IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JAMES O'MALLEY, Appellant.	S024046 Santa Clara Case No. 131339-0

APPELLANT'S REPLY BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Santa Clara County

Honorable Hugh F. Mullin, III, Judge

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DEATH PENALTY

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I. THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

There were only two African-Americans called as prospective jurors in this case: Donald Carey and Richard Allen. (13 RT 2657-2659.) Mr. Carey's father was a police officer, he believed prosecutors were "trying to serve justice" and his major concern with the criminal justice system was that "[p]eople do terrible crimes and get off lightly." (13 Aug. CT 3069, 3071-3072.) Mr. Allen was himself a former police officer who served in the military, had no opposition to the death penalty and believed that crime was one of the nation's biggest problems. (11 Aug. CT 2465-2466, 2469, 2471, 2478 2480; 6 RT 1257.)

From the substance of their responses, then, both Mr. Carey and Mr. Allen seemed like excellent jurors for the prosecution. Yet the prosecutor used his very first peremptory challenge to discharge black prospective juror Carey. (13 RT 2651.) Moments later, the prosecutor used a peremptory challenge against black prospective juror Allen. (13 RT 2657.) On defense counsel's timely objection, the prosecutor was required to state his

reasons for discharging these seemingly prosecution-oriented jurors.

In his opening brief, Mr. O'Malley analyzed the prosecutor's stated reasons and contended the prosecutor's decision to strike these jurors required reversal. (Appellant's Opening Brief ("AOB") at 52-71.) As to Mr. Carey, the reasons the prosecutor stated were all either unsupported by the record or equally applicable to white jurors who were not discharged. (AOB 55-67.) As to Mr. Allen, while some of the stated reasons were both race-neutral and supported by the record, others were either inherently implausible or once again equally applicable to white jurors who were not discharged. (AOB 67-71.)

The state argues both jurors were properly discharged. This reply follows. As discussed in argument I-B, because each of the reasons given for discharging Mr. Carey was a pretext, the state did not rebut the prima facie showing of racial discrimination and reversal is required. As discussed in argument I-C, because several of the reasons given for discharging Mr. Allen were patently implausible and one was equally applicable to white jurors whom the prosecutor did not strike, the trial court had a duty to make a sincere inquiry into the discharge. Because the trial court did nothing of the sort, reversal is required for this reason as well.

B. The Prosecutor's Reasons For Discharging Prospective Juror Carey Were A Pretext For Discrimination.

The prosecutor discharged black prospective juror Donald Carey. The prosecutor gave three reasons for this challenge:

(1) "There were answers in his questionnaire that talked about that his father was a police officer back in the 60's. However, he recalled and spoke of the prejudice. He mentioned the license tag and so on." (13 RT 2658.)

(2) The prosecutor expressed concern with Mr. Carey's written answer (on the jury questionnaire) to question 58b. (13 RT 2659.) This question asked "how he felt about if somebody bragged about doing something, whether they could be punished – whether or not they actually did it." (13 RT 2659.) Mr. Carey "strongly disagreed" with this proposition.

(3) The prosecutor stated that he did not like Mr. Carey's answer to question 55j, which asked about the burden of proof. (13 RT 2659.)

As Mr. O'Malley explained in his opening brief, reason number (1) was entirely unsupported by the record, and reasons (2) and (3) were equally applicable to white jurors whom the prosecutor did not strike. (AOB 55-61.) Thus, none of these reasons support the discharge and reversal is required. (AOB 61-67.)

The state disagrees, arguing that the prosecutor did not improperly discharge Mr. Carey. The state concedes the prosecutor's reason (1) is indeed unsupported by the

record, but explains this was simply "an inaccurate recollection of the record" -- a "mistake" -- which does not support a finding of pretext. (RB 53-54.) The state cites *People v. Williams* (1997) 16 Cal.4th 153 to support this argument. (RB 53-54.) As to reasons (2) and (3), the state concedes Mr. Carey's responses to questions 58b and 55j were identical to white jurors who were not struck, but argues that Mr. Carey's responses to *other* questions -- none of which were mentioned by the prosecutor -- really explain why the prosecutor struck juror Mr. Carey. (RB 48-52.) The state cites no case law to support its position that where a prosecutor has affirmatively given reasons why he struck a minority juror, the state may defend the striking of that juror years later by relying on reasons which the prosecutor did *not* give. The state's arguments must be rejected.

1. Respondent concedes that one of the prosecutor's three reasons was unsupported by the trial record and supports an inference of pretext.

First things first. As noted above, in explaining why he struck Mr. Carey, the prosecutor said "[t]here were answers in his questionnaire that talked about that his father was a police officer back in the 60's. However, he recalled and spoke of the prejudice." (13 RT 2658.) In fact, Mr. Carey said nothing about prejudice in either his jury

questionnaire or his actual voir dire. (13 Aug. CT 3059-3084; 6 RT 1331-1337.)[1]

The state does not dispute this. (RB 53.) Nor does the state dispute that where a prosecutor gives reasons for excusing a minority juror which are unsupported by the record, this points towards a finding the discharge was a pretext for discrimination. (*See, e.g.*, *People v. Silva* (2001) 25 Cal.4th 345, 385; *People v. Turner* (1986) 42 Cal.3d 711, 723. *See also Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 279; *McLain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1221; *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 651; *Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1330-1331) Here, the state concedes one of the prosecutor's three reasons for discharging Mr. Carey was unsupported by the

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[1] This stated reason was not simply unsupported by the record. On its face, this reason was directly related to race. As noted, the prosecutor's invented reason was that Mr. Carey had "recalled and spoke of the prejudice." (13 RT 2658.) The prosecutor necessarily believed the prejudice that Mr. Carey "recalled and spoke of" had caused an anti-government position, at least as far as law enforcement was concerned. Otherwise, of course, there would have been no reason for the prosecutor to discharge Mr. Carey from jury service in this criminal case by relying on this reason. Inventing a reason to strike an otherwise qualified black man from a criminal jury, where the reason is not only unsupported by the record but where it also assumes the black man has an anti-law enforcement bias because of racial prejudice he presumably suffered, is hardly race-neutral.

record; pursuant to *Silva* and *Turner* this points towards a finding of pretext.[2]

2. Mr. Carey's response to question 58b was identical to white jurors who were not discharged and supports an inference of pretext.

The prosecutor's reliance on a fact completely unsupported by the record is not the only factor pointing towards a finding of pretext. As the Supreme Court has concluded, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an

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[2] Although respondent does not dispute the basic legal principles of *Silva* and *Turner*, holding that reliance on a reason unsupported by the record is evidence of pretext, in point of fact respondent simply ignores this case law. Instead, respondent relies on this Court's decision in *People v. Williams*, *supra*, 16 Cal.4th 153. But *Williams* does not address this issue at all.

In *Williams*, defendant was charged with capital murder. During voir dire the prosecutor struck black prospective juror Mary Smith. After the defense made a *Batson* motion, the prosecutor forthrightly conceded he had made a mistake in striking Ms. Smith and offered to "put her back on the panel" if the defense would agree. (16 Cal.4th at p. 188.) Under these facts, this Court held that that prosecutor's mistake was not a pretext for racial discrimination. (*Id.* at pp. 188-189.)

This case does not involve a prosecutor's forthright concession that he made a mistake in discharging a particular prospective juror, and an offer to put the discharged juror back on the panel. Instead, and unlike *Williams*, this case involves a prosecutor explicitly defending a discharge, and giving reasons which are unsupported by the trial record on which he purports to rely. Respondent's argument that the *Williams* "confession-of-mistake doctrine" also applies when prosecutors do *not* admit to a mistake, but instead defend the discharge of a black juror by giving reasons totally unsupported by the record is simply an implicit invitation to overrule *Silva* and *Turner* and depart from cases like *Riley*, *McLain*, *Caldwell* and *Johnson*. The invitation should be declined.

otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.) That is just what the record shows here.

Curiously, although *Miller-El* is the Supreme Court's most important case on comparative juror analysis, it is not even cited in the state's discussion at all. (RB 43-57.) The omission is glaring, given that the prosecutor's second proffered reason for discharging Mr. Carey was his written answer to question 58b. In fact, this stated reason "applies just as well to . . . otherwise-similar nonblack[s] who [were] permitted to serve . . ." (*Miller-El*, *supra*, 545 U.S. at p. 241.)

As noted above, question 58b asked prospective jurors to what extent they agreed that "if someone brags about doing something wrong, he should be punished -- whether or not he actually did it." (13 Aug. CT 3076.) Not surprisingly, Mr. Carey indicated he "strongly disagreed" with this statement. (13 Aug. CT 3076.) He explained in a single sentence that "someone could be joking around." (13 Aug. CT 3976.)

Of course, one would hope that every single prospective juror in the state of California would "strongly disagree" that a defendant should be punished for a crime he did not commit simply because he bragged about it. Here, as Mr. O'Malley explained in

his opening brief and as respondent concedes, Mr. Carey's "strongly disagree" answer to question 58b was *identical* to the answers of 12 of 16 jurors who were actually seated. (AOB 59; 26 CT 5790, 5816, 5842, 5894, 5920, 5946, 5972, 6050; 27 CT 6076, 6102, 6154, 6180.) And the short written explanation Mr. Carey gave that someone "could be joking around" was for all intents and purposes identical to the written explanations given by two of these 12 white jurors who were seated. (*Compare* 26 CT 5816 ["bragging is just talking, not committing a crime"]; 26 CT 6050 ["[p]eople say a lot of things that they don't often mean or to show off to others"].)

Confronted with this stark evidence, respondent makes two arguments. Respondent divides the set of 12 jurors who gave the same answer into two distinct groups: (1) the 10 jurors who answered question 58b identically to Mr. Carey but did not give a short explanation for their answer and (2) the two jurors who answered question 58b identically to Mr. Carey and gave a short explanation which was also identical to Mr. Carey's explanation. Respondent offers a different defense to each of these groups.

As to 10 of the 12 jurors who gave the identical "strongly disagree" response, respondent defends the prosecutor's decision to strike black prospective juror Carey by arguing that Mr. Carey was "not similarly situated" to these 10 jurors. (RB 49.) Respondent argues that although Mr. Carey's actual answer to question 58b was the same,

he explained his answer while they did not. (RB 49.) According to respondent, this proves that Mr. Carey "had more than a passing interest" in this issue and "account[s] for the prosecutor's" decision to strike Mr. Carey. (RB 49.)

The argument need not long detain the Court. The one-sentence explanation Mr. Carey provided added nothing of substance to the answer he had already given. With all due respect, the argument that Mr. Carey's one-sentence explanation for his answer to question 58b renders him "not similarly situated" to the10 white jurors who gave an identical answer to this question is made not by relying on binding authority from the United States Supreme Court -- *Miller-El* -- but by ignoring it completely:

> "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . . A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, n.6.)

In short, under *Miller-El* the prosecutor's decision to strike Mr. Carey by relying on an answer to question 58b which was identical to the answer given by 10 white jurors who the prosecutor did not strike is additional evidence of pretext.

Which brings us to respondent's position regarding the two white jurors who not

only gave identical answers to question 58b, but who gave a short explanation as well. As to these jurors, of course, respondent cannot repeat its argument that Mr. Carey was not similarly to because he gave a one-sentence explanation for his answer. Both seated jurors Rosco and Snedeker also gave a short and very similar explanation for their identical answer. Accordingly, as to these jurors, respondent shifts gears and argues they are "not similarly situated" to Mr. Carey because his answers to "the questions regarding the death penalty" were different from theirs. (RB 50.) Questions 60 through 70 of the jury questionnaire related to the death penalty. (13 Aug. CT 3077.)

As an initial matter, the state's argument depends on a factual predicate that is largely mistaken. The record does not support respondent's suggestion that the answers given by jurors Rosco and Snedeker as to the death penalty were different from those given by Mr. Carey.

For example, as to seated white juror Linda Rosco, respondent argues her answers on questions 60 and 61 were different from those given by Mr. Carey. (RB 50.) The following chart shows the question number, the question itself, and the answers of juror Rosco and Mr. Carey:

#	Text of Question	Answer by Juror Rosco	Answer by prospective juror Carey
60	"What are your general feelings regarding the death penalty?"	"In some cases, when the defendant is proved definitely guilty, I think it should happen." (26 CT 5818.)	"I feel it is fair according to the case in which it is involved." (13 Aug.
61	"How do you feel about the adage: 'An eye for an eye.'"	"I don't believe in it." (26 CT 5818.)	"It is not one that I live by." (13 Aug. CT 3078.)

As to juror Snedeker, the state relies on her answers to questions 35, 36 and 42 and argues she was unlike Mr. Carey because her father was a district attorney for 17 years and she therefore had close ties to law enforcement. (RB 51. *See* 26 CT 6043-6044.) In fact, however, as Mr. Carey's answers to these same questions show, Mr. Carey had equally strong ties to law enforcement -- his father was a police officer for 30 years. (13 Aug. CT 3069.) If there is a distinction here, it is certainly one without a difference.

In short, respondent's attempt to rely on other questions to distinguish Mr. Carey from jurors Rosco and Snedeker in some meaningful way is without merit. Ultimately, however, this is not even the real problem with the state's position.

Even if the record supported the state's position that as to other questions in the 81-question questionnaire there were differences between Mr. Carey and these other

jurors, respondent's position would still have to be rejected as a legal matter. Respondent's position is directly contrary to the language and spirit of the Supreme Court decision in *Miller-El* in at least two separate respects.

First, the record shows -- and the state now concedes -- that Mr. Carey's actual answer to question 58b was identical to the answers of 12 white jurors who were not discharged, and his short, one-sentence explanation was identical to explanations given by two of these jurors as well. That is all that is required for an inference of pretext. As noted above, the Supreme Court has *explicitly* rejected the notion that comparative juror analysis requires the white and non-white juror to be "identical in all respects." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, n.6.) Once again, respondent simply ignores *Miller-El*.

Significantly, the facts of *Miller-El* show that the Supreme Court was faced with -- and rejected -- the *identical* argument respondent makes here. There, defendant contended the prosecutor had improperly discharged black jurors Billy Fields and Joe Warren. (545 U.S. at pp. 242, 247.) The trial prosecutor explained these discharges, relying on (1) Mr. Fields's specific answers to a question regarding rehabilitation and (2) Mr. Warren's specific answer to a question on what the death penalty accomplished. (545 U.S. at p. 243 [Fields] and 247-248 [Warren].) On appeal, the defense relied on the

fact that numerous seated white jurors had given identical responses to these questions. (545 U.S. at pp. 244-245 [Fields] and 248 [Warren].) In its briefing, the state made the same argument the state makes here, arguing that the white jurors identified by the defense were not similarly situated to the discharged black jurors because -- as to other questions on which the prosecutor did not rely -- the discharged jurors gave different answers than the white jurors. (*Miller-El v. Dretke*, 03-9659, Brief for Respondent at pp. 19-20 [Fields] and 22 [Warren], 2004 WL 2446199 at *11-17 .) As noted above, the Supreme Court rejected this argument, acknowledging that there were "some differences" between the discharged jurors and the white seated jurors and recognizing the practical reality that no two jurors would ever be "identical in all respects" because "potential jurors are not products of a set of cookie cutters." (545 U.S. at p. 247, n.6.)

Respondent does not address this aspect of *Miller-El*. Courts around the country, however, have recognized their obligation to follow *Miller-El*; the notion that jurors must be identical before an inference of pretext may be drawn had been consistently rejected. (*See, e.g., Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 376; *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 927 n.3; *United States v. Torres-Ramos* (6th Cir. 2008) 536 F.3d 542, 559; *United States v. Williamson* (5th Cir. 2008) 533 F.3d 269, 274 n.14; *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1030, n.3; *United States v. Odeneal* (6th Cir. 2008) 517 F.3d 406, 420; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 366.) It should

be rejected here as well.

Second, the fact of the matter is that the prosecutor here said he discharged Mr. Carey because of his answer to question 58b. The prosecutor did not rely on Mr. Carey's answers to questions 35, 36, 41, 60 or 61. It is only now, 18 years after trial, that the state's appellate attorneys have come forward to justify the prosecutor's discharge of Mr. Carey because of his answers to these other questions.

As discussed above, as a factual matter the state is wrong that these answers serve to differentiate Mr. Carey from the white jurors seated in the case. But even if the record supported the state's argument, it would have to be rejected. When a prosecutor has given a reason for discharging a minority juror, the *Batson* analysis "stand[s] or fall[s] on the plausibility of the reasons he gives." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) If the "stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, [or a state's appellate advocate] can imagine a reason that might not have been shown up as false." (*Ibid.*) Yet again the state is simply ignoring *Miller-El*. (*See also Green v. Lamarque*, *supra*, 532 F.3d at p. 1030; *People v. Lenix* (2008) 44 Cal.4th 602, 625 ["efforts by a trial or reviewing court to 'substitute' a reason will not satisfy the prosecutor's burden of stating a racially-neutral explanation."].)

In short, a comparative juror analysis shows that the answer Mr. Carey gave to question 58b was identical to numerous white jurors whom the prosecutor did not discharge from jury service. Under *Miller-El*, this gives rise to an inference of pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

3. Mr. Carey's response to question 55j was identical to white jurors who were not discharged and supports another inference of pretext.

As discussed above, there is an inference of pretext which arises from the prosecutor's invented claim that Mr. Carey "recalled and spoke of the prejudice." There is an additional inference of pretext which arises from the comparative juror analysis performed in connection with the prosecutor's stated reliance on question 58b. But this does not end the pretext analysis. Once again there is more.

As noted above, the third reason offered by the prosecutor to justify his challenge to Mr. Carey was that he did not like Mr. Carey's answer to question 55j. (13 RT 2659.) This question asked whether jurors agreed that the state had to prove its case beyond all doubt, not just beyond a reasonable doubt. (13 Aug. CT 3075.)

Two white jurors -- Rellamas and Sherrell -- "strongly agreed" with this proposition. (26 CT 5867, 5945.) The prosecutor questioned them both during voir dire

and received assurances from each that they would follow the law as given by the trial court. (5 RT 1039-1041; 6 RT 1153-1154.) The prosecutor did not discharge either of these white jurors.

Mr. Carey "somewhat agreed" with this proposition. (13 Aug. CT 3075.) Again the prosecutor questioned him during voir dire and received an assurance he would follow the law as given by the trial court. (6 RT 1336.) The prosecutor discharged Mr. Carey, and justified his action by relying on Mr. Carey's answer to this question. (13 RT 2659.)

The state takes the same approach here that it took in connection with Mr. Carey's answer to question 58b. Searching the 22-page, 81-question juror questionnaire for differences between the answers of Mr. Carey and those of Rellamas and Sherrell, the state identifies several differences it now argues explain why Mr. Carey was really discharged.

For example, as to juror Rellamas, the state notes that Mr. Carey's responses to questions 57a and 58c were different. (RB 52.) As to juror Sherrell, the state notes that Mr. Carey's responses on questions 63 and 66 were different. (RB 52.) The state argues that these differences mean Mr. Carey was "not similarly situated" to these seated white jurors. (RB 53.) As discussed in detail above, the claim is foreclosed by *Miller-El*: not

only is absolute identity *not* required for comparative juror analysis under *Miller-El*, but the state may not rely on justifications which the prosecutor himself did not offer. (545 U.S. at p. 247, n.6, 252.)

In addition to ignoring *Miller-El*, the state's position suffers from what is perhaps an even more basic flaw. Analyzed in context, the answers to these other questions support yet another inference of discrimination. This may be why the prosecutor himself elected not to rely on answers to any of the questions the state now identifies.

As to juror Rellamas, for example, the state argues that Mr. Carey's answers to questions 57a and 58c show he was not similarly situated to juror Rellamas. Question 57a asked what "comes to your mind when you think of tattoos?" (26 CT 6180.) Question 58c asked whether prospective jurors agreed that motorcycle club members "tend to be very violent." (26 CT 6181.) Juror Rellamas said (1) he thought of "rough people" when he thought of tattoos and (2) he "strongly agreed" that motorcycle club members tend to be violent. (RB 52.) In contrast, respondent explains that Mr. Carey did not react the same way to tattoos and only "somewhat agreed" with the proposition that motorcycle club members are violent. (RB 52.) According to respondent, these are the fundamental differences that explain the real reason why the prosecutor struck black prospective juror Carey but kept white juror Rellamas. (RB 52.)

But not only does this newly minted explanation for the prosecutor's discharge not aid the state's case, it affirmatively supports an inference of pretext. Of the 16 white jurors seated in the case including juror Rellamas, only two (including Rellamas) "strongly agreed" that members of motorcycle clubs were violent. (26 CT 5869, 6051.) Three gave the identical answer that Mr. Carey gave, "somewhat agree[ing]" with this proposition. (26 CT 5843; 27 CT 6077, 6181.) The remaining 11 seated white jurors all gave an answer to this question that was *less* prosecution oriented than Mr. Carey's "somewhat agree" answer. (26 CT 5791, 5817, 5895, 5921, 5947, 5973, 5999, 6025; 27 CT 6103, 6129, 6155.) Yet while the three white jurors who gave the *identical* answer to question 58c as Mr. Carey were seated, and the 11 white jurors who gave a *less* prosecution-friendly answer to this question were also seated, Mr. Carey alone was discharged. Far from aiding the state's case, the focus on question 58c affirmatively supports a finding of pretext. Perhaps this is why the prosecutor himself did not defend his discharge of Mr. Carey by relying on answers to this question.

The same conclusion results from an analysis of the state's new focus on question 57a, the tattoo question. Mr. Carey did not make a negative association with tattoos. Juror Rellamas wrote that she associated tattoos with "rough people." (26 CT 5868.) Significantly, however, of the 16 seated white jurors, only four (including Rellamas) had a negative association of people with tattoos. (26 CT 5816, 5868, 6102, 6154.) The

remaining 12 seated white jurors gave answers which, like Mr. Carey, made no such connection at all. (26 CT 5790, 5842, 5894, 5920, 5946, 5972, 5998, 6024, 6050; 27 CT 6076, 6128, 6180.) Yet in contrast to black prospective juror Carey, none of these seated white jurors were discharged because they lacked a negative view as to tattoos.[3]

In sum, a comparative juror analysis shows that the answer Mr. Carey gave to question 55j was identical to numerous white jurors who the prosecutor did not discharge from jury service. Pursuant to *Miller-El*, this gives rise to an inference of pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.) The state's attempt to distinguish Mr. Carey from these similarly situated white jurors not only violates the legal principles set

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[3] As to juror Sherrell, the state argues that she was "not similarly situated" to Mr. Carey chiefly because her answers to questions 63 and 66 show that Sherrell believed the death penalty (1) was not used often enough and (2) should be mandatory. (RB 52.) In contrast, Mr. Carey (1) stated he did not know a great deal about the death penalty and (2) believed the death penalty should not be mandatory. (RB 52.)

Once again, however, an analysis of this newly minted justification affirmatively supports an inference of pretext. Of the 16 white jurors seated in the case, 15 of them agreed with Mr. Carey that the death penalty should *not* be mandatory. (26 CT 5793, 5819, 5845, 5871, 5897, 5923, 5975, 6001, 6027, 6053; 27 CT 6079, 6105, 6131, 6157, 6183.) Eight agreed with him that they did not know whether the death penalty was used too often or too seldom. (26 CT 5792, 5818, 5922, 5974, 6052; 27 CT 6078, 6130, 6156.) Yet once again in contrast to black prospective juror Carey, none of these white jurors were discharged for their views on these subjects which the state now argues were critical to the prosecutor's decision-making process. Again, this may explain why the prosecutor himself never sought to justify his decision to strike Mr. Carey based on these answers.

forth in *Miller-El*, but is largely unsupported by the record.[4]

4. Summary: the evidence of pretext as to the prosecutor's discharge of Mr. Carey requires reversal.

The prosecutor stated three reasons for discharging Mr. Carey. One of these

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[4] In excusing Mr. Carey, the prosecutor also noted he was "married [with] three kids [and] renting." (13 RT 2658.) In his opening brief, Mr. O'Malley noted that Mr. Carey shared these characteristics with numerous white jurors who were seated. (AOB 57.)

Respondent does not dispute this. Instead, respondent "disagrees with appellant's characterization" and argues the prosecutor was not using these criteria to justify discharging Mr. Carey, but simply to ensure that he and the trial court had identified the same juror and were "on the same page" as to which juror was being discussed. (RB 53.)

Respondent's position would normally be quite logical. The problem is that reviewed in context, this could not have been the real purpose for the prosecutor's decision to mention these criteria. Here is why.

When the prosecutor turned to discuss his discharge of prospective juror Allen, he noted that Mr. Allen was a renter and added "as I indicated, the other juror [juror Carey] is a renter." (13 RT 2659.) If (as respondent now suggests) the real purpose for identifying the home-ownership status of Mr. Carey was to ensure that all parties were discussing the same juror, there would have been no reason at all for the prosecutor to re-emphasize that "as I indicated, the other juror is a renter." After all, at that point, juror Carey had already been identified. Taken in context, the prosecutor's emphasis on the home-ownership status of juror Carey after he had already been identified and discussed shows that this was -- in fact -- a criteria used to justify the discharge, not to identify the juror.

In any event, it is clear respondent no longer justifies Mr. Carey's discharge based on rental or marital status. (RB 53.) Thus, regardless of how the record is viewed in connection with the prosecutor's intent, this factor is no longer being used to justify the discharge of Mr. Carey.

reasons was unsupported by the record, and the remaining two were equally applicable to white jurors who were not struck. None of these reasons remain to justify the discharge of Mr. Carey, and all support a finding of pretext.

But even this is not all. The United States Supreme Court, as well as other courts around the country, have consistently recognized that where a prosecutor discharges a black prospective juror who would otherwise be considered a juror favorable to the prosecution, that too is an important factor in demonstrating pretext. (*See, e.g., Miller El, supra*, 545 U.S. at p. 232; *People v. Allen* (2004) 115 Cal.App.4th 542, 550; *Reed v. Quarterman, supra*, 555 F.3d at p. 376; *Kesser v. Cambra, supra*, 465 F.3d at p. 371.) Here, Mr. Carey's father was a police officer, Mr. Carey thought prosecutors tried "to serve justice" and the major problem with the criminal justice system was that "[p]eople do terrible crimes and get off lightly." (13 Aug. CT 3069, 3071-3072.)

But these were not the only reasons he would have been a good prosecution juror. Mr. Carey identified "crime" as one of the greatest problems facing the nation. (13 Aug. CT 3071.) He would not require the defendant to admit guilt in order to convict, and he strongly agreed that a conviction was possible even in the face of a denial of guilt. (13 Aug. CT 3075.) He was one of the few prospective jurors who actually agreed that members of motorcycle clubs tended to be "very violent," a critical part of the state's

theory in this case. (13 Aug. CT 3077.) He felt the death penalty was "fair" and agreed that where there was more than one murder -- another central feature of the state's case here -- the death penalty was appropriate. (13 Aug. CT 3078-3079.)

In short, from any objective viewpoint, Mr. Carey was an excellent juror for the prosecution. Indeed, respondent itself concedes that because this case involved an allegation that Mr. O'Malley was a white supremacist, "African-American jurors would be beneficial to the prosecution in this case . . . ." (RB 54.) As the case law recognizes, the prosecutor's decision to discharge such a juror is yet more evidence of pretext. (*See People v. Allen*, *supra*, 115 Cal.App.4th at p. 550; *Reed v. Quarterman*, *supra*, 555 F.3d at p. 376; *Kesser v. Cambra*, *supra*, 465 F.3d at p. 371.) Reversal is required.

C. The Prosecutor's Reasons For Discharging Prospective Juror Allen Were A Pretext For Discrimination.

The prosecutor discharged black prospective juror Richard Allen. The prosecutor gave five reasons for this challenge:

(1) The prosecutor noted Mr. Allen, like Mr. Carey, "is a renter." (13 RT 2659.)

(2) The prosecutor noted that Mr. Allen's answer to question 11 of the questionnaire showed a "lack of knowledge or something about certain

circumstances regarding his children." (13 RT 2659.)

(3) The prosecutor did not like that Mr. Allen listed as a hobby in answer to question 18 that he was an amateur magician. (13 RT 2659-2660.)

(4) The prosecutor believed the voir dire showed that Mr. Allen would "require [a] burden of proof over and above what the law required." (13 RT 2660.)

(5) Finally, the prosecutor believed that "in terms of the death penalty he was somewhat equivocal." (13 RT 2660.)

As Mr. O'Malley explained in his opening brief, several o these reasons are on their face both race-neutral and supported by the record. As he also explained, however, reason number (1) was equally applicable to other white jurors whom the prosecutor did not strike. (AOB 69.) And reason number (3) was inherently implausible. (AOB 69-70.) Moreover, although reason (2) expresses concern with Mr. Allen's answers to question 11, and reason (3) expressed concern about Mr. Allen's answer to question 18, during voir dire the prosecutor did not ask Mr. Allen about either of these apparently critical areas. (6 RT 1258-1261, 1263-1264. *See Miller-El*, *supra*, 545 U.S. at p. 246 [where a prosecutor asserts he is concerned about a particular characteristic in a discharged juror but fails to engage in meaningful voir dire on that subject, his failure to question the juror is evidence of pretext].) Based on the presence of plausible and implausible reasons for the discharge, in his opening brief Mr. O'Malley contended the trial court was required to perform a further inquiry to determine whether the stated reasons were a pretext for discrimination. (AOB 69-71, *citing Purkett v. Elem* (1995) 514 U.S. 765, 768 and *People*

v. Silva, *supra*, 25 Cal.4th at p. 386.) The failure to do so here requires reversal.

Respondent disagrees for two main reasons. Respondent does not dispute that many of the white jurors seated in the case were renters, just like Mr. Allen. (RB 57.) Instead, respondent argues that Mr. Allen was not similarly situated to the white renters seated as jurors because he was the only one who listed magic as a hobby. (RB 57.) Second, respondent argues that the prosecutor's reliance on magic as a hobby was not a pretext for discrimination because "even trivial reasons" are sufficient so long as they are race-neutral. (RB 56, citing *People v. Arias* (1996) 13 Cal.4th 92, 136.)

Mr. O'Malley will start with a point not in dispute. In *Miller-El*, the Supreme Court held that the state's failure to question a prospective juror on an area it later alleged was critical to the discharge decision is evidence of pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246. *Accord Reed v. Quarterman*, *supra*, 555 F.3d at p. 376; *Green v. LaMarque*, *supra*, 532 F.3d at p. 1033.) Here, although the prosecutor said Mr. Allen's answers to questions 11 and 18 -- reasons (2) and (3) above -- were critical to the discharge decision, he asked no questions in either of these areas. (6 RT 1258-1261, 1263-1264.) Pursuant to *Miller-El* and its progeny, this supports an inference of pretext. Respondent does not dispute this.

The prosecutor's reliance on Mr. Allen's status as a renter, a status shared by many of the seated jurors, also supports an inference of pretext. (26 CT 5775, 5853, 6009; 27 CT 6061, 6165. *See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.) As discussed in some detail above, the state's argument that there is no absolute identity between Mr. Allen and these other jurors because they were not amateur magicians was squarely rejected in *Miller-El* itself. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, n.6.)

Finally, respondent's argument that even trivial reasons unrelated to the case at hand can survive a step three inquiry under *Batson* is simply wrong as a matter of law. The Supreme Court has made this quite clear.

After a trial court has found a prima facie case of discrimination (the first step of the *Batson* inquiry), the prosecution must articulate a race neutral reason for the discharge (step two). At stage three of the *Batson* framework, the trial court must determine whether the stated reasons were a pretext for discrimination. Contrary to the state's position here, at the third step of the *Batson* inquiry trivial reasons which are implausible and unrelated to the case will *not* support a discharge even if they are race neutral. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768 ["[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."]; *Batson v. Kentucky* (1986) 498 U.S. 79, 98 [holding that for reasons to be valid, they "must be

related to the particular case to be tried."]; *Kesser v. Cambra*, *supra*, 465 F.3d at p. 359.)

Not surprisingly, this Court has reached the identical result. When a prosecutor has stated reasons for a strike that are inherently implausible, the trial court "should be suspicious" and should make an inquiry by "point[ing] out inconsistencies" and asking "probing questions." (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

Here, there is no dispute that Mr. Allen's hobby as a magician is completely unrelated "to the particular case to be tried." (*Batson v. Kentucky*, *supra*, 498 U.S. at p. 98.) Considered either by itself, or in conjunction with the prosecutor's failure to ask any questions at all about two areas he later contended were critical to the discharge decision (questions 11 and 18) and his reliance on Mr. Allen's status as a renter, the trial court was obligated to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation." (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.) Instead, the trial court here made no inquiry at all, pointed out no inconsistencies, asked no probing questions and simply denied the *Batson* motion.

In urging a contrary result, the state cites *People v. Arias*, *supra*, 13 Cal.4th at p. 136. (RB 56.) According to respondent, *Arias* stands for the proposition that "even trivial reasons [may] justify the use of a peremptory challenge." (RB 56.)

To the extent respondent is suggesting that at the third step of the *Batson* analysis, implausible reasons which are completely unrelated to the case at hand can justify striking a minority juror, respondent has simply mis-read *Arias*. In fact, *Arias* itself specifically held that when a prosecutor provides reasons for striking a minority juror, although the reasons may be trivial they must nevertheless "relate[] to the particular case being tried." (13 Cal.4th at p. 136.) Indeed, the requirement that reasons have some relationship to the case has long been the law, both in the United States Supreme Court and this Court as well. (*See, e.g., Batson v. Kentucky, supra*, 498 U.S. at p. 98 [a prosecutor's reasons "must be related to the particular case to be tried."]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216 [*Batson* requires a "neutral explanation related to the particular case to be tried."]; *People v. Hall* (1983) 35 Cal.3d 161, 167 [prosecutor's reasons must be "reasonably relevant to the particular case on trial or its parties or witnesses . . . ."]; *People v. Wheeler* (1976) 22 Cal.3d 258, 282 [same].)

Here, the state has never suggested how Mr. Allen's hobby as a magician was "reasonably relevant to the particular case on trial or its parties or witnesses." The reality is that although Mr. Allen's interest in magic is certainly race-neutral, it had nothing at all to do with this case and is properly viewed as a pretext for discrimination. If step three of the *Batson* inquiry can be satisfied by presentation of a race-neutral reason completely unrelated to the case being tried, then *Batson* is reduced to "a mere exercise in thinking

up" race-neutral reasons. (*Miller-El*, *supra*, 545 U.S. at p. 252.) Reversal is required.

II. THE TRIAL COURT'S IMPROPER EXCLUSION OF PROSPECTIVE JUROR NISHIURA REQUIRES A NEW TRIAL.

Prospective juror Kumiko Nishiura was questioned on Monday, April 1, 1991. (4 RT 923.) After questioning by both sides, the trial court denied the prosecutor's for-cause challenge to Mrs. Nishiura, finding that "she would to the best of her ability follow the Court's instructions on the law." (4 RT 950.) Angry at the ruling, Mrs. Nishiura "slammed the door" and marched out of the courtroom. (5 RT 972.)

The next day, Mrs. Nishiura telephoned the court, complained about sitting as a juror and asked to be removed because it would be "stressful." (5 RT 972.) The court now switched gears and found this was sufficient to discharge her. (5 RT 983-974.) The court conceded that it was not discharging her because of her views on the death penalty, but only because of "her feelings." (5 RT 974-975.)

At the prosecutor's request, the trial court had Mrs. Nishiura return to court several days later. After she explained that three nights earlier she had had a difficult night sleeping (6 RT 1294-1296), the trial court reiterated its earlier finding and concluded that "the juror's emotional state would prevent her or substantially impair her performance and duty as a juror in accordance with the instructions and oath." (6 RT 1297.)

In his opening brief, Mr. O'Malley contended the state had failed to carry its burden of showing that Mrs. Nishiura would have been unable to follow the court's instructions and her oath as a juror. (AOB 72-80.) Because the trial court's ruling resulted in the discharge of a fully qualified juror, reversal was required. (AOB 81-83.)

Respondent does not dispute that if the trial court improperly discharged Mrs. Nishiura, reversal is required. (RB 57-69.) Instead, for two reasons respondent argues that the trial court properly discharged Mrs. Nishiura. According to respondent, "the trial court properly found that Mrs. Nishiura's emotions would substantially impair her ability to serve as an impartial juror." (RB 65.) Next, respondent argues that the trial court also properly found that jury service would have been detrimental to Mrs. Nishiura's well-being. (RB 67-69.)

We can start with three points of agreement. First, a juror may not be challenged for cause unless her views would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45. *See* RB 64.) Second, if the state seeks to exclude a juror for cause, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.) And third, a trial court's ruling will be upheld on appeal only when supported by "substantial evidence." (*People v. Schmeck*

(2005) 37 Cal.4th 240, 262.)

Here, respondent argues that substantial evidence supports the trial court's conclusion "that Mrs. Nishiura's emotions would substantially impair her ability to serve as an impartial juror." (RB 65.) Respondent is wrong.

The trial court had initially *denied* the state's for-cause challenge to Mrs. Nishiura, explicitly finding that she would follow the law. (4 RT 950.) When Mrs. Nishiura returned for more questioning, the court did not ask a single additional question about whether her emotions would prevent her from following the law. (6 RT 1295-1296.) Nevertheless the trial court then found that her emotions would prevent her from following the law. (6 RT 1296-1297.) Quite simply, there was no evidence at all from Mrs. Nishiura which supported this conclusion.

In urging a contrary result, respondent relies a great deal on Mrs. Nishiura's questionnaire and her initial voir dire. (RB 65.) But based on this same information, the trial court found that Mrs. Nishiura *could* serve as a juror and follow the law. (4 RT 950.) And while respondent accurately notes that Mrs. Nishiura had what she herself described as a "rather restless Monday night" after the court initially refused to excuse her, and was plainly stressed about having to serve as a juror in a capital case (RB 65), the fact of the

matter is that such evidence was not a sufficient basis to excuse her from sitting. 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. *See Witherspoon v. Illinois* (1968) 391 U.S. 510, 515 ["'The 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.'"].)

Nor was there substantial evidence to support the trial court's finding that jury service "would be detrimental to Mrs. Nishiura's . . . well-being . . . ." (RB 67.) In order to ensure these kind of discharges are premised on a solid foundation, this Court has made clear the type of evidence necessary to sustain a discharge on this ground:

> "[The prospective juror] must explain in his own words why he would expect such a reaction. If he sets forth reasons based on his background and medical history, and these reasons are deemed persuasive, the court can dismiss him for cause . . . ." (*People v. Bradford* (1969) 70 Cal.2d 333, 346.)

In applying this rule in *Bradford*, the Court held that a statement from a potential juror that she would be "very nervous" in voting for death, along with the juror's declaration

that "the physical effect [of a guilty verdict] might be too great" was an insufficient basis to sustain a discharge. (*Id.* at pp. 346-347.)

Respondent argues that this case is distinguishable from *Bradford* because here we have a statement from Mrs. Nishiura that she had "a rather restless Monday night" (RB 63) and because her voice shook when she was talking about serving as a juror. But the fact of the matter is that even Mrs. Nishiura did not indicate she had had another "restless night" in the several days since the court had refused to excuse her, and the record shows she neither "set forth reasons based on [her] background" nor "set[] forth reasons based on [her] . . . medical history" as *Bradford* requires. With respect, if a single "restless night" and a shaky voice are enough to avoid jury service on capital cases -- the type of cases both this and the United States Supreme Court have properly recognized always involve emotional issues -- the Court should just overrule *Bradford* and be done with it. If not, reversal is required.

III. THE TRIAL COURT'S FAILURE TO INSTRUCT ON ASSAULT AS A LESSER TO THE ROBBERY CHARGED IN COUNT THREE REQUIRES REVERSAL OF THE COUNT THREE ROBBERY CONVICTION, THE COUNT FOUR MURDER CONVICTION AND THE ROBBERY SPECIAL CIRCUMSTANCE FINDING.

Count three of the amended information charged Mr. O'Malley with robbery of Herbert Parr "by force and fear." (24 CT 5216.) Count four charged the murder of Parr, along with a robbery special circumstance; one theory of murder was felony murder based on the count three robbery. (25 CT 5217, 5628-5629, 5634.)

At trial, the defense presented significant evidence showing that at the time of the alleged robbery, Mr. O'Malley was intoxicated by drugs and alcohol. (26 RT 5528; 40 RT 8400-8402.) After hearing this evidence, the trial court instructed the jury it could acquit of robbery if it found Mr. O'Malley did not harbor the requisite intent to steal needed for robbery because of the intoxication. (25 CT 5671.)

Of course, this instruction put the jury in an all-or-nothing position with respect to the robbery charge. The jury would have to either acquit Mr. O'Malley entirely or convict. In his opening brief, Mr. O'Malley contended that reversal of the robbery count was required because the trial court failed to instruct the jury it could convict of the lesser included offense of assault if it concluded that intoxication negated the specific intent

needed for robbery. (AOB 110-121.) In addition, he contended that reversal of the count three robbery also required reversal of the count four first-degree murder conviction (because one theory on which the jury was authorized to return a guilty verdict of first-degree murder was felony-murder based on robbery) and the robbery special circumstance associated with count four. (AOB 122.) In making this argument, Mr. O'Malley conceded that assault was *not* a lesser included offense to robbery under the statutory definition test for lesser included offenses. (AOB 114-115.) Instead, he contended that in light of the language of the accusatory pleading here -- where the state did not simply repeat the language of the robbery statute -- assault *was* a lesser included offense under the accusatory pleading test applied in such cases as *People v. Barrick* (1982) 33 Cal.3d 115. (AOB 112-115.) Mr. O'Malley noted that in several cases this Court recognized the issue and assumed without deciding that assault could be a lesser offense to robbery under the accusatory pleading test. (AOB 115, n.16, *citing People v. Sakarias* (2000) 22 Cal.4th 596, 622, n.4 and *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127. *See also People v. Parson* (2008) 44 Cal.4th 332, 351.)

Respondent disagrees with appellant for four reasons. First, respondent argues that defense counsel invited the error. (RB 86.) Second, relying on *People v. Wright* (1996) 52 Cal.App.4th 203, respondent argues that even under the accusatory pleading test assault is not a lesser included offense to robbery. (RB 87-90.) Third, taking issue with

the trial court's contrary conclusion, respondent argues that there was insufficient evidence to show defendant was intoxicated enough to have failed to form the specific intent required for robbery. (RB 90-92.) Finally, respondent argues that any error was harmless primarily because -- when put in the all-or-nothing position of either convicting of robbery or acquitting based on intoxication -- the jury convicted of the greater charge. (RB 92-93.) Significantly, the state does not argue that the count four murder and special circumstance charges can be sustained if the count three robbery is reversed. (RB 86-94.)

As discussed below, respondent's claims as to the count three robbery charge are without merit. The count three robbery conviction must be reversed and along with it the count four murder conviction and robbery special circumstance finding.

A. Mr. O'Malley Is Not Precluded From Appellate Review Of This Issue By The Doctrine Of Invited Error.

As noted, count three charged robbery. Respondent does not dispute that the trial court had a *sua sponte* duty to instruct the jury on all lesser included offenses supported by the evidence. (RB 86-94; *see People v. Sedeno* (1974) 10 Cal.3d 703, 715, *overruled on other grounds in People v. Breverman* (1998) 19 Cal.4th 142.) Moreover, respondent concedes that at the instructional conference defense counsel affirmatively requested

instructions "on the lesser related offense of receiving stolen property in connection with the robbery charge in count three." (RB 94, *citing* 52 RT 10765; 54 RT 11124-11125.) So there is no dispute that defense counsel did not intend to put the jury in an all-or-nothing position with respect to the robbery.

But after defense counsel asked for receiving stolen property instructions as to the robbery (and second degree murder lesser-included offense instructions as to the count four and six murder charges), the court asked defense counsel if "these are the only lesser includeds you are asking for?" (52 RT 10765.) Defense counsel agreed, and made clear he had discussed with Mr. O'Malley the decision not to ask for lesser offense instructions in connection with the count one murder charge. (52 RT 10765.) Defense counsel, the court and the prosecutor then questioned Mr. O'Malley to ensure he understood the decision in connection with the count one murder charge. (52 RT 10765-10766.) Defense counsel did not express any tactical decision to oppose assault as a lesser to robbery, nor was Mr. O'Malley ever asked about lesser included offenses to the robbery charge. (52 RT 10765-10766.)

Later, in a break during the prosecutor's closing argument, the trial court noted that defense counsel was not asking for a grand theft lesser as to the count three robbery. (54 RT 11124.) The prosecutor expressed his understanding that defense counsel was not

asking for any lesser included offenses as to the robbery. (54 RT 11124.) The prosecutor went on to state that the defense theory was to ask for receiving stolen property instructions. (54 RT 11124-11125.) Defense counsel agreed that as a matter of tactics he had asked for receiving stolen property instructions. (54 RT 11125.) Once again, defense counsel did not express any opposition to assault as a lesser offense to robbery, nor was Mr. O'Malley asked about lesser included offenses to robbery. (54 RT 11124-11125.)

Respondent cites these exchanges and argues Mr. O'Malley invited any error in failing to give assault as a lesser included offense to robbery. With all due respect, the invited error doctrine does not work that way.

The invited error doctrine applies where a defendant makes "a conscious, deliberate tactical choice between having an instruction and not having it." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) Where defense counsel does not articulate "a conscious, deliberate tactical" reason for refusing a particular instruction, there is no invited error. (*People v. Duncan* (1991) 53 Cal.3d 955, 970.)

This Court has been clear in applying these rules. Where a defense lawyer explains his reasons for not wanting lesser included offense instructions on the record in the defendant's presence, and the record shows these reasons were also explained to the

defendant himself, the invited error doctrine applies. (*See, e.g., People v. Beames* (2007) 40 Cal.4th 907, 926-929; *People v. Horning* (2004) 34 Cal.4th 871, 904-905; *People v. Duncan, supra*, 53 Cal.3d at p. 969.) Where defense counsel does not offer any on-the-record explanation for a decision not to seek lesser included offenses as to a charge, and the trial court does *not* question defendant about such an "all-or-nothing" strategy, there is no invited error. (*People v. Duncan, supra*, 53 Cal.3d at pp. 969-970 [defendant charged with murder and robbery, defense counsel explains reasons for not requesting lesser offenses as to murder but offers no explanation in connection with the robbery charge, defendant is questioned by the court in connection with the murder but not the robbery; held, invited error doctrine applies to the murder charge but not the robbery charge].)

Beames, *Horning* and *Duncan* dictate the result here. Unlike *Beames*, *Horning* and the murder charge in *Duncan*, defense counsel here offered no on-the-record explanation for not wanting assault as a lesser included offense to the count three robbery. Nor does the record show that any party ever explained any such decision to Mr. O'Malley himself. This latter requirement was especially important here to ensue a "conscious, deliberate" choice because defense counsel's affirmative request for a receiving stolen property lesser offense shows he was not pursuing an all-or-nothing strategy as to the robbery.

Indeed, this case presents a far stronger scenario for rejecting invited error as to the robbery charge than this Court addressed in connection with the robbery charge in *Duncan*. After all, in *Duncan* defense counsel specifically articulated a conscious, tactical decision to waive lesser included offenses as to the homicide charge; he simply failed to articulate that this tactic applied to the robbery as well. Even with this relatively clear insight into defense counsel's tactics -- and specific inquiries of defendant which showed he understood counsel's all-or-nothing strategy -- this Court held that invited error would not apply to the robbery charge because there had been no specific waiver as to that charge.

Here, as noted above, defense counsel set forth his reasons for not requesting lesser included offenses as to the count one charge, and Mr. O'Malley was specifically questioned in connection with this decision. (52 RT 10765-10766.) As to the remaining homicide charges (in counts four and six) and as to the count three robbery, defense counsel did *not* did not articulate a tactical decision to put the jury in all-or-nothing position and to waive lesser included offenses. To the contrary, defense counsel here *requested* a lesser offense instruction as to the robbery (as respondent concedes) and lesser included offenses as to the murder charges. (52 RT 10765.) And unlike *Duncan*, *Beames* and *Horning*, there was no questioning of Mr. O'Malley at all in connection with the decision not to request assault as a lesser included offense as to the robbery charge.

In short, if inferring "a conscious, deliberate tactical choice" was inappropriate in *Duncan*, it is even more inappropriate here. The doctrine of invited error cannot apply to this case.

B. Under The Accusatory Pleading Test, The Trial Court Should Have Instructed On Assault.

1. Assault was a lesser included offense to the robbery charged in this case.

As Mr. O'Malley noted in his opening brief, when robbery is charged in its statutory language -- a taking by "force *or* fear" -- assault is *not* a lesser included offense because a taking by fear will not necessarily involve an assault. (AOB 114-115, *citing* *People v. Wolcott* (1983) 34 Cal.3d 92, 99-100.) But unlike *Wolcott*, this case involves an amended information which charged Mr. O'Malley with robbery by "force *and* fear." (24 CT 5394.) Pursuant to *People v. Barrick*, *supra*, 33 Cal.3d 115, this made assault a lesser included offense. (AOB 113-115.)[5]

In urging a contrary result respondent relies exclusively on a 13-year old decision

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[5] In his opening brief, Mr. O'Malley inadvertently cited the Court to count three of the original information. (AOB 115, *citing* 24 CT 5216.) While this is correct, the more accurate reference is to count three of the second amended information. (24 CT 5394.)

from the Third District Court of Appeal in *People v. Wright* (1996) 52 Cal.App.3d 203. (RB 87-89.) Respondent accurately notes that *Wright* rejected the argument Mr. O'Malley is making here. (RB 88.)

In *Wright*, the appellate court ruled that the element of "force" could be satisfied not only by evidence of physical violence necessary for an assault, but also by evidence of fear. Thus, the force required to commit a robbery did not necessarily include the force required to commit an assault:

> "As we have noted, 'force' is not an element of robbery independent of 'fear'; there is an equivalency between the two. '"[T]he coercive effect of fear induced by threats . . . is in itself a form of force, so that either factor may normally be considered as attended by the other."' (*People v. Wright*, *supra*, 52 Cal.App.4th at p. 211 [ellipses in original].)

Other appellate courts have taken exactly the opposite approach. For example, in *People v. Tuggle* (1991) 232 Cal.App.3d 147 the Court of Appeal held that when a prosecutor charged robbery by "force *and* fear," a conviction necessarily demonstrated the existence of the separate elements of both "force" and "fear." There, the state charged defendant with robbery by "force *and* fear." Defendant pled guilty. In a subsequent prosecution, defendant was charged under section 667.7 as a habitual offender. The plain terms of section 667.7 permit habitual offender treatment for a prior robbery only where it

involves "force." Defendant was treated as a habitual offender by virtue of his guilty plea to an information charging him with robbery by "force and fear."

On appeal, defendant contended that there was an insufficient basis to conclude that he had been previously convicted of a robbery by force. He made the identical argument respondent makes here (and adopted in *Wright*), arguing that there was no substantive difference between a robbery charged by "force *and* fear," and a robbery charged by "force *or* fear." The Court of Appeal rejected defendant's contention precisely because defendant's reading of section 211 effectively read the element of "fear" out of the robbery statute:

> "We cannot agree with appellant's suggestion that the charge of force 'and' fear was superfluous. Force is not a necessary element of the offense of robbery because the offense may be committed by fear alone." (*People v. Tuggle*, *supra*, 232 Cal.App.3d at p. 155.)

In light of the prosecutor's decision to charge the offense in the conjunctive, *Tuggle* held that defendant's guilty plea to the prior robbery constituted an admission that the separate elements of both force *and* fear had in fact been used. (232 Cal.App.3d at p. 154; *see also People v. Mendias* (1993) 17 Cal.App.4th 195, 203-204.)

Tuggle is squarely inconsistent with *Wright*. Under *Tuggle*, if a defendant charged

with robbery by "force and fear" pleads guilty, the force allegation is not surplusage and the plea is an admission that force *in addition to fear* was used. Under *Wright*, if that defendant goes to trial, the force allegation becomes mere surplusage and may be satisfied by evidence of fear alone. Unless the phrase "force and fear" is to mean one thing for prosecutors and something different for criminal defendants, this Court should adopt *Tuggle* and reject *Wright*.

In addition, *Wright* runs counter to two well-accepted principles of statutory construction. First, the decision in *Wright* effectively rewrites Penal Code section 211, rendering the "fear" element of robbery superfluous. This violates the principle of statutory construction which counsels against reading a statute so as to make some of its terms superfluous. In accord with this principle, the law has long given distinct meanings to these two phrases, equating "force" with violence and "fear" with intimidation. (*See* B. Witkin & N. Epstein, 2 *California Criminal Law* (2d ed. 1988) § 642(a) at p. 724; *People v. Davison* (1995) 32 Cal.App.4th 206, 213-214; *People v. Bolander* (1994) 23 Cal.App.4th 155, 163 (conc. opn. of Mihara, J.); *see also* W. LaFave & A. Scott,

Criminal Law (2d ed. 1986) § 8.11(d)(1) at p. 781.)[6]

Second, *Wright*'s construction of the "force" element of robbery -- equating it with the fear element -- obliterates the Legislature's carefully drawn distinction between robberies by "force" and "fear" which appears in other provisions of the Penal Code. For example, Penal Code section 667.7(a) permits a defendant to be treated as a habitual offender whenever the defendant has committed "*robbery involving the use of force* or a deadly weapon." (Emphasis supplied.)

Of course, it must be presumed that in enacting section 667.7(a) the Legislature was aware of its own definition of robbery as a taking accompanied by "force or fear." (*People v. Hernandez* (1988) 46 Cal.3d 194, 201 [in enacting statutes, Legislature is presumed to be aware of existing statutes].) Thus, the exclusion of "robbery involving the use of fear" from section 667.7 plainly demonstrates the Legislature's intent to

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[6] Indeed, in light of the distinct meanings of "force" and "fear," courts have long held that proof of one of these elements does not establish the other element. (*See, e.g.*, *People v. Renteria* (1964) 61 Cal.2d 497, 498-499 [where accusatory pleading charged robbery by force and fear, prosecution was required to present substantial evidence of fear apart from evidence of force]; *People v. Prieto* (1993) 15 Cal.App.4th 210, 215-216 [where accusatory pleading charged robbery by force or fear, defendant's robbery conviction sustained where there was no evidence of force, but substantial evidence of fear]; W. LaFave & A. Scott, *Criminal Law* (2d ed. 1986) § 8.11(d)(2) at p. 782 ["The elements of force and fear -- of violence or intimidation -- are alternatives: if there is force, there need be no fear, and vice versa. (Citations omitted.)"].)

differentiate robberies committed by "force" and those committed by "fear." To allow robbery by "force" to be satisfied merely by evidence of fear, as *Wright* did, would subvert this clear intent.

Tuggle was correct. *Barrick* should not be ignored; it should be followed. Assault is a lesser included offense to robberies charged by "force and fear." *Wright* was wrong.

2. Even if this Court were to hold that assault cannot be a lesser to robbery charged by "force and fear," such a ruling could not retroactively apply to this case.

Respondent has asked this Court to embrace the appellate court's opinion in *Wright* and hold that assault is not a lesser offense to robbery even where that robbery is charged by "force and fear." (RB 87-89.) Under respondent's view, a defendant charged with such a robbery cannot defend against the charge by presenting evidence that he is guilty only of assault.

Even if this Court were to embrace respondent's view, such a result could not constitutionally be applied to this case without violating the federal and state due process and ex post facto clauses. As *Wright* itself recognized, at the time of the 1994 trial in that case, existing case law held that defendants *could* defend against a robbery charge by

presenting evidence that they were only guilty of assault as a lesser offense. (*People v. Wright*, *supra*, 52 Cal.App.4th at p. 209, n.16, *citing People v. Carter* (1969) 275 Cal.App.2d 815, *People v. Duncan* (1945) 72 Cal.App.2d 423 and *People v. Driscoll* (1942) 53 Cal.App.2d 590 [noting that assault was proper where defendant was charged with robbery by "force and fear."].)

Trial in this case occurred in 1991. Even if this Court were to embrace the views put forth in the 1996 decision in *Wright*, this view could not be retroactively applied to this case.

Article I, section 10 of the United States Constitution provides in relevant part that "[n]o state shall . . . pass any Bill of Attainder [or] ex post facto law . . . ." Article I, section 9 of the California Constitution provides in similar terms that "[a] bill of attainder [or] ex post facto law . . . may not be passed."

The text of the Ex Post Facto clauses of the federal and state constitutions refers to legislative enactments. Neither the federal nor the state clause specifically addresses whether retroactive judicial decisions are also improper. The Supreme Court has filled this void, holding that Due Process requires that new judicial decisions be treated in the same way as legislative acts:

> "The ex post facto clause is a limitation upon the powers of the legislature . . . and does not of its own force apply to the Judicial Branch of Government. But the principle on which the Clause is based -- the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties -- is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." (*Marks v. United States* (1977) 430 U.S. 188, 191.)

Thus, the Due Process Clause limits the power of the judicial branch of government in the same way that the Ex Post Facto Clause limits the power of the legislative branch. (*Marks v. United States*, *supra*, 430 U.S. at p. 192; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-354.) Put simply, the Ex Post Facto and Due Process Clauses prevent identical harms; the former clause protects against legislative abuses, the latter protects against judicial abuses. (*Marks v. United States*, *supra*, 430 U.S. at p. 192; *Bouie v. City of Columbia*, *supra*, 378 U.S. at pp. 353-354.) This Court has reached the same conclusion with respect to the Due Process Clause of the California Constitution. (*See, e.g.*, *People v. Davis* (1994) 7 Cal.4th 797, 811.)

In its most basic form, of course, an ex post facto law makes conduct criminal through the passage of a new law. (*Calder v. Bull* (1798) 3 U.S. (1 Dall) 386, 390.) In addition, an ex post facto violation exists where a new law removes a defense that was available at the time the act was committed. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42; *Beazell v. Ohio* (1925) 269 U.S. 167, 169-170.) The Court has made this basic point

clear for more than half a century:

> "It is well settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." (*Beazell v. Ohio*, *supra*, 269 U.S. at pp. 169-170.)

Pursuant to these principles, courts around the country have addressed the same Due Process question presented here. Uniformly the courts have ruled that it would violate Due Process for a court to retroactively abolish a defense which existed at the time a particular crime was committed. (*See, e.g.*, *State v. Hobson* (Wis. 1998) 577 N.W.2d 825, 838; *State v. Robinson* (N.C. 1993) 436 S.E.2d 125, 126-128; *State v. Koonce* (N.J. 1965) 214 A.2d 428, 436-437. *See Commonwealth v. Barnes* (Mass. 1976) 340 N.E.2d 863, 867.)

Here, at the time of trial, a California defendant charged with robbery by "force and fear" could defend against the charge by presenting evidence that he did not harbor the specific intent necessary for robbery and should therefore be convicted only of assault. If this defense is to be abolished, the federal and state constitutions do not permit it to be abolished retroactively. Respondent's contrary argument must be rejected.

C. There Was Sufficient Evidence To Require Instructions On Assault.

The trial court heard the defense evidence of intoxication. The trial court found this evidence sufficient to warrant instructions on intoxication. (25 CT 5671.)

At several other points in its brief, respondent earnestly relies on the principle that because the trial judge (as opposed to an appellate court) sees and hears witnesses, its rulings are entitled to deference on appeal. (*See, e.g.*, RB 47, 66.) But here, respondent effectively ignores this principle in urging this Court to reach a different result from the trial court. (RB 90-92.) As courts have long recognized, however, a trial court's finding should not be so cavalierly disregarded. (*See, e.g., People v. McElvy* (1987) 194 Cal.App.3d 694, 705 [when a trial court holds there is an evidentiary basis for a certain instruction, the court's underlying factual evaluation is entitled to great weight on appeal]. *Accord People v. Page* (1980) 104 Cal.App.3d 569, 575.) When the trial court's factual evaluation requires additional instructions, an appellate court should not lightly substitute its judgment as to the underlying factual basis for these additional instructions. (*See, e.g., People v. McElvy, supra*, 194 Cal.App.3d at p. 705. *Accord People v. Page, supra*, 104 Cal.App.3d at p. 575; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 985; *People v. Vasquez* (1972) 29 Cal.App.3d 81, 88-89; *People v. Bowen* (1971) 22 Cal.App.3d 267, 293; *People v. Griffin* (1971) 18 Cal.App.3d 864, 870; *People v. Coyne* (1949) 92

Cal.App. 2d 413, 417.)

Respondent disagrees. Citing a forty year old case, respondent argues that the trial court here was duty bound to give instructions on the defense of intoxication only because it was applying a standard requiring such instructions where there is "any evidence deserving of any consideration whatsoever." (RB 92.) The implicit suggestion respondent is making, of course, is that a different (and higher) evidentiary threshold is required for instructions on lesser included offenses. Accordingly, the implicit argument goes, the trial court's finding in connection with the sufficiency of evidence for the intoxication defense (based on any "any evidence at all" standard) should not be deferred to in connection with the sufficiency of evidence for the lesser included offenses based on intoxication (which requires a higher showing).

In fact, respondent is wrong. As this Court has itself made clear, the traditional standard for instructing on defenses (like intoxication) actually requires *more* evidence than the standard for instructing on lesser included offenses. (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 716; *People v. Eilers* (1991) 231 Cal.App.3d 288, 294.) Thus, the trial court's finding that the evidence was sufficient to merit instructions on intoxication as a defense necessarily means instructions on an intoxication-based lesser included offense

were also required. Respondent's contrary argument should be rejected.[7]

D. The Jury's Conviction On The Greater Offense Does Not Render Harmless The Failure To Instruct On The Lesser.

The jury here was put in an all-or-nothing position with respect to the intoxication defense: either acquit Mr. O'Malley entirely or convict. There was no middle ground. The jury convicted of robbery. As noted above, respondent argues that conviction on the greater offense shows that jury had resolved that intoxication did not negate the ability to harbor specific intent for robber. (RB 92-93.) This argument must be rejected.

To be sure, it is true that absent instructions on the lesser offense, the jury here convicted Mr. O'Malley of the greater charged offense. But this does not render the failure to instruct on the lesser offense harmless. Respondent is essentially arguing that a jury's guilty verdict on a greater offense necessarily renders harmless a trial court's failure to instruct on a lesser included offense supported by the evidence. This is simply not the law. (*See People v. Randle* (2005) 34 Cal.4th 987, 1003-1104 [reversal required for failure to give lesser included offense despite jury's conviction of greater offense];

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[7] It is worth noting that in many more recent cases this Court has used language suggesting the two standards are actually similar. (*See, e.g., People v. Wickersham* (1982) 32 Cal.3d 307, 320; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, n.12.) Obviously, if the standards are the same, then deference is appropriate.

People v. Lacefield (2007) 157 Cal.App.4th 249, 262 [same]; *People v. Racy* (2007) 148 Cal.App.4th 1327, 1334-1336 [same]; *People v. Anderson* (2006) 141 Cal.App.4th 430, 450 [same]; *People v. Castro* (2006) 138 Cal.App.4th 137, 143 [same].) Were it otherwise, of course, the failure to instruct on a lesser included offense could *never* be prejudicial on appeal, since the appeal itself means that the jury convicted on the greater charged offense. Reversal of the count three robbery charge, the count four felony murder conviction and the robbery felony special circumstance, is required.[8]

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[8] Respondent correctly notes that the jury was instructed on the lesser offense of receiving stolen property. (RB 93-94.) According to respondent, this shows the jury was not put in an all-or-nothing position. (RB 94.)

But this lesser option had nothing to do with the intoxication defense. Simply put, if because of intoxication defendant did not intend to steal Parr's motorcycle, then he could not be guilty of receiving stolen property or robbery. (*See* CALJIC 14.66.) As such, the jury's decision to convict of robbery rather than receiving stolen property says nothing about whether it rejected the intoxication defense in this case.

IV. THE TRIAL COURT'S PROVISION OF CALJIC NO. 2.11.5 FUNDAMENTALLY UNDERCUT THE DEFENSE PRESENTED TO THE HOMICIDES CHARGED IN COUNTS ONE, FOUR AND SIX.

Prosecution witness Brandi Hohman testified that Mr. O'Malley confessed to all three killings. (26 RT 5573; 27 RT 5791; 28 RT 5851, 5860-5961.) As the prosecutor himself admitted prior to trial, Hohman was "the chief witness" against appellant, and she was "critical [and] crucial to this case." (RT 3/5/91 at 94.) In short, if the jury believed Hohman, guilt was a foregone conclusion.

But there is little dispute that Hohman had credibility problems. After all, before she agreed to testify for the state, she herself had been arrested and charged as an accessory to murder. (29 RT 5919-5922.) She was granted immunity, placed in the State's witness protection program, and paid over $28,000 in cash and money orders. (1 Second Augmented CT at 72-79; 29 RT 5938, 5941-5944; 30 RT 6338-6340.) Mr. O'Malley himself testified that Hohman was lying to protect herself after having initially been charged as an accessory to murder. (45 RT 9409.) Thus, the jury would have to determine why Hohman testified against Mr. O'Malley, and why she had not been prosecuted.

Prior to deliberations, however, the trial court gave the jury an instruction which

directly interfered with its ability to make this critical determination, advising the jury that as to "persons other than defendant . . . [who] may have been involved in the crime[s]" the jury was not to "discuss or give any consideration as to why the other person or persons is not being prosecuted in this trial or whether he or she has been or will be prosecuted." (25 CT 5598; 53 RT 10790.) In his opening brief, Mr. O'Malley contended that provision of this instruction fundamentally undercut his theory of defense because it told the jury not to consider the defense that Hohman was lying in order to obtain immunity from prosecution. (AOB 123-132.) Under the circumstances of this case, the error was prejudicial and requires reversal. (AOB 132-134.)

But this was not the only harm caused by this instruction. As to the murders charged in counts one, four and six, Mr. O'Malley presented a third-party culpability defense. The theory of defense was that Connie Ramos was responsible for the count one murder of Sharley German, and Rex Sheffield was responsible for the Parr and Robertson murders. In his opening brief, Mr. O'Malley contended that the court's instruction advising the jury not to consider why others were not being prosecuted undercut this defense as well. (AOB 134-135.)

Respondent does not dispute that if error occurred, reversal is required. (RB 94-98.) Instead, as to Hohman's testimony, respondent argues that reversal is not required

for three reasons: (1) any claim the instruction undercut the defense in connection with Hohman's testimony was waived by defense counsel's failure to object to the instruction on this specific ground (RB 95, citing *People v. Lewis* (2008) 43 Cal.4th 415, 503, and *People v. Daya* (1994) 29 Cal.App.4th 697, 714), (2) there was no evidence that Hohman was a participant in the crimes, so the jury would not have believed CALJIC No. 2.11.5 applied to her (RB 96), (3) the instructions as a whole advised the jury it could consider the defense case as to Hohman's testimony. (RB 97-98.) As to the third party culpability defense, respondent argues that nothing in the instruction precluded the jury from considering the third party culpability evidence. (RB 97.)

Respondent's waiver argument is easily addressed. First, because the instruction given here undercut the central theory of defense in violation of Mr. O'Malley's substantial rights under the Fifth, Sixth and Eighth Amendments, no objection was necessary in order to raise this claim on appeal. (*See* Penal Code section 1259 ["Upon an appeal being taken by the defendant . . . . [t]he appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].) Second, because (as respondent concedes) defense counsel did object -- albeit on other grounds -- counsel plainly did not want the instruction given. Because there could be no tactical reason for objecting to an instruction but doing so on incomplete grounds, counsel's

failure to properly object violated Mr. O'Malley's federal and state constitutional rights to the effective assistance of counsel, and the claim is properly addressed here as well. (*See, e.g., People v. Marshall* (1996) 13 Cal.4th 799, 831.)[9]

Turning to the merits, respondent argues that there was no evidence that Brandi Hohman "was a participant" in the charged crimes. (RB 96.) According to respondent, "classification as a participant [is required] for purposes of CALJIC 2.11.5." (RB 97.)

As given in this case, CALJIC No. 2.11.5 tells the jury that "[t]here has been evidence indicating that a person or persons other than defendant was or may have been involved in the crime for which defendant is on trial." (25 CT 5598.) The instruction goes on to tell the jury not to "discuss or given any consideration" as to why such other

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[9] As noted above, respondent cites two cases to support its waiver argument as to this instructional argument. Neither case even remotely supports respondent's position.

People v. Lewis -- the first case respondent cites -- did not involve a instructional error at all. It held that a defendant failed to preserve for appeal a claim that a detective was unqualified to testify about strike marks on a shotgun shell. (43 Cal.4th at p. 503.) As for respondent's second case -- *People v. Daya* -- it did involve claims of instructional error, but the court found the claims to be "without merit." (29 Cal.App.4th at p. 712.) The appellate argument was the trial court had erred by giving instructions on included offenses to which defendant was objecting to at that time. (*Id.* at pp. 713-714.) In rejecting this argument, *Daya* did not find waiver. Rather, relying on standard law concerning the need to instruct on included offenses, it found the trial court had "not . . . committ[ed] instructional error" at all by instructing on the included offense. (*Id.* at p. 714.)

person has or will be prosecuted. (25 CT 5598.)

Contrary to the state's position, this instruction does not preclude the jury from discussing the absence of prosecution only as to those persons who have in some formal way been identified as "participants" in the charged crimes. Instead, by its very terms, the instruction tells the jury not to consider the absence of prosecution as to any other "person . . . [who] was or may have been involved . . . ." And here, Brandi Hohman plainly fits that bill -- she had been charged as an accessory to murder but was given full immunity from prosecution. Respondent cites no authority, and gives no reason, why CALJIC No. 2.11.5 should require more.[10]

Finally, as to Hohman, the state cites the proposition that provision of CALJIC No. 2.11.5 is not error where "the full panoply of witness credibility and accomplice instructions" have been given. (RB 98, *citing People v. Price* (1991) 1 Cal.4th 324, 446.) Respondent goes on to note that "witness credibility instructions" were given in this case, including the general instruction on credibility CALJIC 2.20. (RB 98.)

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[10] Indeed, respondent itself notes that not only did Ms. Hohman conceal bloody clothes in connection with the Robertson murder, but the state's immunity agreement made clear the state's view that Hohman may have been involved with that murder. (RB 96.)

But as Mr. O'Malley pointed out in his opening brief, accomplice instructions were *not* given here. (AOB 132.) Thus, the jury was not told to view the testimony of an accomplice with distrust, nor was it told it could not rely on the uncorroborated testimony of an accomplice. Accordingly, the jury had *not* been advised of all the relevant factors to consider in evaluating Hohman's testimony.[11]

Moreover, read in context CALJIC No. 2.11.5 specifically instructed the jurors that, despite the general considerations contained in CALJIC No.2.20, they were *not* permitted to give "any consideration" to Hohman's immunity agreement and monetary benefits. The specificity of CALJIC No. 2.11.5 clearly gave this instruction precedence over the general witness credibility instruction, such that it is reasonably likely the jury construed CALJIC No.2.11.5 according to its plain meaning. As this Court has made clear, "where two instructions are inconsistent, the more specific charge controls the general charge." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878, citing *Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 267.) The United States Supreme Court has likewise noted that a general instruction which contradicts an otherwise erroneous specific instruction will not remedy the infirmity. (*Francis v.*

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[11] In a footnote, respondent argues that no accomplice instructions were required. (RB 98, n.57.) But as discussed above, and as the prosecutor recognized in the immunity agreement, Hohman "was or may have been involved" as an accomplice at least as to the Robertson charges.

Franklin (1985) 471 U.S. 307, 322.)

Respondent's argument as to the third-party culpability evidence is very different. Respondent recognizes that appellant presented such evidence as to all three murder charges. (RB 97.) Respondent argues, however, that nothing in CALJIC No. 2.11.5 precluded the jury from considering any of this evidence. (RB 97.)

Mr. O'Malley will concede that the harmful impact of CALJIC No. 2.11.5 may not be as immediately obvious in connection with the third-party culpability evidence as it is in connection with the Brandi Hohman evidence. But read in context, CALJIC No. 2.11.5 was reasonably likely to have prevented the jury from considering this evidence. The instruction told jurors they were precluded from "discuss[ing] or giv[ing] any consideration" to evidence "that a person or persons other than appellant" (e.g., Connie Ramos or Rex Sheffield) was the guilty party. And as Mr. O'Malley pointed out in his opening brief, this logical reading of the instruction is especially likely given the absence of any other specific instructions which affirmatively told the jury how it should evaluate the third-party culpability evidence.

As noted above, the state does not make an alternative harmless error argument in connection with this claim. (*Compare* RB 94-98 *with* RB 85-86 [raising alternative

harmless error argument as to severance issue]; 92-94 [instructional issue]; 102-103 [same]; 106-107 [same]; 120-121 [evidentiary issue].) Accordingly, with the state not even seeking to meet its burden of "prov[ing] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (*Chapman v. California*, *supra*, 386 U.S. at p. 24), this instructional error requires reversal.

V. THE TRIAL COURT'S FAILURE TO INSTRUCT ON A TARGET OFFENSE THE JURY COULD USE AS A PREDICATE FOR THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE REQUIRES REVERSAL.

Count two charged Mr. O'Malley with conspiring to murder Mr. Parr. (24 CT 5394.) The murder charge itself as to Mr. Parr was alleged in count four. (24 CT 5395.) Count five charged a conspiracy to murder Mr. Robertson. (24 CT 5395.) The murder count as to Mr. Robertson was alleged in count six. (24 CT 5396.)

The trial court gave the jury three different theories in connection with these murder charges. First, the court instructed the jury it could convict of murder based on a felony murder theory. (25 CT 5628.) Second, the court instructed the jury it could convict of murder if it found a killing with malice aforethought. (25 CT 5628.) Third, the court instructed the jury it could convict Mr. O'Malley under the natural and probable consequence doctrine. (25 CT 5655.) In accord with this last theory, the court instructed the jury it could convict of murder as to counts four and six if it found: (1) defendant was "guilty as a member of a conspiracy to commit the crime originally contemplated" and (2) "the crime[s] alleged in Counts 4 & 6 [were] a natural and probable consequence of the originally contemplated criminal objective of the conspiracy." (25 CT 5655.) But the court failed to define either "the crime originally contemplated" or "the originally contemplated criminal objective" on which a natural and probable consequence

conviction could rest.

During deliberations, the jury suggested that it had, in fact, relied on this third theory, at the very least with respect to Mr. Parr. As noted, count two charged defendant with conspiracy to murder Parr, while count five charged a conspiracy to murder Robertson. After several days of deliberating, the jury asked the court whether it could instead convict Mr. O'Malley of a conspiracy to commit assault -- a "crime [] not specified in the charges" -- if it "decided that there was a conspiracy to commit a crime other than murder and the natural result of that crime was murder . . . . The other crime would be assault." (25 CT 5568.) This question added that it was in reference to "count # 2." (25 CT 5568.)

The trial court properly instructed the jury it could not convict Mr. O'Malley of a crime -- such as conspiracy to commit assault -- of which he had never been charged. (25 CT 5568.) But because the jury's question shows it was considering the natural and probable consequence doctrine, in his opening brief Mr. O'Malley contended that the trial court committed prejudicial error in failing to define a target crime for the jury to use in applying the doctrine. (AOB 136-137.) Because the jury's questions during deliberations show that the jury itself was focusing on the natural-and-probable-consequences theory and was creating a homespun predicate act to use under that theory, reversal is required.

(AOB 137-140.)

Respondent disagrees for three reasons. First, respondent argues that trial counsel's failure to object to this instruction waives the issue for appeal. (RB 101.) Second, respondent notes that the trial court did not instruct on the natural and probable consequence doctrine under CALJIC No. 3.02. (RB 101-102.) Finally, respondent argues there was no prejudice because (1) the prosecutor did not rely on the natural and probable consequence doctrine and (2) there was overwhelming evidence showing a conspiracy to kill, and so the jury would not have relied on the natural and probable consequence doctrine after all. (RB 102-103.) These arguments should be rejected.

This Court need not linger over the waiver argument. In *People v. Prettyman* (1996) 14 Cal.4th 248 this Court specifically held that a trial judge has a *sua sponte* duty to instruct on predicate offenses when the jury is instructed on the natural-and-probable-consequences doctrine. Noting that "jury instructions on target crimes under the 'natural and probable consequences' doctrine are hardly 'new,'" this Court held that "the trial court must, *on its own initiative*, identify and describe for the jury any target offense allegedly aided and abetted by the defendant." (*Id.* at p. 268 and fn. 8, original emphasis.) The *sua sponte* duty recognized in *Prettyman* applies both "when the prosecution relies on the 'natural and probable consequences' doctrine" and when "the trial court, without a

request therefor, cho[oses] to instruct the jury" on that rule. (*Id.* at pp. 268, 270.) Respondent's waiver argument cannot be squared with *Prettyman*.[12]

In addition, respondent's waiver argument also fails for many of the same reasons discussed earlier. The trial court's failure to instruct on the target offense for the natural and probable consequence doctrine, and the jury's subsequent reliance on that doctrine to convict based on a homespun target offense that the jury itself created, permitted the jury to convict of murder based on a theory of culpability of which the defense had no notice. As discussed in the opening brief, this not only implicated Mr. O'Malley's due process right to notice of the charges, but his right to effective assistance of counsel as well. (AOB 139-140.) Under these circumstances, no objection was necessary in order to raise this claim on appeal. (*See* Penal Code section 1259 ["Upon an appeal being taken by the defendant . . . . [t]he appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the

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[12] While the *Prettyman* decision was handed down after appellant O'Malley's trial, the trial in Mr. O'Malley's case occurred after Mr. Prettyman's *trial*. Since the trial court had a *sua sponte* duty to instruct on predicate offenses at Prettyman's trial, it necessarily follows that the duty existed at the time of appellant's trial.

substantial rights of the defendant were affected thereby."].)[13]

Respondent's second point is true, but irrelevant. Respondent correctly notes that the trial court did not instruct the jury with the natural and probable consequence doctrine pursuant to CALJIC No. 3.02. (RB 101.) But the fact of the matter is that the trial court did instruct the jury on the natural and probable consequence doctrine pursuant to CALJIC 6.11. (25 CT 5655.) Of this there should be no doubt:

> "A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though he was not present at the time of the commission of such act." (25 CT 5655.)

The jury was subsequently instructed that it had to decide whether "the defendant is guilty as a member of the conspiracy to commit the crime originally contemplated, and, if so, whether the crime alleged in Count[s] 4 & 6 was a natural and probable

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[13] Moreover, there was no plausible tactical reason for defense counsel to allow a theory of culpability to go to the jury of which the defense was given no notice. Nor was there a tactical reason for defense counsel to allow a theory of culpability which -- precisely because he was given no notice -- he had no opportunity to contest. Accordingly, and as also discussed above, the claim is properly addressed here. (*See, e.g., People v. Marshall, supra*, 13 Cal.4th at p. 831 [addressing the merits of a claim despite defense counsel's failure to object where the failure was not the result of a reasonable tactical judgment].)

consequence of the originally contemplated criminal objective . . . ." (25 CT 5655.) This too is part and parcel of the natural and probable consequence doctrine.

In short, the jury was instructed on the natural and probable consequence doctrine, plain and simple. That it was given to the jury in CALJIC 6.11 rather than 3.02 is utterly beside the point. (*See* Shakespeare, Romeo and Juliet, Act II, scene ii ["What's in a name? That which we call a rose [b]y any other name would smell as sweet."].)

Respondent's final argument is that there was no prejudice because the prosecutor did not rely on the natural and probable consequence doctrine and there was "overwhelming" evidence showing a conspiracy to kill. (RB 102-103.) In a short footnote, respondent argues that the jury question indicating it had actually relied on the natural and probable consequence doctrine using a predicate crime of assault is irrelevant to the question of whether the jury -- in fact -- relied on the natural and probable consequence doctrine. (RB 102, n.62.) Respondent cites no authority in support of this proposition.

It is true, of course, that the prosecutor did not rely on the natural and probable consequence doctrine. But the prosecutor was not deciding Mr. O'Malley's guilt or innocence -- the jury was. And the jury's question shows (or at least strongly suggests) it

considered the doctrine. Indeed, it is hard to draw any other conclusion from a question in which the jury suggests it had (1) "decided that there was a conspiracy to commit a crime other than murder and the natural result of that crime was murder" and (2) "the other crime would be assault." (25 CT 5568.)

As noted, in a footnote the state suggests this Court should blind itself to the logical meaning of the jury's question. With all due respect, the suggestion is puzzling. It was the jury that was deciding this case. Respondent never explains what principle of law or common sense compels this Court to ignore evidence in the record directly relevant to the question of what theory the jury relied on. Fortunately, this Court has long recognized what common sense dictates -- that in determining what the jury may have considered, questions from the jury are directly relevant to this inquiry. (*See, e.g., People v. Dominguez* (2006) 39 Cal.4th 1141, 1160 [question asked by the jury is relevant to determining theory on which jury relied]; *People v. Haskett* (1990) 52 Cal.3d 210, 229 [questions from the jury relevant to determining what evidence the jury was considering].)

In short, as to the murder charges in counts four and six, the jury was directly presented with a natural and probable consequence theory. At least as to the Herbert Parr charges, the jury's question suggests it in fact relied on this theory to convict. Because

the court failed to instruct on a target offense for application of this doctrine, but the jury nevertheless may have relied on this theory in convicting, the process deprived Mr. O'Malley of his state and federal constitutional rights to notice, competent counsel and a reliable determination of guilt. Reversal is required.

VI. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT IT COULD RELY ON FACTS PROVEN ONLY BY A PREPONDERANCE OF THE EVIDENCE, TO CONVICT OF (1) THE CONSPIRACY CHARGED IN COUNT FIVE AND (2) THE MURDER CHARGED IN COUNT SIX.

Count five charged Mr. O'Malley with conspiracy to murder. (25 CT 5624.) The trial court properly instructed the jury that in order to convict on this charge the state had to prove (1) an unlawful agreement (i.e. the conspiracy itself) and (2) at least one overt act. (25 CT 5653.) The trial court properly instructed the jury that the conspiracy itself was an unlawful agreement:

> "A conspiracy is an agreement entered into between two or more persons . . . ." (25 CT 5653.)

At trial, the state introduced evidence of uncharged criminal acts Mr. O'Malley committed against Christopher Walsh. (13 RT 2635-2636; 20 RT 3831-3868.) Later, the trial court instructed the jury that (1) the uncharged acts had only to be proven "by a preponderance of the evidence" and (2) if proven, the uncharged acts could be considered to prove "the existence of a conspiracy." (25 CT 5608, 5610.)

In his opening brief, Mr. O'Malley contended that for two reasons, this combination of instructions improperly permitted the jury to rely on uncharged acts

proven only by a preponderance of the evidence to find true the existence-of-a-conspiracy element of the count five conspiracy charge. (AOB 142-152.) First, these instructions permitted the jury to find true an element of the offense by relying on evidence which had been proven only by a preponderance of the evidence in violation of Mr. O'Malley's right to proof beyond a reasonable doubt. (AOB 144-146.) Second, these instructions permitted the jury to infer an element of the count five conspiracy charge from predicate facts -- the uncharged acts -- which had no logical nexus to establishing that element. (AOB 146-151.) Moreover, because the conspiracy could have been the basis for the count six murder conviction as well and it is not possible to "conclude, beyond a reasonable doubt, that the jury based its [murder] verdict on a legally valid theory," both the conspiracy and the count six murder conviction must be reversed. (AOB 152; *People v. Chun* (2009) 45 Cal.4th 1172, 1203.)

Respondent does not dispute (and in fact concedes) the state introduced uncharged criminal acts against Mr. O'Malley. (RB 103-104.) Respondent does not dispute (and in fact concedes) that the trial court instructed the jury not only that this uncharged acts evidence need only be proven by a preponderance of the evidence, but that the jury could rely on this evidence to prove "the existence of a conspiracy." (RB 104-105.)

Nevertheless, for three reasons respondent argues that reversal of the conspiracy

conviction is not required. First, respondent argues there was no error. Respondent correctly notes that Mr. O'Malley's argument is based on the premise "that the existence of a conspiracy is one of the elements of the crime of conspiracy." (RB 105.) According to respondent, this premise is "flawed." (RB 105.) Respondent actually argues that "a conspiracy is not an element of the crime of conspiracy." (RB 106.) Second, respondent argues that there is no "reasonable likelihood" the jury applied this instruction in an improper way, citing *Estelle v. McGuire* (1991) 502 U.S. 62. (RB 107-108.) Third, respondent argues that any error was harmless. (RB 107.)

Mr. O'Malley will concede that if respondent is correct that "a conspiracy is not an element of the crime of conspiracy" then there is no error here. Respondent is entirely correct that the premise of Mr. O'Malley's claim of error in connection with this instruction is "that the existence of a conspiracy is one of the elements of the crime of conspiracy." (RB 105.)

But respondent's suggestion that "a conspiracy is not an element of the crime of conspiracy" is simply wrong. As noted above, the jury was properly told here that "[a] conspiracy is an agreement . . . between two or more persons . . . ." (25 CT 5653.) And respondent itself concedes that one element of a conspiracy charge is "an agreement between two or more persons." (RB 106.) Given this concession, and with all due

respect, it is frankly difficult to understand respondent's suggestion that "a conspiracy is not an element of the crime of conspiracy." (RB 106.)

It may be that respondent is drawing a distinction between an "agreement between two or more persons" (which respondent concedes *is* an element of conspiracy) and a conspiracy itself (which respondent argues is not). Even if this academic distinction had some virtue in another setting, it can have no application here: the jury was explicitly instructed that "[a] conspiracy is an agreement entered into between two or more persons . . ." (25 CT 5653.) Given this instruction, telling jurors they could rely on uncharged criminal conduct proven only by a preponderance of the evidence to prove a "conspiracy" was the same as telling them they could rely on this evidence to prove "an agreement entered between two or more parties."

Respondent cites no authority to support its argument. In fact, the case law plainly requires a conspiracy as an element of conspiracy. (*Se, e.g.*, *People v. Morante* (1999) 20 Cal.4th 403, 416-417 ["[A] conspiracy consists of two or more persons conspiring to commit any crime."]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [same]; *People v. Iniquez* (2002) 96 Cal.App.4th 75, 78 ["The crime of conspiracy exists where, as relevant here, two or more person 'conspire . . . to commit any crime.'"].) Because a conspiracy is a necessary element of any conspiracy conviction, and the jury was instructed it could

find this element based on evidence proven only by a preponderance of the evidence, provision of this instruction was clear error.[14]

Alternatively, respondent argues that the conspiracy conviction need not be reversed because any error was harmless. (RB 106-107.) Respondent analyzes the error under the state's harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. (RB 106.)

But as Mr. O'Malley explained in his opening brief, the vice of the instruction here is that it permitted the jury to find true an element of the offense by a preponderance of

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[14] As noted, respondent offers a second reason why no error occurred. Citing *Estelle v. McGuire*, *supra*, 502 U.S. 62 respondent argues there is no "reasonable likelihood" the jury applied this instruction in an improper way. (RB 107-108.) In his opening brief, Mr. O'Malley already explained why the instructions here were "reasonably likely" to have allowed conviction based on proof less than beyond a reasonable doubt. (AOB 145-146.)

It is worth adding here that application of the test set forth in *Estelle* may well be inappropriate in this case. The *McGuire* test is used to determine the existence of error when a trial court has provided ambiguous instructions. (*See, e.g., Jones v. United States* (1999) 527 U.S. 373, 390; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) But where a jury instruction is not ambiguous, but erroneous on its face, this standard does not apply. (*Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 592.) Here there was nothing "ambiguous" about the trial court's instruction. The jury was told that the state had to prove an agreement to obtain a conviction on the conspiracy count. (25 CT 5653.) In no uncertain terms, the jury was then told (1) it could rely on uncharged acts evidence to find the agreement had been proven and (2) the state needed to prove the uncharged acts evidence only by a preponderance of the evidence. (25 CT 5608, 5610.) There was nothing "ambiguous" about these very clear, very direct instructions which requires application of the *McGuire* test.

the evidence. (AOB 144-146.) This violated his Fifth and Sixth Amendment rights and is not an error subject to the *Watson* standard of prejudice used for errors of state law. Instead, misinstruction on the burden of proof is structural error and requires reversal without a showing of prejudice. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

One final comment about this issue is required in light of the state's brief. As noted above, in his opening brief, Mr. O'Malley contended that because the jury was told it could convict on the count six murder (involving Mr. Robertson) as a natural and probable consequence of a conspiracy, reversal of the underlying conspiracy also requires reversal of the count six murder conviction. (AOB 152.) The state disagrees arguing that "because the murder charge was not predicated on the conspiracy charge" reversal of the count six charge was not required here. (RB 108.)

Mr. O'Malley will agree that if in fact "the murder charge was not predicated on the conspiracy charge," then the state's position would be well taken. The problem with the state's argument is that the instructions explicitly show the jury was told it could convict of the count six murder charge by finding the murder was a natural and probable consequence of a conspiracy. (25 CT 5655.) The state's argument as to the count six murder must be rejected; if the conspiracy conviction must be reversed, so too must the

count six murder charge.[15]

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[15] In a single sentence, respondent repeats its refrain that trial counsel's failure to object waives this issue. (RB 105.) There is no waiver here; because the instructional error lessened the state's burden of proof and constituted an unconstitutional presumption, both in violation of the Fifth and Sixth Amendments, this instructional issue is properly before this Court under Penal Code section 1259. Moreover, as also discussed above, even if this were not the case, since there can be no tactical reason for failing to object to an instruction which lowers the burden of proof, the claim is properly addressed here. (*See, e.g., People v. Marshall, supra*, 13 Cal.4th at p. 831 [addressing the merits of a claim despite defense counsel's failure to object where the failure was not the result of a reasonable tactical judgment].)

In aid of its contrary position respondent cites *People v. Hart* (1999) 20 Cal.4th 546. (RB 101.) But *Hart* has nothing to do with waiver in the current situation. Instead, *Hart* involved a claim "that the jury instructions were impermissibly ambiguous and that the trial court failed to fulfill its *sua sponte* duty to offer clarifying instructions" regarding first and second-degree felony murder. (*Id.* at p. 622.) Here there is no claim that the instructions were ambiguous (see preceding fn.) or that trial court had a *sua sponte* duty to offer "clarifying instructions." The instructions were simply unconstitutional as applied to this case. There is no waiver.

VII. TRIAL COUNSEL SHOULD HAVE BEEN REPLACED AFTER HE ADVISED THE COURT HIS ABILITY TO EFFECTIVELY PRESENT MITIGATING EVIDENCE AND ARGUE FOR LIFE WOULD BE ADVERSELY AFFECTED BY A CONFLICT OF INTEREST.

A. Introduction.

Prior to the beginning of the penalty phase, defense counsel moved to withdraw based on a conflict of interest. As recounted in some detail in the opening brief, during the jury's guilt phase deliberations defense counsel was told that if defendant was convicted, his (defense counsel's) wife would be killed. (55 RT 11312-11313.) In a series of hearings with the trial judge defense counsel made the following representations:

1) It would be "almost impossible" for him to effectively represent Mr. O'Malley in the penalty phase. (Sealed RT 8/20/91 at 11314-11315.)[16]

2) He "had a very serious problem" in effectively representing O'Malley at any penalty phase. (Sealed RT 8/27/91 at 11329-11330.)

3) He could not ethically represent O'Malley, he would have difficulty "present[ing] mitigating factors to the jury" and he "would not be able to participate as an effective advocate in literally arguing that his life be spared to this jury . . . " and that counsel did "feel very strongly about it." (Sealed RT 9/11/91 at 11364-11365, 11381, 11382.)

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[16] Although these documents were originally designated as sealed, this Court unsealed them in an order dated April 22, 2009.

The trial court made no inquiry into whether counsel would -- in fact -- be able to effectively present mitigating evidence and argue for life. Instead, the court questioned counsel about (1) whether he believed that O'Malley himself had anything to do with the threats and (2) what disagreements he had with O'Malley about tactics during the trial. (Sealed RT 8/27/91 at 11330-11336; Sealed RT 9/11/91 at 11365-11379.)

In his opening brief, Mr. O'Malley contended that reversal of the penalty phase was required because defense counsel had an actual conflict of interest which violated defendant's Sixth Amendment right to the effective assistance of counsel. (AOB 190-212.) But even if counsel's representation did not violate the Sixth Amendment, Mr. O'Malley separately contended that the special reliability requirements of the Eighth Amendment were violated because he was represented by an attorney who advised the court he could not present mitigating evidence or argument on Mr. O'Malley's behalf. (AOB 212-214.)

As to the Sixth Amendment, respondent disagrees for three reasons. In logical order, respondent first argues that any conflict claim was waived by defendant's request to keep counsel. (RB 145-146.) Second, respondent argues that in any event, there was no actual conflict at all; the trial court properly inquired into the potential conflict and learned that defense counsel would properly represent Mr. O'Malley. (RB 142-143.)

Finally, respondent argues that the record will not support a conclusion of prejudice because counsel called numerous witnesses during the penalty phase, and the record does not show what actions his attorney would have taken absent the conflict. (RB 144, 146.) As to Mr. O'Malley's separate Eighth Amendment argument, respondent says not a word. (RB 125-146.)

None of respondent's Sixth Amendment arguments has merit. And because respondent has not even put the separate Eighth Amendment argument at issue, relief is therefore required under both the Sixth and Eighth Amendments.

B. There Was No Waiver.

As noted, respondent begins its analysis with yet another waiver argument. Fortunately, neither the law or the facts relevant to this particular waiver claim are in dispute. Both compel rejection of this latest waiver argument.

First the law. While a defendant may certainly waive the right to conflict free counsel, reviewing courts must indulge "every reasonable presumption *against* the waiver of unimpaired assistance of counsel." (*People v. Bonin* (1989) 47 Cal.3d 808, 840 [emphasis added].) For such a waiver to be valid it must be unambiguous and "without

strings," and made "with sufficient awareness of the relevant circumstances and likely consequences." (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837; *see also People v. McDermott* (2002) 28 Cal.4th 946, 990.) To obtain a valid waiver, "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* (1983) 35 Cal.3d 86, 110.) This Court has specifically held that 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.)

The question then becomes whether the facts of this case rebut *Bonin*'s "presumption *against* the waiver of unimpaired assistance of counsel." They do not.

As respondent accurately notes, after trial counsel moved to withdraw, the court asked Mr. O'Malley what he desired, and he replied, "I would like to have him as my attorney still." (Sealed RT 11381.) Respondent argues that this statement "must be understood as a waiver . . . ." (RB 146.)

The problem with respondent's position is basic. As discussed above, for a valid waiver this Court's precedents required Mr. O'Malley to be told of (1) the dangers and possible consequences of proceeding with conflicted representation in his case and (2) his absolute right to conflict-free representation. Here, the record shows -- and respondent does not dispute -- that Mr. O'Malley was advised of neither. There was no waiver.

In making its contrary argument, respondent "presumes" Mr. O'Malley and his counsel spoke of the "ramifications of new counsel being appointed." (RB 145.) Mr. O'Malley will concede that, fairly read, the record shows he was advised of the dangers of proceeding with new counsel. (*See* Sealed RT 9/11/91 at 11374-11375.) But this does not aid the state's case; a discussion about the "ramifications of *new counsel* being appointed" simply does not satisfy the separate obligation to inform Mr. O'Malley as to the ramifications of proceeding with *current conflicted counsel*. That is what *Bonin* requires for a valid waiver, and that is what is missing here.

Respondent's citations to *People v. Jones* (1991) 53 Cal.3d 1115 and *Maxwell v. Superior Court* (1982) 30 Cal.3d 606 do not change this result. In *Jones*, the trial court actually relieved conflicted counsel twice, only to hire him back at defendant's request after defendant was permitted -- on several different occasions -- to formally consult with outside counsel about the dangers of proceeding with conflicted counsel. (53 Cal.3d at

pp. 1137-1138.) This plainly satisfied the *Bonin* obligation of ensuring defendant was properly informed of the dangers of proceeding with conflicted counsel.

Similarly, in *Maxwell*, in a pretrial writ proceeding, defendant contended the trial court in his case had improperly discharged retained defense counsel based on a conflict of interest caused by certain paragraphs of his fee agreement with counsel. The trial court specifically offered defendant a chance to consult with outside counsel about the contract, which defendant declined. (30 Cal.3d at p. 611.) The trial court then itself specifically inquired into these paragraphs with defendant, discussing the potential conflicts they caused. (30 Cal.3d at pp. 611-612.) Although defendant decided to keep his retained lawyer, the trial court nevertheless discharged him. This Court reversed, ruling that defendant's "informed" decision to proceed was a sufficient waiver of any conflict. (30 Cal.3d at p. 619.) Here too the *Bonin* obligation was plainly satisfied.

But neither of these cases aids the state here. The fact of the matter is that Mr. O'Malley was *not* offered outside counsel with whom to consult, nor did he in fact get the chance to consult with outside counsel. And the trial court *never* specifically discussed the potential conflict with Mr. O'Malley -- to the contrary, rather than discuss the problems in proceeding with *conflicted counsel*, the only issue actually discussed with Mr. O'Malley were potential problems should he decide to proceed with *replacement*

counsel. (Sealed RT 9/11/91 at 11374-11375.) This was not a proper waiver; respondent's contrary argument must be rejected.

C. There Was An Actual Conflict Of Interest.

An actual conflict of interest exists "whenever counsel is so situated that the caliber of his services may be substantially diluted." (*People v. Hardy* (1992) 2 Cal.4th 86, 136.) Respondent properly concedes that "a criminal defense attorney is generally in the best position to determine whether a conflict of interest exists . . . ." (RB 142, *citing People v. Hardy* (1992) 2 Cal.4th 86. *See also Cuyler v. Sullivan* (1980) 446 U.S. 335, 337; *Holloway v. Arkansas* (1978) 435 U.S. 475, 485.) Respondent notes "defense counsel discussed the issue with the court in detail on three occasions" and further concedes that in these detailed discussions defense counsel said (1) it would be difficult to dismiss the threat from his mind, and (2) he did not know if it would impact his ability to present mitigation and argue for life. (RB 143.)

With respect, although these concessions are accurate as far as they go, they capture neither the sincerity nor the breadth of counsel's protest. As noted above, in these three detailed discussions with the court, counsel stated it would be "almost impossible" for him to effectively represent Mr. O'Malley in the penalty phase. (Sealed RT 8/20/91 at

11314-11315.) He told the court he "had a very serious problem" in effectively representing Mr. O'Malley at any penalty phase. (Sealed RT 8/27/91 at 11329-11330.) And in no uncertain terms, counsel later reiterated that he could not ethically represent O'Malley, that he would have difficulty "present[ing] mitigating factors to the jury," that he "would not be able to participate as an effective advocate in literally arguing that his life be spared to this jury" and that he "fe[lt] very strongly about it." (Sealed RT 9/11/91 at 11364-11365, 11381, 11382.)

But although it concedes defense counsel was "in the best position to determine whether a conflict of interest existed," the state nevertheless argues that counsel here was wrong and he was not, in fact, conflicted at all. (RB 143.) Out of the three "detail[ed]" discussions defense counsel had with the trial court, the state isolates a single comment made by defense counsel at the August 27 hearing that "he believed he would still be professional enough to try and mentally" represent defendant -- and argues that this justifies the trial court's ruling. (RB 143, *citing* Sealed RT 8/27/91 11330.)

While the state's quote is accurate, the quote is taken out of context. As noted, there were three discussions with the trial court: August 20, August 27 and September 11, 1991. At the initial discussion, counsel said it would be "almost impossible" for him to represent Mr. O'Malley in the penalty phase. (Sealed RT 8/20/91 at 11314-11315.) He

conceded that he did not "know where I would be in a week or two weeks . . . from now." (Sealed RT 8/20/91 at 11315.)

One week later there was another hearing. It was at this hearing that defense counsel said he thought he "would still be professional enough to *try* mentally to do that [to continue]." (Sealed RT 8/27/91 at 111330.) That is the sentence on which respondent relies. But as noted above, defense counsel added at that same hearing that it would be "very difficult" to dismiss the threat "if I had to continue as an advocate in the rest of the case" and noted that he "was very upset about that and still am." (Sealed RT 8/27/91 at 11329-11330.)

To the extent there was any ambiguity, defense counsel removed that ambiguity at the third hearing, held two weeks later. Having dwelled on the threat for two weeks, defense counsel told the court in no uncertain terms that the incident "*does* interfere with the effectiveness of myself in terms of now going forward with the penalty phase and literally arguing and advocating for his life." (Sealed RT 9/11/91 at 11365.) Defense counsel recognized that ethically he was "supposed to disregard . . . anything else that might interfere with your ability to represent" Mr. O'Malley, but reminded the court that "lawyers are still human beings." (Sealed RT 9/11/91 at 11365.) He concluded by telling the court that "it's my opinion that I would not be able to continue . . . presenting

evidence on his behalf in mitigation" and "would certainly not be able to participate as an effective advocate in literally arguing that his life be spared" and "I feel very strongly about it, and feel deep down inside, it would be an impediment . . . ."

The state ignores the context of the one sentence statement made at the August 27 hearing. But put in context, this statement simply will not support the trial court's finding.

Significantly, the state also ignores entirely both the court's actual inquiry and its findings. Although the court was specifically alerted to the risk that defense counsel would not present mitigating evidence or argument on Mr. O'Malley's behalf, the court did not ask a single question about whether counsel would effectively present on defendant's behalf either (1) mitigating evidence or (2) a zealous argument for life. (Sealed RT 8/27/91 at 11327-11338; Sealed RT 9/11/91 at 11364-11381.) And after denying trial counsel's motion to withdraw, the court made no specific findings relevant to these areas, the precise areas that required the inquiry in the first place. (*See* 55 RT

11402-11403.)[17]

In short, defense counsel was entirely clear there was a conflict in this case. He could no longer act as a zealous advocate on Mr. O'Malley's behalf. The state's argument to the contrary must be rejected. Reversal is required.[18]

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[17] The court did find that trial counsel had an ethical obligation to do as much as possible for appellant and a duty to put his personal feelings and beliefs aside. (55 RT 11403.) Of course, this is entirely true, but also irrelevant. The question here is whether the record shows that counsel could follow this obligation.

It is true that the court went on to state that trial counsel indicated that he could do this. (55 RT 11404.) But the record does not support this. Trial counsel said that although he would *try* and act in a professional manner, he believed it would be "very difficult" for him to dismiss the threat and act as an effective advocate for appellant. (Sealed RT 8/27/91 at 11330.) "[D]eep down inside" trial counsel said the threat was something that would interfere with his ability to act as counsel and advocate for appellant's life. (Sealed RT 9/11/91 at 11364-11365-11366.) Counsel did not "know any way possible" to change this. (Sealed RT 9/11/91 at 11366.)

[18] As noted above, respondent also argues that any error was harmless because defense counsel called numerous witnesses during the penalty phase, and the record does not show what actions his attorney would have taken absent the conflict. (RB 144, 146.) But as discussed in Mr. O'Malley's opening brief, where defense counsel objects to continued representation based on a conflict, and the trial court improperly requires continued representation, the federal constitution requires reversal without a further showing of prejudice. (*See, e.g.*, *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 488.) This Court itself could not have been much clearer on this exact point:

> "Where a trial court requires the continuation of conflicted representation over a timely objection, reversal is automatic." (*People v. Clark* (1993) 5 Cal.4th 950, 994.)

Respondent does not cite either *Clark* or *Holloway* in its contrary prejudice argument. (RB 144, 146.) Accordingly, that argument must be rejected.

VIII. THE TRIAL COURT'S REFUSAL TO ALLOW MR. O'MALLEY TO DISCHARGE HIS RETAINED LAWYER VIOLATED BOTH THE STATE AND FEDERAL CONSTITUTIONS.

Mr. O'Malley privately hired attorney James Campbell to represent him. (9 ART 280; 10 ART 282; 11 ART 291; 12 ART 299; 13 ART 315, 320; 15 ART 349-350; 21 ART 764-765; 55 RT 11400.) After Mr. Campbell had repeatedly told the court that because of the threats to his wife's life he would have difficulty presenting mitigation and arguing for life, counsel advised the court that Mr. O'Malley wished to make a "quasi *Marsden* motion." (56 RT 11533.) The trial court cleared the courtroom -- as it would do with any *Marsden* hearing -- and listened to Mr. O'Malley's complaints.

Mr. O'Malley stated that "I do not have confidence in my attorney" and explained that his lawyer had "lost all credibility with the jury . . . ." (Sealed RT 9/24/91 at 11535-11536.) He acknowledged but disagreed with the trial court's earlier assessment that trial counsel was "well prepared and highly effective . . . ." (*Id.* at 11536.) Although he expressed concern about possible replacement counsel, he noted that Mr. Campbell had ignored reports and interviews with defense witnesses, as well as suggestions from other members of the defense team. (*Id.* at 11536-11537.) Mr. O'Malley made clear he "strongly disagreed" with a number of choices which counsel had made, and noted that many of these choices had been undertaken without any attorney-client consultation at all.

(*Id.* at 11537.) His problem with Mr. Campbell was "how I was represented." (*Id.* at 11538.)

The trial court saw and heard Mr. O'Malley's comments. Although the trial court refused to provide relief, in no uncertain terms the court made clear its awareness that Mr. O'Malley was trying to discharge counsel:

> "Mr. Campbell is not going to be relieved at this point." (Sealed RT 9/24/91 at 11541.)

The trial court took pains to explain its ruling. Again in no uncertain terms the court stated that Mr. O'Malley could not fire his privately-retained lawyer because he had not met the standard set forth in *Marsden* for replacement of court-appointed counsel:

> "It would not appear that any disagreements that [appellant] may have had over trial tactics has caused a breakdown in the attorney-client relationship that would substantially, if in any way, impair the defendant's rights to effective assistance of counsel." (Sealed RT 9/24/91 at 11541.)

In light of these facts, Mr. O'Malley raised three separate contentions in his opening brief. First, Mr. O'Malley contended that, in fact, the trial court properly found that he was attempting to discharge counsel. (AOB 217-220.) Mr. O'Malley recognized

that he never used word such as "discharge" or "terminate" but contended that -- in context and as a lay person -- Mr. O'Malley had made clear to the trial court his desire to discharge counsel. (AOB 217-220.) He noted that the trial court itself believed Mr. O'Malley was trying to discharge counsel and he discussed *People v. Lara* (2001) 86 Cal.App.4th 139 in support of his position. (AOB 217-220.) Second, Mr. O'Malley contended that because he had retained trial counsel, the *Marsden* standard used by the trial court here had no application to his case. (AOB 220-223.) Third, Mr. O'Malley contended that reversal of the penalty phase was required. (AOB 224-228.)

Respondent does not dispute that because Mr. O'Malley had retained counsel, the *Marsden* standard had no application to this case. (RB 147-155.) Nor does respondent dispute that if error occurred, reversal is required. (RB 147-153. *See People v. Bouzas* (1991) 53 Cal.3d 467, 480 [the state's failure to respond to an argument raised by a criminal defendant is an "apparent conc[ession]" of the point.].) Instead, the state makes one argument -- and one argument only -- in connection with this issue.

The state argues that Mr. O'Malley "did not clearly indicate to the court he wanted to discharge" counsel. (RB 152.) The state correctly notes that Mr. O'Malley said he was concerned about who would be appointed in trial counsel's place. (RB 152.) The state distinguishes *People v. Lara*, *supra*, 86 Cal.App.4th 139 as follows:

> "[Unlike *Lara*] the trial court here did not interpret appellant's statement as a request to discharge counsel and/or a request for new counsel . . . ." (RB 154.)

Respondent is, of course, correct that Mr. O'Malley did not use the word "discharge" or "terminate" during the *Marsden* hearing. But this does not end the matter; as this Court has noted "the semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right." (*People v. Marsden* (1970) 2 Cal.3d 118, 124.) A defendant seeking to discharge counsel need not state any magic words -- he simply must give a "clear indication" that he is no longer satisfied with counsel. (*People v. Lucky* (1988) 45 Cal.3d 259, 281, n.8.) Of course, in light of *Marsden* and *Lucky,* it is the trial court that is in the best position to determine if Mr. O'Malley gave a "clear indication" he wanted new counsel. After all, it is the trial court that saw and heard Mr. O'Malley's complaints about counsel.

This is where *People v. Lara*, *supra*, 86 Cal.App.4th 139 comes in. There, defendant told the court that his privately retained lawyer was not prepared and that he and counsel had disagreements. The trial court refused to discharge counsel because defendant had not satisfied the *Marsden* standard. Like the defendant here, the defendant in *Lara* never said he wanted to discharge his lawyer. On appeal, the state made the

identical argument it makes here, contending that defendant had not made a clear request to discharge counsel. The Court of Appeal properly rejected this argument, noting that the trial court itself had viewed the complaints as sufficient to apply the *Marsden* standard and as a request to discharge counsel. (86 Cal.App.4th at p. 158.)

Respondent ignores both *Marsden* and *Lucky*. Of far greater concern, however, is that in trying to distinguish *Lara*, respondent states "the trial court here did not interpret appellant's statement as a request to discharge counsel and/or a request for new counsel." (RB 154.) With all due respect, that is *exactly* how the trial court interpreted Mr. O'Malley's statement; this fully explains the trial court's explicit ruling in the matter:

> "Mr. Campbell is not going to be relieved at this point." (Sealed RT 9/24/91 at 11541.)

The trial court ruled that Mr. Campbell was "not going to be relieved" precisely because it understood that Mr. O'Malley was requesting just that.

Respondent's failure to defer to, or indeed even mention, the trial court's finding here is especially puzzling. After all, as noted in Argument III, *supra*, respondent tells this Court over and over again throughout its own brief that "the trial court's conclusions are entitled to deference on appeal" precisely because it is the trial court that can place

statements "in context and draw meaning from all circumstances, including matters not discernable from the cold record." (RB 47. *See also* RB 64 [deference required to trial court's evaluation of ambiguous facts]; 66 [same]. *Compare* RB 142 [trial court is in the best position to determine if a conflict of interest existed].)

Here, however, this fundamental principle is honored more in the breach than in the observance. Or, put another way, what is sauce for the goose should be sauce for the gander. The trial court saw and heard Mr. O'Malley's statements, and ruled that Mr. Campbell was "not going to be relieved . . . ." Plainly the trial court understood Mr. O'Malley's statements as a request to relieve counsel. That should end the matter. (*Compare People v. Samuels* (2005) 36 Cal.4th 96, 120 ["In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented"]; *People v. Scott* (1978) 21 Cal.3d 284, 290 [same]; *People v. Bolinski* (1968) 260 Cal.App.2d 7095, 722-723 [same].)

Rather than defer to the trial court's own finding, the state isolates one of Mr. O'Malley's comments expressing concern about who would replace counsel. (RB 152.) Of course, in a capital case -- like any other criminal case -- this was an entirely legitimate concern on Mr. O'Malley's part. Even putting this aside, however, this comment does not change the fact that in the final analysis, the trial court who saw and heard the *entirety*

of Mr. O'Malley's comments -- not just the one comment isolated by the state now -- interpreted these comments as a request to relieve counsel.

Indeed, the state's failure to defer to the trial court's finding here, and its purported distinction of *Lara*, ignore not only the state's own recognition of the importance of deferring to the trial court, but the context for the trial court's ruling as well. The trial court's ruling, after all, was not made in a vacuum.

Mr. O'Malley was proceeding to the penalty phase of his capital trial. The jury would decide whether he lived or died. Trial counsel had stated he could not effectively present mitigation on Mr. O'Malley's behalf or ask the jury to impose a life sentence. Taking Mr. O'Malley's complaints in this context, and as the trial court itself properly understood them, it is obvious that Mr. O'Malley was trying to discharge counsel. The trial court's ruling shows that it understood Mr. O'Malley's request in exactly that way. Indeed, it is hard to imagine what other purpose Mr. O'Malley could have had for

making these statements.[19]

In sum, contrary to the state's current argument, the trial court in this case explicitly recognized Mr. O'Malley was trying to relieve counsel. That is why the trial court, after hearing Mr. O'Malley's complaints, ruled that Mr. Campbell "is not going to be relieved . . . ." Because the state does not dispute either the inapplicability of the *Marsden* standard here, or the need for reversal if error occurred, the penalty phase must be reversed.

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[19] Respondent nevertheless tries. Respondent explains that Mr. O'Malley's real goal was *not* to discharge counsel but instead to present his grievances to the court for "other purposes." (RB 152.) According to respondent, Mr. O'Malley was "set[ting] the stage for a future new trial motion" based on ineffective assistance of counsel. (RB 152.)

While respondent can certainly be commended for the obvious earnestness of its attempt to provide an alternate explanation for Mr. O'Malley's complaints, the Court should be aware there is not a scintilla of evidence in the record to support this spin on the evidence. Nor does respondent cite anything to support its position. The fact of the matter is that *no* new trial motion based on ineffective assistance of counsel was ever filed. (*See* XXVII CT 6193-6209.) Moreover, given that the penalty phase was about to occur -- and that Mr. O'Malley had heard his retained lawyer say he could not present mitigating evidence or argument on Mr. O'Malley's behalf -- respondent never adequately explains why Mr. O'Malley's reaction would be to "set the stage for a future new trial motion" rather than simply and directly get a new lawyer for the penalty phase.

IX. THE TRIAL COURT IMPROPERLY PRECLUDED EVIDENCE REGARDING ONE OF THE TWO SENTENCE CHOICES FACING THE JURY.

The jury was choosing between a life with parole sentence and death. At the penalty phase, the jury heard accurate testimony about the life without parole option. (57 RT 11767-11775.) Defense counsel also sought to introduce accurate testimony about the other option before the jury -- the death sentence. (57 RT 11784.) The trial court sustained the state's objection and excluded the testimony. (57 RT 11784-11785.)

In his opening brief, Mr. O'Malley contended this ruling was improper for two separate reasons. First, exclusion of this evidence violated state law; fundamental principles of statutory construction show that when the electorate enacted Penal Code section 190.3 to govern admission of penalty phase evidence, it intended to *permit* consideration of the actual impact of a sentence on the defendant. (AOB 231-239.) Second, and in any event, recent developments in the United States Supreme Court's Eighth Amendment jurisprudence independently required that such evidence be admissible during the sentencing phase of a capital case. (AOB 240-245.) Because of the importance of this kind of evidence, a new penalty phase is required. (AOB 245-249.)

Respondent does not dispute that if either state or federal law required admission of this evidence, reversal of the penalty phase is required. (RB 154-155.) Instead, in

connection with the state law component of this claim, respondent cites this Court's decision in *People v. Grant* (1988) 45 Cal.3d 829 and argues the evidence was inadmissible under state law. (RB 154-155.) As to the separate Eighth Amendment argument, respondent says not a word. (RB 154-155.)

Mr. O'Malley's response will be short. Although *Grant* itself is odd authority for the proposition that execution impact evidence is inadmissible under state law -- since the defendant there did not seek to introduce any such evidence but simply sought to argue the point in closing argument -- the premise of respondent's position is accurate in part. As Mr. O'Malley noted in his opening brief, this Court has indeed held such evidence inadmissible under state law. (AOB 236; *see People v. Harris* (1981) 28 Cal.3d 935, 962.) Because Mr. O'Malley has already explained in some detail why well-established the principles of statutory construction require the Court to reconsider *Harris* and its progeny, there is no need to repeat that discussion in any detail here. (AOB 231-240.)

Suffice it to say that in his opening brief, Mr. O'Malley set forth two separate bases for concluding that, as a matter of statutory construction, section 190.3 authorizes the admission of evidence of how an execution is carried out. The first basis for this conclusion was the electorate's decision to authorize admission of evidence "any matter relevant to . . . mitigation" in section 190.3 As pointed out in the opening brief, at the

time section 190.3 was enacted, this phrase had a well-understood meaning that embraced the impact of a sentence upon the defendant. (AOB 236-236.) The second basis was the electorate's decision to authorize admission of "any matter relevant to . . . sentence" in section 190.3. (AOB 236-240 [emphasis added].)

The implications of the electorate's use of the word "mitigation" in section 190.3 were neither raised nor addressed in *Grant* or *Harris*, and thus those cases are not authority for rejecting appellant's first statutory-construction argument here. (*People v. Williams* (2004) 34 Cal.4th 397, 405 ["cases are not authority for propositions not considered"]; *People v. Barragan* (2004) 32 Cal.4th 236, 243 [same].) Similarly, the implications of the electorate's use of the phrase "any matter relevant to . . . sentence" was also not addressed in *Harris*. Thus, *Grant* was simply wrong when it found Mr. Grant's claim to be "essentially identical" to the one that *Harris* rejected. Moreover, even in *Grant*, the argument as to the meaning of the statute lacked many of the critical indicia of statutory intent that appellant has relied on. (AOB 238-240.) Thus, neither *Harris* nor *Grant* justifies rejecting Mr. O'Malley's second statutory-construction argument.

Turning to the Eighth Amendment component of this issue, and because the state has not disputed the point, Mr. O'Malley will again be brief. Since *Harris* was decided, the Supreme Court has issued three holdings which require a conclusion that exclusion of

this evidence violates the Eighth Amendment. First, the Court has held that at a capital sentencing hearing, the state may introduce accurate information about non-death options facing the jury *even though that evidence was not directly relevant either to the defendant's character or the crime.* (*California v. Ramos* (1983) 463 U.S. 992, 1006, 1008-1009.) Second, the Court has held that where the Constitution permits one party to a capital sentencing hearing to admit a particular type of evidence, the Eighth Amendment requires that the other party be permitted to introduce that same type of evidence. (*Payne v. Tennessee* (1991) 501 U.S. 808, 820-826.) And third, the Court has issued a series of rulings which establish that at a capital sentencing hearing, a state may not exclude evidence which "might serve as a basis for a sentence less than death;" if a factfinder could "reasonably deem" the evidence to have mitigating value, the evidence may not be excluded. (*Smith v. Texas* (2004) 543 U.S. 37, 44; *Tennard v. Dretke* (2004) 543 U.S. 274, 288.) Because the evidence excluded in this case was accurate evidence about one of the sentence choices facing the jury, and because this evidence could certainly have had mitigating value, the Eighth Amendment required that the evidence be admitted.

Although this argument was specifically raised in Mr. O'Malley's opening brief -- and these cases were discussed -- respondent disputes none of it. (*Compare* AOB 240-245 *with* RB 154-155.) Relief is required. (*See People v. Bouzas*, *supra*, 53 Cal.3d at p.

480 [the state's failure to respond to an argument raised by a criminal defendant is an "apparent conc[ession]" of the point].)

X. THE INSTRUCTIONS AND ARGUMENT IN THIS CASE PERMITTED THE JURY TO DOUBLE COUNT TWO SPECIAL CIRCUMSTANCE ALLEGATIONS IN DECIDING WHETHER MR. O'MALLEY SHOULD DIE.

The jury was given a standard instruction that in deciding whether Mr. O'Malley should live or die, it should consider "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (59 RT 12204.) The court never told the jury it could not double count the special circumstances on death's side of the scale, both as special circumstances and as circumstances of the crime.

Twenty years ago, this Court noted (1) a penalty phase jury may not double count evidence as both a special circumstance and a circumstance of the crime and (2) the standard instruction contains an ambiguity on this very point and seems to permits just such double counting. (*See People v. Melton* (1988) 44 Cal.3d 713, 768.) In cases since *Melton*, the Court made clear that the standard penalty phase instructions are not likely to result in this type of improper double counting "in the absence of any misleading argument by the prosecutor . . . ." (*People v. Monterroso* (2004) 34 Cal.4th 743, 790. *Accord People v. Welch* (1999) 20 Cal.4th 701, 769; *People v. Cain* (1995) 10 Cal.4th 1, 68; *People v. Proctor* (1992) 4 Cal.4th 499, 550.)

As discussed in detail in Mr. O'Malley's opening brief, the prosecutor in this case made precisely the type of misleading argument referenced in *Monterroso*, *Welch*, *Cain* and *Proctor*. As to the German homicide, for example, the prosecutor urged the jury to consider as a circumstance of the crime the fact that the crime was committed for financial gain. (59 RT 12232-12233.) The prosecutor separately urged the jury to also rely on the financial gain special circumstance. (59 RT 12234.) He specifically reminded the jury to remember that "we're talking about two different things, because you can consider the circumstances of the crime and the special circumstance." (59 RT 12234.) Similarly, as to the Parr homicide, the prosecutor relied on the fact of the robbery as both an aggravating circumstance of the crime and a special circumstance. (59 RT 12235, 12237.)

In light of this argument, in his opening brief Mr. O'Malley contended there was a reasonable likelihood the jury understood the standard instruction to permit double counting of facts in the calculus of death. (AOB 250-253.) Because the objective record of jury deliberations show that this was a close case as to penalty, a new penalty phase is required. (AOB 253-255.)

Respondent concedes the prosecutor "urged the jury to rely on the circumstances underlying the murders as well as the . . . attendant special circumstances." (RB 159.)

Nevertheless, respondent argues reversal of the penalty phase is not required for three main reasons. First, respondent argues that defense counsel's failure to affirmatively request an instruction telling the jury it could not double count facts, and his failure to cite the federal constitution, waives the issue. (RB 156, 159.) Second, respondent argues that the prosecutor's closing argument "did not ask the jury to double count . . . facts.' (RB 159.) Finally, in a single sentence, respondent argues that any error which did occur was harmless because of the "overwhelming evidence presented by the prosecution regarding the heinous nature of the facts underlying the three murders . . . ." (RB 161.)

Respondent's waiver arguments are easily addressed. This Court has often addressed the merits of this exact argument without either an affirmative request for a modifying instruction from trial counsel or rote reference to the constitution. (*See, e.g.*, *People v. Lewis* (2001) 25 Cal.4th 610, 669; *People v. Mayfield* (1997) 14 Cal.4th 668, 804-805 [rejecting constitutional challenges on merits]; *People v. Fauber* (1992) 2 Cal.4th 792, 857-858 [same]; *People v. Melton*, *supra*, 44 Cal.3d at pp. 768-769.) And while respondent cites two cases holding that a defendant is entitled to a clarifying instruction upon request (RB 156), neither case holds that the current claims are forfeited if such a clarification is not sought. Nor would such a forfeiture holding make sense in a situation like this case, where -- at the time the instructions were agreed upon here -- appellant's counsel could not possibly know the prosecutor would later make the

misleading argument that created the reasonable likelihood of jury misunderstanding in the first place.

But even putting this aside, in light of the prosecutor's penalty phase closing argument here, there could be no conceivable tactical reason for defense counsel's failure act to circumscribed the jury's ability to use adverse facts in the calculus of death. Accordingly, even if such action was required, counsel's failure violated Mr. O'Malley's federal and state constitutional rights to the effective assistance of counsel, and the claim is properly addressed here for this reason as well. (*See, e.g., People v. Marshall, supra,* 13 Cal.4th at p. 831 [prosecutor misstated law in closing argument, defense counsel did not object, on appeal defendant urged court to address the merits of the misconduct claim because counsel had no tactical reason for failing to object; held, court addresses merits of misconduct claim].)[20]

In his opening brief, Mr. O'Malley explained exactly how the prosecutor's closing argument double counted facts in this case. (AOB 250-252.) As noted above, respondent

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[20] To support its waiver argument the state relies on *People v. Daya* (1994) 29 Cal.App.4th 697. (RB 156.) This reliance is curious.

Daya was a non-capital case which did not involve the instruction at issue here. Instead, the appellate court there simply held that absent a request by defense counsel, the trial court was not obligated to instruct "on the niceties of the law concerning motive." (*Id.* at p. 714.) *Daya* has nothing to do with the double counting issue here.

reaches a different conclusion, claiming that the prosecutor's closing argument "did not ask the jury to double count . . . facts.' (RB 159.) There is not a great deal to add here. Suffice it to say that as to the German and Parr homicides, the prosecutor not only relied on the financial gain and robbery special circumstances twice for the same purpose -- once as a circumstance of the crime and once as a special circumstance -- but he went further and specifically reminded the jurors to consider them twice because "we're talking about two different things, because you can consider the circumstances of the crime and the special circumstance." (59 RT 12234.)

Finally in a single sentence the state alternatively argues that any error was harmless. (RB 161.) Respondent relies primarily on the "heinous nature and facts" of the crimes. (RB 161.)

But the fact of the matter is that the major defense presented at the guilt phase was that Mr. O'Malley did not commit any of the three crimes. The guilt phase jury deliberated for 32 hours over seven days, asking for re-reading of testimony and re-instruction on the law, eventually acquitting of one count and convicting of the three homicides. (25 CT 5553-5555, 5556-5557, 5569-5583, 5585.) The penalty phase jury deliberated more than 20 hours over six more days. (25 CT 5715-5722.) This kind of deliberation alone has been recognized as showing a close case as to penalty. (*See, e.g.*,

In re Sakarias (2005) 35 Cal.3d 140, 167.)

Respondent ignores both the deliberations and *Sakarias*. But that is not all respondent ignores in its one-sentence harmless error argument. In fact, in addition to the presence of lingering doubt as an obvious mitigating factors in this case (as reflected in the guilt phase jury deliberations), the defense also presented substantial and unrebutted mitigating evidence about Mr. O'Malley's spiritual development, his troubled upbringing and background, and his excellent conduct in custody. (56 RT 11504-11519, 11617-11621, 11634-11639; 57 RT 11718-11748, 11845-11857; 58 RT 11893-11900, 11923-1-11923-8.) On the record of this case, permitting double counting of special circumstances in the death calculus requires reversal of the penalty phase under any standard of prejudice.

CONCLUSION

For all these reasons, and for the reasons set forth in Mr. O'Malley's opening brief, reversal is required

DATED: 4/24/10

Respectfully submitted,

By _____
Cliff Gardner
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 24440 words in the brief.

Dated: 4/24/10.

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 19 Embarcadero Cove, Oakland, California 94606. I am not a party to this action.

On April 26, 2010 I served the within

APPELLANT'S REPLY BRIEF

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

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I declare under penalty of perjury that the foregoing is true. Executed on April 26, 2010, in Oakland, California.

Declarant