (1955) 131 Cal.App.2d 687, 690 [prosecutor has a "duty to see that the witness volunteers no statement that would be inadmissible"], disapproved on another point by *People v. White* (1958) 50 Cal.2d 428.)

In this case, Mr. Rices's jury heard claims that Mr. Rices was "bragging" about the murders from Detective Hoefer. (15 RT 2361-2362.) The state's claim that "there was no context or understanding on the jury's part what it was [Mr.] Rices was bragging about" was simply untrue. (6 CT 1374.) Hoefer first described how the Ms. Mattia's feet moved after she was shot. (15 RT 2361.) The prosecutor then asked Hoefer if he confirmed that the victim's feet moved by talking to other people, such as Dwayne Hooks. (*Ibid.*) Hoefer then said he had heard from other people that Mr. Rices had "bragged." (*Ibid.*) Immediately after he was cut off, Hoefer went on to explain the surveillance video confirmed the "stipulations of Debbie Mays and Dwayne Hooks and of Rodney Hodges . . . that Mr. Rices said the female victim's feet flew into the air . . . ."

(15 RT 2362.) The state's claims that "Hoefer did not say what it was that Mr. Rices was bragging about" simply ignores the entire context of the questions and answers which were being given.

And the trial court's admonition can hardly be called powerful in this case. The trial court simply told the jury that "[t]here's certain things that I've excluded in terms of his description of what other people have said because it's technically hearsay. [para.] Mr. [Prosecutor], I'm striking the word that you cut him off on, 'bragged.' It is to be disregarded." (15 RT 2361-2362.) Of course, this was more than "technically hearsay." Defense counsel based his strategy in keeping this highly inflammatory evidence out.

When viewed in isolation or in conjunction with the improper gang evidence, Hoefer's improper bragging comment was prejudicial. (*Lisenba v. California*, *supra*, 314 U.S. at p. 236; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.) Reversal is required.

XVIII. BECAUSE THE TRIAL COURT WAS PRESENTED WITH CONFIDENTIAL INFORMATION BOTH ABOUT THE CRIME AND MR. RICES, AND BECAUSE THE TRIAL COURT REFUSED TO ALLOW MR. RICES ACCESS TO THIS EVIDENCE, A NEW SECTION 190.4 HEARING IS REQUIRED.

A. The Relevant Facts.

Generally, discovery in a criminal case is governed by Penal Code section 1054, et seq. Section 1054.7 of the Penal Code permits either party to make an in camera showing to explain why it should be excused from disclosing certain evidence which would otherwise have to be disclosed.[36]

In this case, on July 30, 2008 -- well before trial began -- the state filed four motions pursuant to Penal Code section 1054.7. (3 CT 590-595, 675-676.) In relevant part, in these motions the state sought orders permitting it not to disclose to counsel for

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[36] In relevant part, section 1054.7 provides as follows:

> "Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter."

Mr. Rices (1) the identity and statements of "John Doe #1" and (2) statements from various in-custody inmates pertaining to inculpatory statements made by Mr. Rices. (*Ibid.*) Defense counsel opposed each of these motions. (3 CT 686-700.)

On November 17, 2008 the court held in an in-camera proceeding from which defendant and his lawyers were excluded. (4 RT 684.) The court promised that a written ruling would follow. (4 RT 684.) The in-camera hearing is contained at sealed pages 686-706 of the Reporter's Transcript.

On November 26, 2008, the trial court issued its written ruling. The court granted the state's motion permitting it not to disclose either the identity and statements of John Doe or the identity and statements of various in-custody inmates. (4 CT 769-770.) The court's order makes clear it had reviewed "inculpatory information provided by John Doe" as well as "inculpatory information provided by these inmates . . . ." (4 CT 769, 770.)

Ultimately, the jury sentenced Mr. Rices to death. (6 CT 1252.) Pursuant to Penal Code section 190.4, defense counsel moved for a reduction in the sentence to life without parole. (6 CT 1328-1334.) The trial court denied this motion and sentenced Mr. Rices to die. (6 CT 1408-1411.)

B. The Trial Court's Access To Confidential Information -- Which The Trial Court Itself Characterized As "Inculpatory" And Which Mr. Rices Could Not Confront, Deny Or Rebut -- Violated The Eighth Amendment And The Due Process Clause.

When a state chooses to impose capital punishment, the Due Process Clause of the Fifth and Fourteenth Amendments and the Eighth Amendment require procedures which insure the sentence is not imposed in an unreliable manner but instead is based on complete and accurate information about the defendant. (*See, e.g., Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) Both the Eighth Amendment and the Due Process Clause preclude the state from basing a death sentence on information which the defendant did not have a full opportunity to rebut. (*See, e.g., Gardner v. Florida, supra*, 430 U.S. at p. 357.)

Gardner involved a situation very similar to this case. There, defendant was convicted of capital murder. The jury recommended a life sentence. Under Florida law, however, trial courts are vested with power to modify the jury's sentence. Pursuant to state law, the trial judge in *Gardner* was presented with information about the case contained in a presentence report prepared by the probation department. (430 U.S. at p. 353.) Under Florida law, part of this report was confidential and had not been disclosed to defense counsel. (*Ibid.*) The trial court modified the jury's sentence to death. Defense counsel had not asked to see the portion of the confidential report, nor did the trial court

"indicate there was anything of special importance in the undisclosed portion . . . ." (430 U.S. at p. 353.) Nevertheless, the Supreme Court found that defendant's due process rights had been violated because he was unable to rebut or confront the confidential information. (430 U.S. at p. 362.) The Supreme Court then rejected the state's suggestion that it simply remand the case for the state reviewing court to perform harmless error analysis with the confidential report in hand; instead, the Supreme Court ruled that such a procedure "could not fully correct the error" because "it is possible that full disclosure, followed by explanation or argument by defense counsel" could have resulted in a different ruling by the trial court. (*Ibid.*) Accordingly the case was remanded for "further proceedings at the trial court level . . . ." (*Ibid.*)

The same result is compelled here. Here too the state presented evidence to the trial court which was kept from the defense. Just as in *Gardner*, defendant was not given copies of these inculpatory statements and -- as a consequence -- was completely unable to rebut or respond to them. Indeed, this case is even stronger than *Gardner* -- where the trial court did not "indicate there was anything of special importance in the undisclosed portion . . . ." (430 U.S. at p. 353.) In contrast, here the trial court itself described the confidential evidence as "inculpatory." (4 CT 769-770.) Moreover, and also in contrast to *Gardner*, trial counsel here objected and tried to obtain the information.

Ironically, the trial court here was apparently aware of the danger of considering information which the defense did not have a chance to rebut. Thus, the trial judge had received a presentence report from the probation officer and was careful to state that he had conducted his section 190.4 review "before I received a presentence report from the probation officer." (20 RT 2814.) The judge had also received a "confidential" section of the probation report which was labeled "Victim addendum" and stated on the record he had "not reviewed that." (20 RT 2818.) In the context of both these documents the court emphasized that it had "considered only evidence presented to the jury." (20 RT 2814.) And the court did not hear the victim impact statements until after ruling on the motion to modify the sentence. (20 RT 2819.)

In the final analysis, the vice identified in *Gardner* is the risk that the court making the final decision will be influenced by information about the case or defendant which -- because it was confidential and not subject to the adversarial process -- may have been unreliable. That risk is present here when the court was exposed to "inculpatory" evidence about the crime and the defendant. A new section 190.4(e) hearing is required.

XIX. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. RICES'S DEATH SENTENCE MUST BE REVERSED.

In the capital case of *People v. Schmeck* (2005) 37 Cal.4th 240, the defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (37 Cal.4th at p. 303.) This Court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (37 Cal.4th at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the Court held that a defendant could preserve these claims by "(i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (37 Cal.4th at p. 304.)

Mr. Rices has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck*, Mr. Rices identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case:

(1) The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die. (19 RT 2734.) This aggravating factor is unconstitutionally vague in violation of the Eighth Amendment and requires a new penalty phase. This Court has already rejected this argument. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) The Court's decision in *Ray* should be reconsidered.

(2) California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has already rejected this argument. (*People v. Schmeck, supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck, supra*, however, the Court's decision should be reconsidered.

(3) Penal Code section 190.3, subdivision (a) -- which permits a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death. The jury in this case was instructed in accord with this provision. (19 RT 2733.) This Court has already rejected this argument. (*People v. Schmeck, supra*, 37 Cal.4th at pp. 304-305.) For the same reasons set forth by the appellant in *People v. Schmeck, supra*, however, the Court's decision should be reconsidered.

(4) During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (19 RT 2734.) The jurors were instructed they could not rely on this evidence unless it had been proven beyond a reasonable doubt. (19 RT 2737.) The jurors were told, however, that they could rely on this factor (b) evidence even if they had not unanimously agreed that the conduct had occurred. (19 RT 2737.) In light of the Supreme Court decision in *Ring v. Arizona* (2002) 536 U.S. 584, the trial court's failure to require unanimity as to these crimes violated Mr. Rices's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decision in *Lewis* should be reconsidered.

(5) Under California law, a defendant convicted of first degree murder cannot receive a death sentence unless a jury (1) finds true one or more special circumstance allegations which render the defendant death eligible and (2) finds that aggravating circumstances outweigh mitigating circumstances. The jury in this case was not told that the second of these decisions had to be made beyond a reasonable doubt. This violated Mr. Rices's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(6) At the penalty phase, the trial court instructed the jury in accord with a standard instruction defining the statutory aggravating and mitigating factors. (19 RT 2733-2735.) This instruction was constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or "substantial," and (5) it failed to specify a burden of proof as to either mitigation or aggravation. (*Ibid.*) These errors, taken singly or in combination, violated Mr. Rices's Fifth, Sixth, Eighth and Fourteenth Amendment rights. This Court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) The Court's decisions in *Schmeck* and *Ray* should be reconsidered.

(7) Because the California death penalty scheme violates international law -- including the International Covenant of Civil and Political Rights -- Mr. Rices's death sentence must be reversed. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

To the extent respondent argues that any of these issues is not properly preserved because Mr. Rices has not presented them in sufficient detail to this Court, Mr. Rices will seek leave to file a supplemental brief more fully discussing these issues.

CONCLUSION

For all these reasons the case should be reversed for a new penalty phase.

DATED: 11/18/14

Respectfully submitted,

Cliff Gardner
Attorney for Appellant
Jean Pierre Rices

APPENDIX A

APPENDIX A

ANALYSIS OF QUESTION 4 FROM THE JURY QUESTIONNAIRE

Juror Number	Unidentifiable Area/Neighborhood	Citation
298	San Diego County	14 CT 3154

Juror Number	*Non*-East County Area/Neighborhood	Citation
4	Spring Valley	8 CT 1638
244	Fashion Valley	14 CT 3329
11	San Carlos	18 CT 4206

Juror Number	East County Area/Neighborhood	Citation
14	El Cajon	7 CT 1440
185	La Mesa	7 CT 1462
59	Julian	7 CT 1484
138	Rancho San Diego	7 CT 1506
155	Ramona	7 CT 1528
71	Lakeside	7 CT 1550
67	El Cajon	7 CT 1572
57	Fletcher Hills, El Cajon	7 CT 1594
7	East County	8 CT 1616
4	Spring Valley	8 CT 1638
108	Spring Valley	8 CT 1682
47	Rancho San Diego	8 CT 1704
13	East County	8 CT 1726
115	Spring Valley	8 CT 1748
8	Boulevard	8 CT 1770
164	East	15 CT 3504
72	Spring Valley	8 CT 1792
106	Lemon Grove	9 CT 1814
231	La Mesa	9 CT 1835
142	El Cajon (Olive Hills)	9 CT 1857
118	Ramona	9 CT 1879
32	Ramona	9 CT 1901
201	Mt. Helix	9 CT 1923
171	Alpine	9 CT 1945
103	Spring Valley	9 CT 1967

316	92021 [El Cajon]	9 CT 1989
200	Fletcher Hills	9 CT 2011
116	El Cajon	9 CT 2033
218	El Cajon	9 CT 2055
174	Lakeside, CA	10 CT 2077
144	Fletcher Hills	10 CT 2099
49	Dulzura/East County	10 CT 2121
20	El Cajon	10 CT 2143
253	National City/Spring Valley	10 CT 2165
281	El Cajon	10 CT 2186
82	Lakeside	10 CT 2208
222	La Mesa	10 CT 2230
233	Lemon Grove	10 CT 2251
289	El Cajon	10 CT 2273
211	East of El Cajon	10 CT 2295
250	Rancho San Diego	10 CT 2317
83	El Cajon	11 CT 2339
213	Rancho San Diego	11 CT 2361
143	La Mesa	11 CT 2383
247	Ramona	11 CT 2405
153	Santee	11 CT 2427
313	Lakeside	11 CT 2449
307	Lemon Grove	11 CT 2471
52	Lakeside	11 CT 2493
6	Fletcher Hills/El Cajon	11 CT 2515
23	Spring Valley	11 CT 2537
104	East County, Lakeside	11 CT 2559
184	La Mesa	11 CT 2581
17	La Mesa	12 CT 2603
204	La Mesa	12 CT 2625
162	La Mesa	12 CT 2647
12	La Mesa	12 CT 2669
263	Casa de Oro	12 CT 2691
21	Ramona	12 CT 2713
187	Ramona	12 CT 2735
140	East	12 CT 2757
227	La Mesa	12 CT 2779
91	El Cajon	12 CT 2801
170	Lakeside	12 CT 2823
133	La Mesa	12 CT 2845

159	Lakeside	13 CT 2867
269	La Mesa	13 CT 2889
34	Lakeside	13 CT 2911
134	Santee	13 CT 2933
92	Santee	13 CT 2955
146	Santee	13 CT 2977
294	Rural El Cajon	13 CT 2999
38	Spring Valley	13 CT 3022
90	Spring Valley	13 CT 3044
175	El Cajon	13 CT 3066
85	Lakeside	13 CT 3088
302	Ramona	13 CT 3110
35	Spring Valley	14 CT 3132
208	El Cajon, off Madison	14 CT 3176
224	East County, Dehesa	14 CT 3197
102	Santee	14 CT 3219
241	El Cajon	14 CT 3241
299	La Mesa	14 CT 3263
154	Spring Valley	14 CT 3285
188	Lakeside	14 CT 3307
260	Hidden Mesa Estates	14 CT 3350
62	Fletcher Hills (El Cajon)	14 CT 3372
2	El Cajon	15 CT 3394
190	Lemon Grove	15 CT 3416
287	El Cajon	15 CT 3438
121	El Cajon	15 CT 3460
167	La Mesa/Rolando	15 CT 3482
164	East	15 CT 3504
293	Crest	15 CT 3526
101	Santee	15 CT 3548
163	Lakeside	15 CT 3570
209	Spring Valley	15 CT 3592
288	Santee	15 CT 3614
105	Lemon Grove	15 CT 3636
194	El Cajon	16 CT 3658
183	Lemon Grove	16 CT 3680
259	Fletcher Terrace	16 CT 3702
99	Fletcher Hills	16 CT 3724
303	Casa de Oro	16 CT 3746
88	Spring Valley	16 CT 3768

282	Lakeside	16 CT 3790
125	Santee	16 CT 3812
197	Ramona	16 CT 3834
195	La Mesa	16 CT 3856
207	Santee	16 CT 3878
157	Santee	16 CT 3900
107	Ramona	17 CT 3922
60	El Cajon	17 CT 3944
262	El Cajon/Rancho San Diego	17 CT 3965
126	Unincorporated El Cajon	17 CT 3987
236	Julian	17 CT 4009
219	Unincorporated El Cajon	17 CT 4030
172	El Cajon	17 CT 4052
315	Lakeside	17 CT 4074
135	Santee	17 CT 4096
202	Santee	17 CT 4118
166	Spring Valley	17 CT 4140
44	Santee	17 CT 4162
127	Spring Valley	18 CT 4184
295	Granite Hills	18 CT 4228
74	Ramona	18 CT 4250
312	Granite Hills	18 CT 4272
36	El Cajon	18 CT 4294
29	91942 [La Mesa]	18 CT 4316
111	La Mesa	18 CT 4338
246	Alpine	18 CT 4360
258	La Mesa	18 CT 4382
39	Santee	18 CT 4404
292	Rancho San Diego	18 CT 4426
165	Julian	19 CT 4448
196	La Mesa	19 CT 4470
274	Santee	19 CT 4492
66	Alpine	19 CT 4514
265	La Mesa	19 CT 4536
30	Lakeside	19 CT 4558
279	Ramona	19 CT 4580
2367	East El Cajon	19 CT 4601
89	Spring Valley	19 CT 4623
19	Spring Valley	19 CT 4645
272	El Cajon	19 CT 4667

300	Santee	19 CT 4689
48	Rancho San Diego	20 CT 4711
256	El Cajon	20 CT 4733
308	La Mesa	20 CT 4755
130	Lemon Grove	20 CT 4777
113	Eastern (El Cajon)	20 CT 4799
95	Santee	20 CT 4821
122	El Cajon	20 CT 4843
61	La Mesa	20 CT 4865
252	Jamul	20 CT 4887
161	Rancho San Diego	20 CT 4909
1	El Cajon-Moving to Ramona	20 CT 4931
284	Alpine	20 CT 4953
9	El Cajon	21 CT 4975
238	Flinn Springs	21 CT 4997
75	El Cajon	21 CT 5019
119	Santee	21 CT 5041
10	East County Alpine	21 CT 5063
80	Lemon Grove	21 CT 5085
40	Fletcher Hills	21 CT 5107
235	La Mesa	21 CT 5129
275	Santee	21 CT 5151
46	Santee	21 CT 5173
212	La Mesa	21 CT 5195
26	El Cajon	21 CT 5217
245	Julian	22 CT 5239
94	Ramona	22 CT 5261
37	Santee	22 CT 5283
310	Lakeside	22 CT 5305
100	Lemon Grove	22 CT 5327
286	Spring Valley	22 CT 5349
158	El Cajon	22 CT 5371
86	Lemon Grove	22 CT 5393
266	La Mesa	22 CT 5415
69	Lakeside	22 CT 5437
51	Ramona	22 CT 5459
280	Spring Valley	22 CT 5481
290	Spring Valley	23 CT 5503
84	Santee	23 CT 5525
255	La Mesa	23 CT 5547

216	East County	23 CT 5569
226	Lakeside	23 CT 5591
81	El Cajon	23 CT 5613
223	Alpine	23 CT 5635
129	Alpine	23 CT 5657
261	Spring Valley	23 CT 5679
240	La Mesa/Lake Murray	23 CT 5701
31	El Cajon	23 CT 5723
270	El Cajon	23 CT 5745
112	Lemon Grove	24 CT 5767
304	El Cajon	24 CT 5789
151	El Cajon/Lakeside	24 CT 5811
242	Lakeside	24 CT 5833
15	La Mesa	24 CT 5855
249	Lakeside	24 CT 5877
309	La Mesa	24 CT 5899
145	East County	24 CT 5921
296	Lakeside	24 CT 5943
239	El Cajon	24 CT 5964
191	El Cajon	24 CT 5986
179	La Mesa	24 CT 6008
178	La Mesa	25 CT 6030
137	La Mesa	25 CT 6052
291	El Cajon	25 CT 6074
314	Granite Hills	25 CT 6096
173	Santee	25 CT 6118
58	El Cajon (Granite Hills)	25 CT 6140
182	Rancho San Diego	25 CT 6162
41	Spring Valley	25 CT 6184
45	Santee	25 CT 6206
181	Lakeside	25 CT 6228
232	El Cajon	25 CT 6250
230	Alpine	26 CT 6272
76	Jamul	26 CT 6294
87	Lemon Grove	26 CT 6316
93	San Diego/Mt. Woodson	26 CT 6338
217	El Cajon	26 CT 6360
234	Santee	26 CT 6382
156	La Mesa	26 CT 6404
109	Lakeside	26 CT 6426

301	Boulevard	26 CT 6448
147	Jamul	26 CT 6470
169	Lakeside	26 CT 6492
311	Lakeside	27 CT 6514
189	Santee	27 CT 6536
228	Lakeside	27 CT 6558
251	La Mesa	27 CT 6580
28	El Cajon	27 CT 6602
160	La Mesa	27 CT 6624
120	El Cajon	27 CT 6646
276	El Cajon	27 CT 6668
124	El Cajon	27 CT 6690
64	El Cajon	27 CT 6712

CERTIFICATE OF COMPLIANCE

I certify that the accompanying non-redacted brief is double spaced, that a 13-point proportional font was used, and that there are 74,214 words in the brief.

Dated: November 18, 2014

Cliff Gardner

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 November 18, 2014 I served the within

APPELLANT'S OPENING BRIEF

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

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El Cajon, CA 92020

Office of the District Attorney
250 E. Main Street
El Cajon, CA 92020

I declare under penalty of perjury that the foregoing is true. Executed on November 18, 2014 in Berkeley, California.

Declarant