IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	S076339
Respondent,	)	Superior Court (Shasta) 95F7785
v.	)	
GARY GRIMES,	)	
Appellant.	)	

APPELLANT'S REPLY BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Shasta County

Honorable Bradley L. Boeckman, Judge

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INTRODUCTION

In the United States, the mentally retarded may no longer be executed. (*Atkins v. Virginia* (2002) 536 U.S. 304.) Although trial in this case was before *Atkins* -- when execution of the mentally retarded was still permitted -- trial counsel for Mr. Grimes introduced substantial evidence showing that Mr Grimes was, in fact, mentally retarded.

In its brief on appeal in this case, and very much to its credit, the state recognizes that the testing performed at trial showed Mr. Grimes was retarded:

> "Dr. Wicks administered to appellant the Wechsler Adult Intelligence Scale III (WAIS-III), Wide Range Achievement Test-Revised (WRAT-R), and Weschler Memory Scale III. Appellant scored in the borderline retarded or retarded range on all the tests." (Respondent's Brief ("RB") 31.)

The state correctly adds that these were *not* the only tests performed. The state notes, for example, that in addition to these tests, Mr. Grimes was also given the Halstead-Reitan Neuropsychological Test Battery, the Bender Visual Motor Gestalt Test, the Seashore Rhythm test, a speech and sounds test, a tactual performance test and an executive performance test. (RB 31.) Once again to its credit, the state does not shy way from the uniform nature of these test results either:

> "Appellant scored 'seriously impaired' on the Halstead-Reitan Neuropsychological Test Battery, impaired and below normal on both immediate recall and delayed recall on the Bender Visual Motor Gestalt Test, mildly impaired on the Seashore Rhythm test, seriously impaired on the speech/sounds perception test, and very impaired on the tactual performance test." (RB 31, citations omitted.)

The state also concedes that in 1975, when special education was first introduced to Modesto, out of 3,000 students 11-year old Gary Grimes "was one of [the first] 12 boys" placed in the program based on a clinical evaluation and a battery of tests. (RB 29.) As the state forthrightly notes, only six years after this -- when Mr. Grimes was 17 years old -- he was diagnosed by experts at the Napa State Hospital as mentally retarded. (RB 34.)

In fact, according to neuropsychologist John Wicks, Mr. Grimes's overall IQ was 73, his working memory score was 67, his Wide Range Achievement test score was 62 and he generally tested in the range of a third to fourth grader. (37 RT 9803-9836.) As Dr. Wick concluded in connection with Mr. Grimes's score of 60 on the Weschler Memory Scale III test, Mr. Grimes was mentally retarded:

> "That's the mentally retarded range, again. It's well below 70, which would be the mentally retarded range of functioning. (37 RT 9828-9829.)

None of these basic facts were disputed at trial. To the state's credit yet again, none are disputed on appeal.

The state has filed a 205-page brief in this case. The state urges this Court to affirm the death sentence imposed on Mr. Grimes in this pre-*Atkins* case.

For the reasons which follow, the Court should not do so.

ARGUMENT

I. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR JASSO.

A. Introduction.

Prospective juror Abel Jasso was called to jury service in this case. In his written questionnaire Mr. Jasso stated he was not opposed to the death penalty and believed it might be a deterrent. (12 CT 3384.) However, during his voir dire Mr. Jasso made clear he did not "believe that capital punishment is a good thing of itself" and that "ideally speaking, there should be no need for capital punishment . . . ." (18 RT 5212.)

Question 142 of the jury questionnaire advised Mr. Jasso that in deciding between life and death at sentencing, jurors would be "instructed in the specific factors that you can consider in reaching this decision." (12 CT 3386.) Question 142 also asked prospective juror Jasso whether he would "agree to limit [his] decision to those factors enumerated by the Court and not consider any other factors." (12 CT 3386.) Mr. Jasso did not simply check the "yes" or "no" answers provided in the questionnaire; instead, he handwrote in his response:

"If I must, yes." (*Ibid.*)

The court followed up on this specific point. After securing a promise from Mr. Jasso that he would be unbiased, the trial court sought to learn exactly what Mr. Jasso meant by "[i]f I must, yes:"

> "Q: [by the Court]: There were some questions asked, since this case may or may not get to a second stage where jurors consider possible penalty, but you're asked questions in case it does. You're asked, 'Do you agree to limit your decision as to penalty to those facts enumerated by the court and not consider any other factors?'
>
> "What this means, sir, if we reach the stage where Mr. Grimes is eligible to be considered by the jury for punishment, which means he would have been convicted of a first degree murder with a special circumstance found to be true, then and only then jurors would consider penalty. No penalty is automatic, no matter what type of murder in involved. Do you understand that?
>
> "A: [by prospective juror jasso]: Yes.
>
> "Q: Okay. And it's -- it's always a judgment that jurors have to make, after considering and weighing all the evidence that comes in the second phase of the trial. Understand that?
>
> "A: Yes.
>
> "Q: And you're -- I'm going to tell the jury what types of factors you are permitted to consider. I won't tell you how to decide, obviously, but I'll tell you what the law is. And what you should consider and weigh.
>
> "And the question's asking you, are you willing to hold yourself and bind yourself to consider only those things that I tell you can, or do you feel otherwise? And you said, 'If I must, yes.' Why did you say that?

> "A: I think, for the same reason that I mentioned earlier when I was filling out this report or this questionnaire, that if my moral judgment differed from what the law specified that I would opt for my moral judgment. I think I was thinking in the same fashion, that if there was no conflict, that would be assuming that I could." (18 RT 5201-5203.)

The trial court accurately noted that in his questionnaire, Mr. Jasso said he had no religious or moral views which would interfere with his ability to impose a death sentence. (18 RT 5203.) The court then asked whether Mr. Jasso would set aside his views and follow the law in this area, and he agreed to do so:

> "Q: . . . As you know, this trial is going to take many weeks when we get into the evidence. And we don't -- all of us combined here don't know exactly what the evidence is going to be. So, there's no way we could give you adequate specifics to know for certain whether your personal views are going to conflict with the law. That's why jurors are asked. We try and explore it but then they're asked to take an oath that if there is such a conflict, they agree for the purposes of fulfilling their duties as a juror to set aside their views and follow the law.
>
> "And I'm not going to asking (sic) you, sir, if it's a matter of conscience to put your conscience aside. But if your state of mind is that should there be such conflict you feel bound to follow your conscience and not follow the law, I need to know that.
>
> "A: At this time, I don't know whether that situation would arise; therefore I would say, having to answer your question, I would say that I would set aside [my personal views] in order to follow my duty as a juror." (18 RT 5203-5204.)

In response to defense counsel's questions, Mr. Jasso admitted that his concerns

related to the fact that this was a capital case. (18 RT 5206.) He again agreed however that he would set aside his personal views and follow his oath as a juror. (18 RT 5206.) In her questioning, the prosecutor asked Mr. Jasso if he could impose death on a defendant who did not kill or intend to kill, but aided a felony (in which a murder occurred) as a major participant and with reckless indifference to human life. (18 RT 5224.) Mr. Jasso said he did not agree with that as the law, but if he took an oath to follow the law as a juror, he would put aside his views. (18 RT 5226.)

Despite Mr. Jasso's repeated statements that he would set aside his views and follow the law, the prosecutor moved to discharge him for cause. (18 RT 5227.) Over objection, the court excused Mr. Jasso, focusing explicitly on the court's belief that Mr. Jasso had an "extreme conflict" in his ability to impose death. (18 RT 5228-5229.)

In his opening brief, Mr. Grimes contended that Mr. Jasso's comments were unequivocal and the state had not carried its burden of proving that he was unable to follow the law. (Appellant's Opening Brief ("AOB") at 35-42.) Mr. Grimes cited and discussed *Adams v. Texas* (1980) 448 U.S. 38, a case where the Supreme Court held the state had *not* carried its burden of proving that the views of a number of jurors "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (AOB 40 *citing Adams v. Texas*,

supra, 448 U.S. at p. 45.) Citing *Gray v. Mississippi* (1987) 481 U.S. 648, Mr. Grimes noted that because the erroneous granting of even a single challenge for cause requires reversal, reversal was required. (AOB 42; *see Gray v. Mississippi* (1987) 481 U.S. 648, 660.)

Respondent disagrees for three reasons. First, respondent argues that Mr. Jasso's answers were, in fact, equivocal. (Respondent's Brief ("RB") 48-49.) Second, respondent then cites *People v. Coleman* (1988) 46 Cal.3d 749. (RB 50.) Respondent accurately notes that in *Coleman*, this Court cited *Wainwright v. Witt* (1985) 469 U.S. 412 for the proposition that when a prospective juror is equivocal in connection with whether he can follow the trial court's instructions in applying the death penalty, deference must be paid to the trial judge who saw and heard the prospective juror. (RB 50, *citing People v. Coleman*, *supra*, 46 Cal.3d at p. 767, n.10.) Based on this principle from *Witt*, respondent argues that this Court must bow to the trial court's ruling here: "[t]he trial judge's determination of prospective juror A.J.'s state of mind is binding on this Court." (RB 50.) Third, respondent argues in a footnote that reversal of the guilt phase would not be required here because Mr. Grimes has not shown that the discharge of Mr. Jasso "resulted in the seating of a biased juror, or of a sworn jury that was not fair and impartial." (RB 50, n.15.)

As discussed more fully below, respondent's argument should be rejected. In fact, Mr. Jasso was not equivocal at all. But even putting this aside, respondent's reliance on *Coleman* for the deference rule it seeks is untenable. The precise rule of deference respondent seeks to have this Court apply here was *explicitly* rejected by the United States Supreme Court more than a decade ago. Finally, although respondent's footnoted point is entirely accurate insofar as the guilt phase is concerned -- and as the Supreme Court held in *Gray v. Mississippi*, *supra* -- a different standard applies to the penalty phase. Reversal of the penalty phase is required.

B. Mr. Jasso Was Unequivocal That He Would Follow The Law.

As a factual matter, the suggestion that Mr. Jasso equivocated should be rejected. Mr. Jasso was unequivocal -- time and time again he told the court that if he took an oath as a juror, he would disregard his personal views and follow his oath:

- "I would say that I would set aside [my personal views] in order to follow my oath as a juror." (18 RT 5204.)
- "Now, if I promise, through an oath, to set [my views] aside, I will certainly do my duty . . . ." (18 RT 5206.)
- "If I was sworn in and said I would follow the law based -- regardless of what my conscience says, then I would do as I had sworn to do, that is, follow the law." (18 RT 5221-5222.)

- "[I]f I said I would follow the law, I would follow the law . . . . As I mentioned to you, if I was sworn in as a juror, I have sworn to follow the law as it is explained to me by the court. That's what I would do." (18 RT 5222.)

But perhaps the best indication of Mr. Jasso's views came in this exchange with the trial court who asked Mr. Jasso directly if he could take an oath to follow the law -- which might require a death sentence -- for a defendant who did not kill and did not intend to kill where that defendant was a major participant in an underlying felony who acted with reckless indifference to life:

> "Q: Can you take that oath, or are you telling us that you could not take that oath and make that agreement [to follow the law]?
>
> "A: I am not telling you that. I am telling you that if I was sworn to uphold the law as stated to me, I would do so.
>
> "Q: If you're a juror in this case, you're going to be sworn to follow the law, and you may be in a position where your views conflict with the law in this case . . . . In that circumstance, could you put your conscience and your views aside and follow the law, or would you prefer not to do that?
>
> "A: If -- if it got to that stage that I was a juror, I had taken an oath to uphold the law as stated to me, I would do so." (18 RT 5226.)

In short, Mr. Jasso was not equivocal at all. The state simply did not carry its burden of proving that he would be unable to follow the court's instructions in connection with the imposition of death. Respondent's argument that Mr. Jasso was equivocal must

be rejected.

C. The Legal Thesis On Which The State Relies Was Explicitly Rejected More Than 10 Years Ago By The United States Supreme Court.

Even if Mr. Jasso's comments as to his ability to impose death had been equivocal, reversal of the penalty phase would still be required. In such a case, the state has not carried its burden of proving the juror was unable to sit.

In this regard, the state does not dispute that it was the state's burden to prove that Mr. Jasso was unable to serve as a juror. (RB 39-50; *see Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Instead, the state accurately notes that in a 1988 decision, *People v. Coleman*, *supra*, this Court relied on *Witt* to articulate a principle of deference towards trial judges when a juror gives equivocal responses during voir dire. (RB 50, *citing People v. Coleman*, *supra*, 46 Cal.3d at p. 767, n.10.) For his part, Mr. Grimes will concede that over the years, this Court has applied this rule of deference on numerous occasions, often citing *Coleman* and *Witt*. (*See, e.g.*, *People v. Cummings* (1993) 4 Cal.4th 1233, 1279; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Mason* (1991) 52 Cal.3d 909, 954.) Arguing that Mr. Jasso's comments were equivocal, respondent argues that the principle of *Witt* applies and this Court must defer to the trial court's

ruling. (RB 50.)

The problem with the state's position is basic. The very portion of *Coleman* on which the state relies was explicitly overruled by the United States Supreme Court more than a decade ago.

It is true, of course, that in *Witt* the Supreme Court held that reviewing courts -- in that case, the federal habeas courts reviewing the judgment -- were required to defer to state trial court findings of juror bias in this precise situation. (*Wainwright v. Witt*, *supra*, 496 U.S. at pp. 428-430.) But the Supreme Court has since clarified that the deference rule of *Witt* was based on comity concerns underlying federal habeas review of state court judgments, and is fundamentally inappropriate on direct appeal. (*Greene v. Georgia* (1996) 519 U.S. 145, 146.)

Greene was in all respects identical to this Court's decision in *Coleman*. In *Greene*, defendant was charged with capital murder. (519 U.S. at p. 145.) During voir dire, several jurors gave equivocal responses about their ability to impose death. (*Ibid.*) The trial court discharged these jurors. On appeal in state court, the state supreme court did exactly what this Court did in *Coleman*, relying on *Witt* for the proposition that where a juror is equivocal about his ability to impose death, appellate courts must defer to the

ruling of the trial court. (*Greene v. State* (1996) 266 Ga. 439, 441.) However, the United States Supreme Court reversed, holding that because *Witt* "was a case arising on federal habeas," the deference standard it announced does not apply to "state appellate courts reviewing trial court's rulings on jury selection." (*Greene v. Georgia*, *supra*, 519 U.S. at p. 146.)

As the United States Supreme Court unanimously held in *Greene*, and contrary to the state's argument here, the strict rule of deference announced in *Witt* was based on the unique principles governing federal habeas review of state court judgments. That rule has no place on direct review.

In addition to making clear that the rule of *Witt* has no place on direct review, the Supreme Court has gone further on two occasions and specifically articulated the rule which *does* apply on direct review. Indeed, in each of the direct review cases which have come before it -- *Adams v. Texas*, 448 U.S. 38 and *Gray v. Mississippi* (1987) 481 U.S. 648 -- the Supreme Court has *rejected* the very rule of deference which the state argues for here.

In *Adams*, the Supreme Court held that a number of jurors had been improperly excused for cause in that case, precisely because the state had not carried its burden of

proving that the jurors' views "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) As explained in Mr. Grimes's opening brief, an analysis of the actual voir dire in *Adams* shows that several of the jurors gave admittedly equivocal answers about their ability to follow instructions: juror Francis Mahon, Nelda Coyle, Lloyd White, and George Ferguson. (AOB 40; *see Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix at p. 3, 8, 12, 23-24, 27-28.)

In connection with each of these four jurors expressing equivocal comments, the trial court resolved the ambiguity in the state's favor, discharging them all for cause. Significantly, because the case was on direct review, the Supreme Court did *not* defer to any of these four conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking *any* of these jurors for cause. (448 U.S. at pp. 49-50.) In other words, when a capital case is on direct review, and a juror gives conflicting or equivocal responses -- as did the jurors in *Adams* -- the trial court is not free to simply assume the worst and discharge the jurors for cause. The reason is simple; when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

The treatment of equivocal jurors on direct appeal in *Adams* was compelled by developments in the Supreme Court's capital case/Eighth Amendment jurisprudence. In the years between the Court's 1972 decision in *Furman v. Georgia* (1972) 408 U.S. 238 and its 1980 decision in *Adams*, the Court repeatedly recognized that death was a unique punishment, qualitatively different from all others. (*See, e.g., Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court held there was a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra*, 430 U.S. at p. 357.)

As the Court later recognized, the rule set forth in *Adams* "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to . . . great[] concern over the possible effects of an 'imbalanced' jury." (*Lockhart v. McCree* (1986) 476 U.S. 162, 182.) The rule in *Adams* -- precluding a for-cause challenge based on equivocal responses and specifically designed to minimize the risk of an "imbalanced jury" -- was appropriate precisely because of "the discretionary nature of the [sentencing] jury's task [in a capital case]." (*Id.* at p. 183.) In fact, the Court specifically noted that the *Adams* rule would not apply "outside the special context of capital sentencing."

(*Ibid.*)

In other words, however the standard of proving a juror's inability to serve is properly applied in non-capital cases (where the jury is simply making a binary determination of fact), the standard applied in capital cases is different. In the "special context of capital sentencing" -- where the jury is making a largely discretionary decision as to whether a defendant should live or die -- there is a greater concern over the impact of an "imbalanced jury" on the reliability of the judgment, as well as with ensuring that the state not seat juries predisposed to a death verdict. Accordingly, the Supreme Court made clear in *Adams* that in the context of a direct appeal, when a prospective capital-case juror gives equivocal responses, the state has *not* carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." *(Adams v. Texas, supra,* 448 U.S. at p. 45.)

Seven years after *Adams* the Supreme Court addressed this same issue in a case arising on direct review again, and again rejected the thesis that deference was properly applied on direct review of an equivocal juror. (*See Gray v. Mississippi, supra,* 481 U.S. 648.) There, defendant was charged with capital murder. During voir dire, prospective juror H.C. Bounds was questioned. According to the state supreme court, this voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds which were

"equivocal." (*Gray v. State* (Miss. 1985) 472 So.2d 409, 422.) The trial court discharged Ms. Bounds for cause.[1]

Before the United States Supreme Court, the state "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.) In fact, the state explicitly made the very argument the state makes here, arguing that a conclusion that equivocal juror Bounds was improperly excused for cause would "refuse to pay the deference due the trial court's finding that juror Bounds was not qualified to sit as a juror." (*Gray v. Mississippi*, No. 85-5454, Respondent's Brief at 15-16.) Noting that the trial court found Ms. Bounds to have given equivocal responses, and that "the trial judge was left with the definite impression that juror Bounds would be unable to faithfully and impartially apply the law," the state urged the Supreme Court to give the trial judge's conclusion "the deference that it was due . . . ." (*Id.* at pp. 22, 23.) In his reply, petitioner conceded that Ms. Bounds had "equivocated" in her responses, but argued that under this

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[1] As the actual voir dire shows, the state supreme court's characterization was entirely correct -- juror Bounds was the classic equivocal juror. When asked if she had any "conscientious scruples" against the death penalty, Ms. Bounds replied "I don't know." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I would." (*Id.* at p. 17, 18.) When directly asked by the prosecutor whether she could vote for death, she said "I don't think I could." (*Id.* at p. 19.)

circumstance "the prosecutor, the party that requested Mrs. Bounds's excusal, had not carried its burden." (*Gray v. Mississippi*, No. 85-5454, Petitioner's Reply Brief at 22.)

Of course, the state's position in *Gray* is exactly the position this Court adopted in *Coleman* (by relying on *Witt*) and which the state urges here. Significantly, however, the Supreme Court *rejected* this position in *Gray*, just as it had in *Adams*. In fact, not only did the Supreme Court refuse to afford *any* deference to the trial court's finding in *Gray*, but it concluded that the discharge of juror Bounds violated the constitution. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.) As the Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause." (*Ibid.*)

In sum, as discussed above there was nothing equivocal about the statements made by prospective juror Jasso. But even if there was, the rule of deference which the state seeks to apply on direct review here is squarely inconsistent with (1) *Adams v. Texas*, *supra*, and *Gray v. Mississippi*, *supra* -- the Supreme Court's only two direct appeal cases on this question, (2) *Greene v. Georgia*, *supra*, which specifically held the deference rule of *Witt* has no application in state court direct appeals and (3) Eighth Amendment developments applicable to capital cases since 1972.

D. Reversal Of The Penalty Phase Is Required.

In his opening brief Mr. Grimes contended that the improper discharge of Mr. Jasso required reversal, citing *Gray v. Mississippi*, *supra*, for the proposition that the improper granting of even a single challenge for cause requires reversal. (AOB 42.) In a footnote, respondent argues that reversal of the guilt phase is not required here because Mr. Grimes has not shown that the discharge of Mr. Jasso -- even if improper -- "resulted in the seating of a biased juror, or of a sworn jury that was not fair and impartial." (RB 50, n.15.) Respondent cites *People v. Tate* (2010) 49 Cal.4th 635, 666, in support of this proposition. And, in fact, this Court has reached the same result in other cases as well. (*See, e.g.*, *People v. Holt* (1997) 15 Cal.4th 619, 656; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 148.)

Under current law, respondent's point is a valid one. Mr. Grimes has not shown that the discharge of Mr. Jasso "resulted in the seating of a biased juror, or of a sworn jury that was not fair and impartial." But, as this Court has noted, a very different rule of prejudice applies to the improper discharge of even a single juror because of his or her potential inability to follow a court's instructions in connection with the imposition of death. (*People v. Tate*, *supra*, 49 Cal.4th at p. 666.) In that situation, the Supreme Court's decision in *Gray v. Mississippi*, *supra*, controls, and reversal of the penalty phase

is required where even a single juror is improperly discharged. (*Gray v. Mississippi*, *supra*, 486 U.S. at p. 660.)

That is what we have here. As the above discussion shows, the voir dire shows that Mr. Jasso was discharged because the trial court believed he would not follow the court's instructions in connection with the imposition of death. Accordingly, *Gray v. Mississippi*, *supra*, controls and the penalty phase must be reversed.

II. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR JOHN WOOLBERT.

There was no dispute as to whether Mr. Grimes actually killed anyone in this case: he did not. Accordingly, in order to obtain a death sentence, the prosecutor would have to prove either that Mr. Grimes (1) aided the murder with a specific intent to kill or (2) acted as a major participant in the underlying felonies and exhibited a reckless indifference to human life.

The prosecutor was, of course, aware of these requirements. Thus, during voir dire the prosecutor asked prospective jurors whether they could impose death where the defendant (1) did not kill and (2) did not intend to kill, but (3) acted as a major participant and (4) exhibited a reckless indifference to human life. (*See, e.g.*, 10 RT 3415, 3457, 3490; 11 Rt 3629, 3650, 3741; 12 RT 3861, 3863, 3895, 3919, 3953, 4014, 4054-4055; 13 RT 4086, 4126, 4149-4150, 4175, 4243, 4286, 4309-4310, 4335-4336; 14 RT 4383-4384, 4421, 4442, 4468, 4501, 4525, 4556; 16 RT 4757-4758, 4806-4807, 4869-4870, 4897, 4918-4919; 17 RT 4973-4974, RT 5069, 5084-5085, 5105-5106, 5127-5128, 5154; 18 RT 5193, 5224-5225, 5294, 5320, 5346; 19 RT 5432-5433, 5455-5456, 5474, 5498, 5545, 5579-5580, 5601, 5621-5622; 20 RT 5680, 5709, 5724-5725, 5752, 5793-5794, 5836; 21 RT 5868, 5937, 5989-5990, 6064-6065; 22 RT 6206, 6265, 6291-6292, 6325-

6326; 23 RT 6375, 6407-6408, 6440.)

On three occasions, however, the prosecutor left out the major participant and reckless indifference elements of the question and asked only whether the prospective juror would impose death on a defendant who (1) was not the actual killer and (2) did not intend to kill. (11 RT 3702, 3705; 13 RT 4204; 17 RT 5013.) Defense counsel objected precisely because as phrased the question was wrong. (11 RT 3703-3705; 13 RT 4204; 17 RT 5013.) On each occasion the trial court agreed and required the question to be re-phrased to add the missing components. (11 RT 3704-3705; 13 RT 4204-4205; 17 RT 5013.)

It happened a fourth time in connection with prospective juror John Woolbert. In initially questioning Mr. Woolbert, the prosecutor properly asked him if he could consider death where the defendant (1) was not the killer and (2) had no intent to kill but (3) was a major participant in the crime and (4) acted with a reckless indifference to human life. (21 RT 6028.) Of course, this question fully and accurately conveyed both the state and federal constitutional requirements for a death eligible defendant who was not the actual killer. Without reservation, Mr. Woolbert said he would consider such a defendant death eligible. (21 RT 6028-6029.)

Later, however, the prosecutor modified the question substantially, asking Mr. Woolbert if he would consider death as an option for a defendant who simply had no intent to kill: "[i]n the situation where someone doesn't have any intention to kill, do you feel that you could seriously consider the death penalty?" (21 RT 6030.) Of course, this question completely omitted two key elements which make such defendant's death eligible, and which were present in the prosecutor's prior (and correct) question: that defendant (1) was a major participant in the crime and (2) acted with a reckless indifference to human life.

In response to this very different question, Mr. Woolbert gave a very different answer. Mr. Woolbert said that if a person "flat out had no intention to kill . . . it would be hard to give them the death penalty." (21 RT 6030.) He reiterated that where a defendant had no intent to kill, death was not appropriate. (21 RT 6031.) And as a result of these answers, the trial court granted the prosecutor's motion to discharge Mr. Woolbert for cause. (21 RT 6035-6037.) In contrast to the court's prior rulings, this time the court overruled defense counsel's objection that the prosecutor's questions had deleted both the major participant and reckless indifference parts of the question. (21 RT 6035-6036; *compare* 11 RT 3704-3705, 13 RT 4205, 17 RT 5013.)

In his opening brief, Mr. Grimes contended that the trial court's discharge of Mr.

Woolbert was improper because Mr. Woolbert agreed he *would* consider death for a defendant who (1) was not an actual killer and (2) did not intend to kill but (3) acted as a major participant with (4) a reckless indifference to human life. (AOB 43-64.) On this record the state had failed to carry its burden of proving that Mr. Woolbert would not follow the law. (AOB 56-64.) Because this questioning dealt with the penalty phase only, reversal of the penalty phase was required. (AOB 64.)

Respondent does not dispute that if error occurred, a new penalty phase is required. (RB 51-62.) Moreover, respondent concedes that after initially (and correctly) questioning Mr. Woolbert, "the prosecutor and court did *not* reiterate that to be eligible for the death penalty the jury must find that the defendant was a major participant and acted with reckless indifference to human life." (RB 61-62, emphasis added.) Instead, respondent accurately notes that the prosecutor "short-formed" the question -- deleting any reference to whether the defendant acted as a major participant or with reckless indifference -- and learned that Mr. Woolbert would "not consider death for a defendant who did not have the intent to kill." (RB 62.) Respondent concludes that this was enough to satisfy the state's burden of proof:

> "When considered as a whole, J.W.'s express statements that he could not consider death for a defendant who did not intend to kill could give rise to a determination that J.W.'s views would 'prevent or substantially impair the performance of his duties as a juror . . . ." (RB 63.)

Respondent appears to be arguing that discharging Mr. Woolbert because of his answer to the prosecutor's short-form question was proper because Mr. Woolbert understood that the short-form question implicitly incorporated the two missing elements of major participant and reckless indifference. (RB 62-63.) Of course, if this factual premise is accurate, then Mr. Woolbert's answer to the short-form question was, in effect, a statement that he would not consider death in the exact circumstances of this case. If this were the actual scenario, his discharge was proper.

But this is *not* the actual scenario, and respondent's underlying factual premise is wrong. Considered "as a whole" the voir dire of Mr. Woolbert establishes two propositions:

(1) Mr. Woolbert was directly asked if he could impose death on a defendant "even though they're not the actual killer and they had no intention to kill, [but where the defendant] act[ed] as a major participant in an underlying felony and they act with reckless indifference to human life." (21 RT 6028.) Mr. Woolbert agreed that he could impose death on such a defendant. (21 RT 6028.)

(2) Later, Mr. Woolbert was simply asked if he could impose death on "someone [who] doesn't have any intention to kill." (21 RT 6030.) He said he would not consider death for such a defendant. (21 RT 6031.)

The question is whether this combination of questions and answers is sufficient to carry the state's burden of proving that Mr. Woolbert was unable to consider death as an option in this case. It is not.

To the contrary, what this voir dire "as a whole" shows is that Mr. Woolbert was *willing* to impose death in precisely the situation where death is permissible under the state and federal constitutions. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona*, (1987) 481 U.S. 137, 158 [where defendant is prosecuted for felony murder, but is not the actual killer and does not intend to kill, death is appropriate only where the defendant is a major participant in the underlying felony who acts with a reckless indifference to human life].) The voir dire also shows that Mr. Woolbert was *unwilling* to impose death in precisely the situation where *Tison* itself held that death was *not* a proper punishment: where a defendant is liable for felony murder but does not intend to kill and there is no evidence as to his role in the offense or whether he acted with reckless indifference to human life.

Respondent's argument boils down to a request that this Court ignore that the prosecutor asked two very different questions of prospective juror Woolbert. According to respondent, Mr. Woolbert knew that the short-form question asked by the prosecutor (which did not mention the major participant and reckless indifference components of the

Tison test) was really the same as the prosecutor's first question (which *did* reference both of these *Tison* components). (RB 62-63.) In support of this argument, respondent accurately notes that when the prosecutor asked the short-form question, defense counsel objected as "asked and answered." (RB 62.) The inference respondent would have this Court draw is that defense counsel understood the short-form question was the same as the prior question. (RB 62.)

Curiously, though, respondent ignores not only the specific context of defense counsel's objection, but the trial court's ruling as well. (RB 62-63.) And in gauging *Mr. Woolbert's* understanding of the short-form question -- which, as opposed to defense counsel's understanding, is the relevant focus -- both of these factors are relevant.

The fact of the matter is that shortly before the prosecutor posed her short-form question, the trial court had stated in Mr. Woolbert's presence that the prosecutor would not be allowed "to ask the same question" repeatedly. (21 RT 6029.) Seconds later, when defense counsel objected to the short-form question as "asked and answered," the trial court did not sustain the objection but instead ordered Mr. Woolbert to answer it. (21 RT 6030.)

The obvious implication from this series of rulings could not have been lost on Mr.

Woolbert. Mr. Woolbert knew the trial court would not allow the prosecutor to ask the same question again. When defense counsel objected to the short form question as "asked and answered" -- and when the trial court ordered Mr. Woolbert to answer the question despite that objection -- Mr. Woolbert would plainly have assumed that the short-form question was different from the question that had come before. On such a record, it is difficult to understand how or why Mr. Woolbert would possibly have assumed the prosecutor was asking the identical question again.

In short, the state's argument that the short-form question was identical to the longer question is not made by considering the voir dire of Mr. Woolbert "as a whole,"

but by ignoring significant portions of it entirely. Reversal of the penalty phase is required.[2]

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[2] Although it is not clear, respondent could be making a very different and much broader argument. Respondent could be arguing that even if Mr. Woolbert understood that the short-form question did *not* reference either the major participant or reckless indifference components, the trial court still properly discharged him because he said he would not consider death for a defendant who did not intend to kill. (*See* RB 63 ["When considered as a whole, J.W.'s express statements that he could not consider death for a defendant who did not intend to kill could give rise to a determination that J.W.'s views would 'prevent or substantially impair the performance of his duties as a juror . . . .'"].) This argument rests on the premise that since one of the state's theories was that Mr. Grimes should be given death even though he did not intend to kill, Mr. Woolbert's unadorned statement that he would not consider death for a defendant who did not intend to kill was enough to discharge him.

This argument also ignores the context of this case and the balance of the voir dire. After all, the state's theory was *not* that Mr. Grimes should be given death because he did not intend to kill. It was that Mr. Grimes should be given death even if he did not intend to kill because he was a major participant in the underlying felonies and showed a reckless indifference to human life. And as to this theory, Mr. Woolbert explicitly stated he *would* consider death. (21 RT 6029.) Contrary to the state's position, where a juror has explicitly agreed to consider death for a non-killer so long as the *Tison* requirements have been satisfied, the fact that that same juror would *not* consider death in the absence of the *Tison* requirements cannot possible satisfy the state's burden of proving that the juror's "views would 'prevent or substantially impair the performance of his duties as a juror."

III. THE DEATH SENTENCE AND SPECIAL CIRCUMSTANCE FINDINGS SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY EXCLUDED MORRIS'S ADMISSION THAT HE ALONE KILLED THE VICTIM.

This case involved a felony murder where John Morris was the actual killer. As such, in order to prove the special circumstance allegations true and render Mr. Grimes eligible for a death sentence, the state had to prove he either (1) aided the murder with a specific intent to kill or (2) was a major participant in the felonies who acted with a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d).) Here, the prosecutor argued both theories. (35 RT 9203-9215.)

In seeking to prove the "intent to kill" theory, the prosecutor relied "primarily" on the testimony of jailhouse snitch Jonathan Howe that Mr. Grimes confessed to ordering Morris and Wilson to kill the victim. (31 RT 8380, 8381; 5 CT 1020.) Again and again the prosecutor relied on Howe to support her intent-to-kill theory of the special circumstances. (35 RT 9212-9214, 9293-9294.) The prosecutor again relied on Howe at the penalty phase in asking for death. (41 RT 10879-10880.)

There was substantial evidence showing that Howe made this up. Prior to trial, and before he committed suicide, Morris himself admitted to two different people -- Albert Lawson and Misty Abbot -- that he killed the victim. (24 RT 6747-6750.) The

trial court admitted this evidence. (24 RT 6747, 6749-6750, 6796, 6798.)

Morris also told both witnesses he acted *alone* in killing the victim, Grimes was *not* involved in the decision to kill, and in fact, Mr. Grimes was shocked when the killing happened. (24 RT 6747-6750.) The court excluded Morris's statements to Lawson that Mr. Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house." (24 RT 6747, 6797.) The court also excluded Morris's statements to Abbott that (1) Grimes "did not take part in the killing," (2) Mr. Grimes had not "participated in the killing" and (3) after he "did the lady" Mr. Grimes "looked at him as if they were saying, what in the hell are you doing, dude." (24 RT 6750, 6797.) The court ruled these statements were *not* declarations against interest. (24 RT 6797.)[3]

In his opening brief, Mr. Grimes raised three separate contentions. First, the trial court's ruling violated state law because the evidence was admissible as a declaration against Morris's interest. (AOB 77-82.) Second, the court's ruling violated federal law as well. (AOB 82-88.) And finally, under either state or federal law, reversal of the special circumstance allegation and death sentence was required. (AOB 88-91.)

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[3] Other evidence too suggested Howe was lying. According to three different experts, Howe failed a voice stress test and was lying. (5 CT 1026; 30 RT 8228-8229.) Howe failed a lie detector test. (5 CT 1026; 30 RT 8228-8229.) And he lied at trial, denying receipt of any benefits for his testimony. (*Compare* 31 RT 8384, 8428 *with* 31 RT 8385, 8405, 8445-8446.)

Respondent does not dispute that if error occurred, reversal of both the special circumstance and penalty phase verdicts is required. (RB 69-77.) Instead, respondent argues that no error occurred for two reasons. First, respondent argues that exclusion of the evidence did not violate state law because it was not really against Morris's penal interest. (RB 72-76.) Second, respondent argues that exclusion of the evidence did not violate federal law. (RB 76-77.) Each of respondent's contentions is without merit; reversal of the special circumstance and penalty phase verdicts is required.

A. Because Morris's Admission That He Acted Alone Was Distinctly Against His Penal Interest, The Evidence Was Admissible Under State Law.

Respondent argues that the general test for applying the declaration against interest exception to the hearsay rule contained in Evidence Code section 1230 requires a determination of whether the statements sought to be introduced are "disserving to the interests of the declarant." (RB 74.) Respondent argues that statements which do not make a declarant "more culpable" are inadmissible. (RB 74.)

Mr. Grimes agrees. The problem with the state's position here is that the statements Mr. Grimes sought to admit were indeed "specifically disserving" to Morris and rendered him "more culpable."

In this regard, as Mr. Grimes noted in his opening brief, when a capital jury must decide between life and death, it weighs aggravating factors including the "circumstances of the crime." (Penal Code section 190.3, subdivision (a).) In common sense language directly relevant to the inquiry under Evidence Code section 1230, this Court has noted that a jury may consider circumstances of the crime which render a defendant "more culpable" for the crime:

> "[S]ection 190.3, factor (a) is concerned with those circumstances that make a murder especially aggravated, and therefore *more culpable* and deserving of the ultimate penalty." (*People v. Bunyard* (2009) 45 Cal.4th 836, 859, emphasis added.)

Applying this common-sense approach to factor (a), the Court has repeatedly held that where a defendant has acted alone in deciding to kill, that fact is a circumstance of the crime that makes the defendant "more culpable" within the meaning of section 190.3. (*See e.g.*, *People v. Carpenter* (1997) 15 Cal.4th 312, 415. *See also People v. Howard* (1992) 1 Cal.4th 1132, 1195 [reiterating aggravating nature of the fact that a defendant acted alone in killing the victim].)

Here, Morris told both Lawson and Abbott that Mr. Grimes did not participate in the killing and, in fact, was shocked when he learned that Morris had actually killed the victim. This was compelling evidence not only that Morris acted alone, but that he alone

had made the decision to kill the victim. Pursuant to cases like *Carpenter* and *Howard*, as to Morris this evidence was aggravating under Penal Code section 190.3 precisely because it made Morris "more culpable and deserving of the ultimate penalty." (*People v. Bunyard, supra*, 45 Cal.4th at p. 859.)

As Mr. Grimes noted in his opening brief, it is difficult to imagine how a statement which renders a defendant "more culpable" within the meaning of section 190.3 does not also make him "more culpable" for purposes of Evidence Code section 1230. (AOB 80.) The entirety of the state's analysis on this point consists of an observation that *Carpenter* and *Howard* "do not compel the conclusion that a factor that may be considered aggravating under section 190.3 equates to a declaration against penal interest under Evidence Code section 1230." (RB 76.) However, aside from the statement of its position, respondent never really explains *why* a defendant's statements which are genuinely aggravating under section 190.3 (because they make him "more culpable") should not also come within section 1230.

It may be that there is a case where the state's position would make sense. But this is not that case. As this Court concluded in *Bunyard*, the very reason evidence is considered "aggravating under section 190.3" is that it renders the defendant "more culpable . . . ." (*People v. Bunyard, supra*, 45 Cal.4th at p. 859.) Significantly, that is

the *exact* test that the state itself *concedes* applies to determining the admissibility of statements under section 1230. (RB 74 [citing *People v. Lawley* (2002) 27 Cal.4th 102 for the proposition that statements are admissible under section 1230 when they make the declarant "more culpable"].) And here, pursuant to both *Carpenter* and *Howard*, Morris's statements about acting alone plainly made Morris "more culpable."

In aid of its contrary conclusion, the state relies on this Court's decision in *Lawley*. (RB 74-75.) But *Lawley* is of no aid to respondent.

There, defendant was charged with capital murder. At trial, he sought to introduce statements from a man named Seaborn (1) admitting to the killing, (2) admitting that he (Seaborn) was hired to do the killing and (3) stating that the Aryan Brotherhood hired him. (27 Cal.4th at pp. 153-154.) The trial court admitted the first two statements, and excluded the third. On appeal, this Court upheld the ruling, correctly noting that "nothing about who hired Seaborn to kill [the victim] made Seaborn more culpable." (27 Cal.4th at p. 154.)

Lawley is patently distinguishable from this case. As noted, in *Lawley* the excluded evidence did not make Seaborn more culpable. Here, under both common sense and established case law -- and in contrast to *Lawley* -- Morris's admissions that he acted

alone did indeed make him "more culpable" for the homicide. (*See People v. Carpenter*, *supra*, 15 Cal.4th at p. 415; *People v. Howard*, *supra*, 1 Cal.4th at p. 1195.) As such, this evidence was admissible under section 1230. The trial court's exclusion of this important evidence was error.

B. Because Morris's Admission That He Acted Alone Had Strong Indicia Of Reliability, Excluding That Evidence From The Penalty Phase Violated The Fifth, Sixth And Eighth Amendments.

When a trial court excludes reliable defense evidence which fully corroborates a defense presented to the jury, the defendant's Fifth Amendment right to a fair trial and his Sixth Amendment right to confrontation have been violated. (*See, e.g., Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23.) The Supreme Court has applied this rule in two distinct situations.

First, the Court has applied the rule when the state trial court's exclusion of defense evidence is based on a general rule of state law declaring inadmissible an entire class of evidence. (*See, e.g., Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302 [constitutional error where state statute precluded defendant from introducing evidence to impeach his own witness]; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23 [constitutional error where state statute precluded defendant from calling an accomplice

to testify for the defense].) Second, the Court has applied this very same rule when the state trial court's exclusion of evidence is *not* based on a general rule of state law, but instead is based on a trial court's individual exercise of discretion in ruling evidence inadmissible in a particular case. (*See, e.g., Crane v. Kentucky* (1986) 476 U.S. 683, 687-691 [constitutional error where state trial court made discretionary ruling precluding defense from offering evidence regarding voluntariness of defendant's confession]; *Smith v. Illinois* (1968) 390 U.S. 129, 130-133 [constitutional error where state trial court made discretionary ruling precluding defense from asking certain questions on cross-examination].)

Here, there was no real question as to whether Morris's statements to Lawson and Abbott were reliable. The context of the statements show that Morris was admitting to his role in murdering the victim. On its face, this was plainly disserving to his interests. Pursuant to the above authorities, the trial court's exclusion of this evidence violated both the Fifth and Sixth Amendments.

Respondent disagrees for two specific reasons. First, respondent cites *People v. Cudjo* (1993) 6 Cal.4th 585 for the proposition that "the mere erroneous exercise of discretion" in ruling on the admissibility of evidence does not violate the federal constitution absent a general rule of evidence which precludes admission of relevant

evidence. (RB 76.) But as noted above, this position is flatly inconsistent with United States Supreme Court precedent: a state trial court's discretionary ruling excluding reliable and important evidence from a criminal defendant violates the constitution even where that ruling is *not* based on a "general rule of evidence" which creates a per se exclusion of the evidence at issue. (*See, e.g., Crane v. Kentucky, supra*, 476 U.S. at pp. 687-691; *Smith v. Illinois, supra*, 390 U.S. at pp. 130-133.)

Not surprisingly, every federal circuit to reach the issue has reached the identical result. A state trial court's discretionary decision to exclude reliable and critical defense evidence is unconstitutional even where that ruling is not based on a "general rule of evidence" creating a per se exclusion of the evidence at issue. (*See, e.g., Howard v. Walker* (2nd Cir. 2005) 406 F.3d 114; *Lyons v. Johnson* (2nd Cir. 1996) 99 F.3d 499; *Kittleson v. Dretke* (5th Cir. 2005) 426 F.3d 306; *Ferensic v. Birkett* (6th Cir. 2007) 501 F.3d 469; *Vasquez v. Jones* (6th Cir. 2007) 496 F.3d 564; *Lunberg v. Hornbeak* (9th Cir. 2010) 605 F.3d 754; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057; *Ellis v. Mullin* (10th Cir. 2002) 326 F.3d 1122. *Accord People v. Cudjo, supra*, 6 Cal.4th at p. 641 [Kennard, J., dissenting] [rejecting the argument that a trial court's erroneous exclusion of defense evidence violated the federal constitution only when the exclusion resulted from "a state statute or rule of evidence," as "an odd distortion of the nature and purpose of the constitutional guarantee" because "[w]hat the state and federal Constitutions secure for

the accused is the right to present a defense, not merely the right to be free of unduly restrictive state laws of evidence and procedure."].)

Alternatively, respondent argues there can be no federal constitutional violation here because the trial court's ruling did not "completely deprive appellant of the ability to present evidence that Morris had acted alone . . . ." (RB 77.) Respondent's factual predicate is entirely correct -- the trial court here did not exclude *all* evidence that Morris acted alone, it simply excluded the most persuasive evidence on this point -- Morris's own admissions to this fact.

The problem with the state's argument here is not a factual one, it is a legal one. Once again, the Supreme Court has repeatedly rejected this argument. In criminal cases, state trial courts may not exclude important defense evidence even if that evidence corroborates a defense theory of the case presented to the jury through other witnesses. (*See Chambers v. Mississippi*, *supra*, 410 U.S. at p. 289 [in holding unconstitutional the trial court's exclusion of defense evidence, the Court noted that the evidence would have corroborated a defense which the defendant had been "partially successful [in] bring[ing] before the jury" through other evidence]; *Washington v. Texas*, *supra*, 388 U.S. at pp. 16, 22 [in holding unconstitutional that the trial court's exclusion of defense evidence, the Court noted that the evidence would have corroborated defendant's own testimony as to

the defense theory of the case].) Thus, the fact that the trial court here did not exclude *all* evidence that Morris acted alone, but only the *best* evidence of this fact, does nothing to advance the state's position.

The trial court's ruling violated both the Fifth and Sixth Amendments. It kept important and reliable evidence from the jury deciding whether Mr. Grimes was guilty of the special circumstance allegation and, if so, whether he would live or die. It prevented Mr. Grimes from fully confronting the state's theory -- presented through the testimony of Jonathan Howe -- that Mr. Grimes was the moving force behind the crime. Reversal of the special circumstance findings and penalty phase is required.[4]

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[4] In his opening brief, Mr. Grimes also contended that exclusion of this reliable evidence violated his Eighth Amendment right to a reliable penalty phase. (AOB 87-88.) Because respondent did not discuss this separate argument, no further reply is warranted. (RB 69-77.)

IV. THE SPECIAL CIRCUMSTANCE FINDINGS SHOULD BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY IT MUST UNANIMOUSLY AGREE ON THE SPECIAL CIRCUMSTANCE VERDICTS.

A. Introduction.

As noted, because Mr. Grimes was not the actual killer, in order to prove the truth of the special circumstance allegations (and thereby render Mr. Grimes eligible for death), the state had to prove that he either (1) aided the murder with the intent to kill or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona*, *supra*, 481 U.S. at p. 158.) In her closing argument the prosecutor relied, in the alternative, on each of these factual theories. (35 RT 9203-9211 [reckless indifference], 9212-9215 [intent to kill].) Despite defense counsel's request, however, the trial court refused to instruct the jury it had to unanimously agree on the facts required for application of the special circumstance verdict. (34 RT 9047-9048, 9063.)

In his opening brief, Mr. Grimes raised three separate contentions. First, he contended that the trial court's refusal to provide a unanimity instruction as to the special circumstance allegations violated the Sixth Amendment requirement of at least a super-majority of jurors agreeing on the facts which comprise the offense. (AOB 113-119 and

n.18.) This argument had two components: (1) the Sixth Amendment right to a jury trial applied to special circumstance allegations (AOB 113-114) and (2) because Mr. Grimes was prosecuted on the special circumstance allegation as an accomplice, and the state put forth two different factual theories to support this legal theory of culpability, Mr. Grimes had a Sixth Amendment right to either unanimity, or at least a super-majority of jurors agreeing, on the facts which comprise the charge. (AOB 115-119 and n.18.) Second, Mr. Grimes contended that the trial court's refusal to give such a unanimity instruction violated the Eighth Amendment requirement of enhanced reliability in capital cases. (AOB 119-123.) Finally, Mr. Grimes contended that because there were different defenses to each of the two theories, the state could not prove the error harmless and reversal of the special circumstance verdicts was required. (AOB 123-127.)

Once again, respondent does not dispute that if error occurred, reversal of the special circumstance allegations is required. (RB 86-93.) Instead, respondent argues that no unanimity instruction was required. (RB 89-92.) Respondent also argues that neither the Sixth nor Eighth Amendments were violated here. (RB 89.) Each argument will be addressed in turn. They are without merit, and the special circumstance allegations must be reversed.

B. Because The State Presented An Accomplice Theory Of Liability As To The Special Circumstance Allegations, And Put Forth Two Very Different Factual Theories To Support That Legal Theory, A Unanimity Instruction Was Required.

Respondent's thesis is simple. Respondent notes that a unanimity instruction need not be given when the jury is presented with more than one *legal* theory on which to find a charge true. (RB 91-92.) Respondent argues that is exactly the situation here. According to respondent, there was no need for a unanimity instruction as to the special circumstance allegation here because to find the special circumstance allegation true, all the jury had to find was whether Mr. Grimes "aided and abetted [the] murder in the course of a robbery and/or aided and abetted [the] murder in the course of a burglary." (RB 92.)

If this statement of what the jury was required to find was accurate, there would be no unanimity issue under current law. In this situation, as respondent notes, unanimity as to the precise legal theory -- robbery felony-murder or burglary felony-murder -- would not be required precisely because unanimity as to a legal theory is not required. (*See, e.g.*, *People v. Jenkins* (2000) 22 Cal.4th 900, 1024.)

But the state's characterization of what the jury was required to find is *not* accurate, and it is not really very close. Contrary to the state's suggestion, and precisely

because the state was prosecuting Mr. Grimes entirely as an accomplice, in order to find the special circumstance true the state had to prove that Mr. Grimes *either* (1) aided the murder with the intent to kill or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona*, *supra*, 481 U.S. at p. 158.)

In other words, the state prosecuted Mr. Grimes under a single legal theory (accomplice liability) for which it had two very different factual scenarios: (1) aiding the murder itself or (2) aiding the underlying felony only. In this situation -- where a defendant is prosecuted on a single legal theory with various different factual theories -- a trial court is required to instruct the jury it must unanimously agree on the factual theory. (*See, e.g.*, *People v. Diedrich* (1982) 31 Cal.3d 263, 281; *People v. Failla* (1966) 64 Cal.2d 560, 567; *People v. Dellinger* (1984) 164 Cal.App.3d 284.)

Respondent seeks to avoid the teaching of these cases by arguing that here, "there was no dispute that appellant had aided and abetted [the] murder." (RB 91.) Once again, if this allegation was accurate, there might be no need for a unanimity instruction, or at least no harm from failing to give one. After all, if there was genuinely no dispute that Mr. Grimes aided the murder (and did so with an intent to kill), there would be no need to give a unanimity instruction in connection with the special circumstance allegation.

Once again, however, the state's characterization of the record is *not* accurate, and again it is not really very close. As noted above, the trial prosecutor herself made clear the state had *two* very different theories as to the special circumstance allegation. One of these theories -- based largely on the testimony of jailhouse snitch Jonathan Howe -- was that Mr. Grimes had directly aided and abetted the murder itself. (35 RT 9212-9215.) But contrary to the state's suggestion that there was "no dispute" as to this theory, the defense presented significant evidence showing that Howe was lying, relying on Howe's criminal history, the benefits he expected to receive from his testimony, and the uncorroborated nature of his evidence. (35 RT 9244-9245.) To suggest that there was "no dispute" as to whether Mr. Grimes "aided and abetted [the] murder" simply ignores the record.

Indeed, it is precisely because the defense disputed the state's aiding and abetting theory as to the murder that the prosecutor presented a second factual theory of accomplice liability for the special circumstance allegation. Thus, the prosecutor argued that if Mr. Grimes did *not* aid and abet the murder at all, he was nevertheless liable for the special circumstance allegation because he aided the underlying felony as a major participant with a reckless indifference to human life. (35 RT 9203-9211.)

In the final analysis, the state's legal theory as to the special circumstance

allegation was that Mr. Grimes was liable as an accomplice. The state is quite correct that under current law the jury was not required to agree on whether the murder occurred during a robbery or a burglary. But the fact remains that the state presented two very different factual theories on which accomplice liability could be based: (1) aiding the murder with an intent to kill and (2) aiding the underlying felonies as a major participant with a reckless indifference to human life. Moreover, as respondent's decision not to contest prejudice shows, the state presented very different evidence as to each of these two factual theories and Mr. Grimes presented different defenses to each of these theories. (AOB 125-127.) Thus, jurors could reasonably have distinguished between and disagreed on which theory to rest. The trial court erred in refusing to give a unanimity instruction.

C. The Refusal To Give A Unanimity Instruction Violated The Sixth And Eighth Amendments.

As noted above, Mr. Grimes contended that the trial court's refusal to give a unanimity instruction as to the special circumstance allegation violated the Sixth and Eighth Amendments. As to the Sixth Amendment claim, respondent argues that the Sixth Amendment does not "require[] unanimous jury verdicts in state criminal trials." (RB 89.)

As Mr. Grimes noted in his opening brief, although this is entirely true in the non-capital context, it is an open question as to whether a less-than-unanimous verdict is permitted under federal law in a capital case. (AOB 119, n.18.) As he also noted, however, it does not matter in this case. If the Sixth Amendment applies to the special circumstance allegations then -- at a minimum -- a super-majority of jurors must agree on the facts on which the special circumstance verdict is based. (AOB 119, n.18.) And here, the trial court's instruction permitted the jurors to find the special circumstance allegation true if six jurors had agreed on each theory. In short, respondent's observation that the Sixth Amendment does not require unanimity -- while accurate in the non-capital context -- does not resolve the Sixth Amendment component of the issue presented in this case.

Similarly, respondent asserts that the lack of unanimity did not violate the Eighth Amendment either, citing *People v. Wilson* (2008) 44 Cal.4th 758. But *Wilson* did not decide this issue at all.

In *Wilson*, defendant was charged with capital murder in the shooting death of the victim. The state theorized defendant was either the actual killer or an accomplice. The jury was told it did not have to agree on which theory was true to convict. The jury convicted defendant, and found true an allegation that he personally used the gun during the shooting. On appeal, defendant contended that the absence of unanimity instructions

violated the Eighth Amendment requirement of reliability applicable to capital cases. Noting the jury's unanimous finding that it was defendant who used the gun, the Court held that "[a]ny possible instructional error regarding unanimity was thus harmless under any standard." (44 Cal.4th at p. 802.) The Court also stated that it was "unpersuaded" that the absence of unanimity instructions rendered the guilt phase unreliable. (*Ibid.*)

Of course, given that the jury in *Wilson* unanimously found defendant was the shooter, it stands to reason that the absence of a unanimity instruction as to a perpetrator or accomplice theory could not conceivably have undercut the reliability of the guilt phase verdict. Put another way, the defendant in *Wilson* got exactly what he was entitled to under the constitution: a super-majority (at least) of jurors agreeing on the facts which comprised the charged offense. In fact, the defendant there got more than he was entitled to, since the jury unanimously agreed he was the actual shooter. Such a verdict required the jury to discuss and debate the factual issues, and come to a reliable conclusion.

But here, Mr. Grimes got no such benefit. The jury was *not* told it had to be unanimous, and there is *no* suggestion at all that the jury ever unanimously agreed on a theory of the special circumstance allegation. Precisely because no unanimity instruction was given in this case, there was no need at all for the jury here to discuss or debate on the factual elements of the special circumstance at all. Moreover, as discussed above, the

state presented very different evidence as to each factual theory of the special circumstance allegation and the defenses to each theory were very different. (*See* AOB 125-127.) Thus, jurors could reasonably have distinguished between and disagreed on which theory to rely. The refusal to instruct on unanimity violated the Sixth and Eighth Amendments, as well as state law.[5]

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[5] Although the state makes no harmless error argument, it does suggest in a single sentence that any jurors who believed Jonathan Howe and found Mr. Grimes aided the murder with the intent to kill would necessarily have found that he acted as a major participant in the underlying felony and with reckless indifference to human life. (RB 92.) But as discussed in some detail in Mr. Grimes's opening brief, because the witnesses and evidence as to the state's two theories were very different, as were the defense, a juror convinced of one of the theories would not necessarily be convinced of the other. (AOB 118, 125-127.)

V. THE SPECIAL CIRCUMSTANCE FINDING SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO PROPERLY INSTRUCT ON THE MENTAL STATE ELEMENT OF THE FELONY MURDER SPECIAL CIRCUMSTANCE ALLEGATION.

As noted above, in order to render Mr. Grimes death eligible, the state needed to prove either that Mr. Grimes (1) aided the murder with the intent to kill (intent to kill theory) or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life (reckless indifference theory). (*See* Penal Code § 190.2, subdivisions (c), (d); *Tison v. Arizona*, *supra*, 481 U.S. at p. 158.) In *People v. Estrada* (1995) 11 Cal.4th 568, this Court held that a defendant exhibits reckless indifference when he knows or is aware that his acts involve a grave risk of death to an innocent human being. (*Id.* at pp. 579-580. *See* CALJIC 8.80.1.)

The jury here was given a written instruction which properly conveyed this law:

> "A defendant acts with reckless indifference to human life *when* that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (6 CT 1259.)

In his opening brief, Mr. Grimes contended that the trial court's oral instructions to the jury varied in two respects from this written instruction. Instead of telling jurors that reckless indifference exists "*when* [the] defendant knows or is aware that his acts involve

a *grave* risk of death to an innocent human being," the oral instruction told jurors that reckless indifference exists "*whether* [he] knows or is aware that his acts involve a *great* risk of death to an innocent human being." (AOB 129 *citing* 35 RT 9178, emphasis added.) Mr. Grimes contended that this oral instruction improperly permitted the jury to find the special circumstance true without necessarily finding that he "kn[ew] or [was] aware that his acts involve[d] a grave risk of death to an innocent human being." (AOB 131-134.) He separately contended that reversal of the special circumstance finding and death judgment was required because the state could not prove the error harmless. (AOB 134-138.)

Respondent concedes that "the trial court misspoke when it read to the jury the definition of reckless indifference to human life" by replacing the word "when" with "whether." (RB 93.) Nevertheless, respondent argues there was no error because where incorrect oral instructions are given, but correct written instructions are given, the Court

will presume that the correct written instructions control. (RB 94.)[6]

In support of its argument, the state accurately cites a number of this Court's cases, including *People v. Mills* (2010) 44 Cal.4th 158. In *Mills* this Court did indeed hold that where there is a discrepancy between written instructions and oral instructions, the Court would presume the written instruction controlled. (*Id.* at pp. 200-201.)

In fact, however, the question of whether a correct written instruction means there is no error from provision of an incorrect oral instruction is somewhat more nuanced than the state's citation of *Mills* would suggest. More than 30 years ago, this Court reached precisely the opposite conclusion on this very issue:

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[6] In a footnote, respondent states that its version of page 9178 of the Reporter's Transcript contains only one of the two errors Mr. Grimes described in his opening brief. (RB 93, n.24.) Mr. Grimes has rechecked his copy of the Reporter's Transcript and respondent is entirely correct. The second error identified in the opening brief -- the replacement of the word "grave" with "great" -- did not occur.

Mr. Grimes withdraws that part of the claim. Counsel for Mr. Grimes apologizes to both the Court and opposing counsel for the error. Counsel's explanation for the error is simple though perhaps unsatisfying; as various judges have noted over the years in like circumstances, "[t]he matter does not appear to me now as it appears to have appeared to me then." (*People v. McGill* (1986) 41 Cal.3d 777, 780 n. 2. *Accord Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1071 [Kennard, J., concurring and dissenting]; *Smith v. Anderson* (1967) 67 Cal.2d 635, 645 [Mosk, J., concurring]; *McGrath v. Kristensen* (1950) 340 U.S. 162, 178 [Jackson, J., concurring]; *Andrew v. Styrap* (Ex. 1872) 26 L.T.R. (N.S.) 704, 706.)

> "In delivering jury instructions, a trial court may misread an instruction, misspeak himself or extemporaneously elaborate upon the written instructions . . . If erroneous, these deviations may constitute reversible error either by themselves or in combination with other trial errors." (*People v. Silva* (1978) 20 Cal.3d 489, 493.)

In the years since *Silva*, this Court has on numerous occasions taken exactly the same approach and relied on oral instructions over the written instructions. (*See, e.g.*, *People v. Rundle* (2008) 43 Cal.4th 76, 189, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390; *People v. Bloyd* (1987) 43 Cal.3d 333, 353; *see People v. Staten* (2000) 24 Cal.4th 434, 459, n.7.) Thus, in *Bloyd* this Court *refused* to assume the written instructions controlled where the written instruction was incorrect but the oral instruction was correct. (43 Cal.3d at p. 353. *Accord People v. Wilson*, *supra*, 44 Cal.4th at p. 803 [same].) In *Wilson*, the Court recognized the very practical reason a reviewing court might have for assuming the oral instruction controlled:

> "Although this court gives priority to the written version of an instruction when a conflict exists between the written and oral versions, the jury is not informed of this rule. It is thus possible the jury followed the oral instruction." (44 Cal.4th at p. 803.)

Similarly, in yet another series of cases decided prior to *Mills*, this Court again took a starkly different approach, holding that although provision of a correct written instruction was relevant in assessing prejudice, a trial court's provision of an incorrect

oral instruction in the face of a correct written instruction did indeed constitute error. (*See, e.g., People v. Rodgers* (2006) 39 Cal.4th 826, 901; *People v. Majors* (1998) 18 Cal.4th 385, 410; *People v. Andrews* (1989) 49 Cal.3d 200, 215-216; *People v. Heishman* (1988) 45 Cal.3d 147, 163-164.)

Taken together, these cases show that the matter is not nearly as simple as respondent's cite to *Mills*. And this is as it should be -- after all, the test for determining if provision of a particular instruction is error is whether there is a "reasonable likelihood" that the jurors understood the instruction in an improper way in light of the entire record. (*See Boyde v. California* (1990) 494 U.S. 370, 381.) This determination is made *not* by looking at the terms of any single instruction in isolation through the lens of an artificial presumption about the impact of a single instruction -- whether that instruction is written or oral -- but by looking at all the instructions together. (*See People v. Holt, supra*, 15 Cal.4th at p. 677; *People v. Haskett* (1990) 52 Cal.3d 210, 235.)

Applying this test here, although provision of a correct instruction is certainly relevant, it is not determinative. Indeed, the United States Supreme Court reached this identical result in *Francis v. Franklin* (1985) 417 U.S. 307. There, defendant was charged with murder. Under state law, this required the state to prove defendant had an intent to kill. (*Francis v. Franklin, supra*, 471 U.S. at p. 315, n.4.) The jury was given

an accurate instruction which told it the state had to prove all elements of the offense beyond a reasonable doubt. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 319.) But the jury was also given an incorrect instruction which told the jury it could presume defendant had the intent to kill. (*Id.* at p. 315.) On appeal, the state argued that there was no error because one version of the law given to the jury was entirely correct. (*Id.* at p. 319.) The Supreme Court explicitly rejected this argument:

> "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Id.* at p. 322.)

The same is true here. The record does not show if even a single juror looked at the correct written instructions. But the record unmistakably shows that all twelve of the jurors were in court when the trial judge read the incorrect instruction. As in *Franklin*, this Court simply has "no way of knowing" which of the two instructions the jurors followed.

And the particular error which the court made was on perhaps the most critical point of the entire special circumstances determination. Because Mr. Grimes was not the actual killer, one of the two theories on which the state was relying to prove the special circumstance allegation required the jury to find that he exhibited a reckless indifference

to human life. The jury should have been told that reckless indifference to human life exists only "when" a defendant knows his acts involve a grave risk of death.

But here, the oral instruction told the jury that it could find reckless indifference "whether" Mr. Grimes knew his act involved a grave risk of death. (35 RT 9178.) The problem created by this incorrect instruction is the significant risk that the jury would find reckless indifference even if the state did not prove that he knew his act involved a grave risk of death.

Worse still, this error was anything but theoretical here. After all, at the outset of his closing argument in the guilt phase, defense counsel conceded that Mr. Grimes was liable for felony murder. (35 RT 9237.) As defense counsel explained to the jury, "[t]he contested issue in this case is the special circumstances that apply . . . ." (35 RT 9238.)

And on this issue, the evidence and arguments presented at trial show that whether Mr. Grimes exhibited a reckless indifference was very much at issue factually. The state's theory, of course, was that Mr. Grimes was the central force in planning and carrying out the robbery and burglary and was aware of the risk of death to the victim. (35 RT 9203-9204.) But the defense contested this theory at every turn; given the defense concession of guilt as to felony murder, defense counsel's entire closing argument was

directed at this very issue. (35 RT 9236-9282.)

Because the question of reckless indifference was both critical to the special circumstance allegation, and very much disputed at trial, the question remains whether the risk that the jury followed the incorrect oral instruction is satisfactorily undercut by the fact that the court provided a correct written instruction at which jurors may have looked. As Mr. Grimes noted above, this Court has long recognized that where an incorrect oral instruction has been given, the fact that a correct written instruction was provided to the jury is certainly relevant to the prejudice calculus. (*See, e.g., People v. Rodgers, supra,* 39 Cal.4th at p. 901; *People v. Majors, supra,* 18 Cal.4th at p. 410; *People v. Andrews, supra,* 49 Cal.3d at pp. 215-216; *People v. Heishman, supra,* 45 Cal.3d at pp. 163-164.)

Significantly, however, in each of these cases where the Court found provision of an erroneous oral instruction harmless either (1) the jury verdicts or evidence showed that the jury made or would have made the requisite finding omitted by the instructional error or (2) the erroneous instruction was cured by the trial court's provision of written and oral instructions *other* than the specific conflicting written instruction at issue (so there was not simply an unresolvable conflict between two instructions). (*See, e.g., People v. Rodgers, supra,* 39 Cal.4th at p. 901 [erroneous oral instruction which did not tell jury that it could consider defendant's mental disturbance as a mitigating factor held harmless

where oral and written instructions told the jury it could consider defendant's emotional disturbance and "[t]he jury would not have considered 'mental' disturbance to be a separate category from 'emotional' disturbance, which the oral instructions told the jury to consider."]; *People v. Majors*, *supra*, 18 Cal.4th at p. 410 [erroneous oral instruction harmless where verdicts show the jury resolved the factual issue arguably removed by the error]; *People v. Andrews*, *supra*, 49 Cal.3d at p. 216 [erroneous oral instruction harmless where other instructions required jury to resolve factual issue arguably removed by the error]; *People v. Heishman*, *supra*, 45 Cal.3d at p. 165 [erroneous oral instruction harmless where the evidence shows any error had no conceivable impact on the case].)

Here, the jury verdicts do *not* show the jury made the requisite mental state finding omitted by the oral instruction under a proper understanding of reckless indifference. (6 CT 1296-1297.) Nor was any other instruction given which could have resolved this conflict. Finally, as discussed above, the evidence as to reckless indifference was very much disputed at trial, and it cannot be said as a matter of law that the jury would necessarily have found reckless indifference under proper instructions.

In the final analysis, as the Supreme Court noted in *Francis v. Franklin*, *supra*, when conflicting instructions are given, "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict."

(471 U.S. at p. 322.) As this Court has correctly noted, when there are conflicts between an oral and written instruction, "[i]t is . . . possible the jury followed the oral instruction." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 803.) None of the factors typically relied on to render an incorrect oral instruction harmless are present here.

The Supreme Court noted more than 30 years ago that reviewing courts in capital cases must be vigilant to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Because the trial court's instructional error here creates that same risk, and because it is impossible to say the jury did not rely on the incorrect definition, reversal of the special circumstance verdict is required.[7]

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[7] Alternatively, the state argues that there is no error because the jury could have gotten the correct law from the arguments of counsel. (RB 95.) If the incorrect instruction was ambiguous, it would certainly be proper to examine the arguments of counsel to see how the instruction could reasonably be understood. (*See People v. Prettyman* (1996) 14 Cal.4th 248, 272-273 [examining arguments of counsel to determine whether jury was mislead by an ambiguous instruction].)

But here, the incorrect instruction was not ambiguous. It was flat wrong and permitted the jury to find the special circumstance allegations true without a specific finding as to reckless indifference. And in this very different context, the arguments of counsel are not conclusive; after all, the trial court explicitly told the jury that it "must accept and follow the law as I state it to you" and that if "anything concerning the law said by the attorneys in their arguments . . . during this trial conflicts or conflicted with my instructions on the law, you must follow my instructions." (35 RT 9159.) This Court must, of course, presume the jury followed this instruction. (*See e.g.*, *People v. Foster* (2010) 50 Cal.4th 1301, 1337.)

VI. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE DURING THE PLEA BARGAINING PROCESS.

In June of 1997, the state offered Mr. Grimes a deal: waive his constitutional rights and plead guilty to first degree special circumstances murder and the state would not seek death. (3 CT 324.) But there was a catch: Mr. Grimes had only 21 days to decide. At the time, Mr. Grimes's lawyer, Richard Maxion, had been on the case for only 13 days. (3 CT 314, 323-324.)

As co-counsel for the defense later made clear, the discovery from the state alone constituted more than 3,000 pages. (6 RT 2568.) Mr. Maxion had not yet tested at least 13 important items of physical evidence. (5 CT 921 [August 1998 stipulation to allow testing].) At the time he had to advise Mr. Grimes whether to take the plea, because of the short time he had been on the case, defense counsel "did not have the ability to fully understand the prosecution's evidence, couldn't fully investigate . . . ." (6 RT 2568.) Upon the advice of such an unprepared lawyer, at the end of the 21 day period Mr. Grimes rejected the plea bargain. (3 CT 335.)

Sixteen months later, when trial began, Mr. Maxion was fully prepared on the case, he had reviewed all the discovery, conducted all necessary tests and had sufficient time to

consult with Mr. Grimes. As respondent itself notes, at this time "trial counsel's knowledge of the case [had] changed in the 15 months [since] appellant's rejection of the People's offer . . . ." (RB 117.) Now, Mr. Grimes was willing to accept the plea. (22 RT 6149.) But the state refused; apparently, the offer was longer open. (22 RT 6149.) When co-counsel contended that Mr. Grimes had received ineffective assistance of counsel because of the insufficient time Mr. Maxion had to come up to speed on the case, the trial court rejected the claim because "although there was a time limit set, that that time limit was agreed upon with defense counsel, and [district attorney] Scott testified . . . that if additional time had been requested that he would have allowed additional time . . . ." (6 RT 2571.)

In his opening brief, Mr. Grimes contended that he received ineffective assistance of counsel during the plea process. (AOB 170-174.) Given the state's case, properly prepared counsel could have made only one decision: advise the client to accept the plea offer. (AOB 173.) Because the record shows Mr. Grimes would have taken such advice, reversal of the penalty phase is required. (AOB 175-176.)

Respondent disagrees for two reasons. First, respondent argues that the appellate record does not show what advice Mr. Maxion gave to Mr. Grimes at the end of the 21 day window. (RB 117.) Second, respondent argues that the record does not show that

with different advice, Mr. Grimes would have pleaded guilty. (RB 118.)

As discussed below, respondent's first point is entirely accurate, but misses the essential harm of what happened here. And respondent's second point is simply wrong.

First things first. It is true, as respondent notes, that the appellate record does not show exactly what advice Mr. Maxion gave to Mr. Grimes. But because of the extraordinary time constraint Mr. Maxion was under, this case presents the unusual case where the specifics of Mr. Maxion's advice do not matter. The error here is not in the specifics of what advice Mr. Maxion gave, but in his failure to insure a process that would lead to an informed opinion as opposed to a guess -- which might (or might not) turn out to be right -- after he actually examined the evidence.

In this case -- regardless of whether Mr. Maxion advised Mr. Grimes to take the plea or to reject it -- Mr. Grimes would have been hard-pressed to believe he had been given sound advice. Given the time constraints the state placed on Mr. Maxion, his advice could not possibly have been informed. As co-counsel made clear in making the ineffective assistance of counsel argument below, there were thousands of pages of discovery, numerous witnesses, and many pieces of physical evidence which Mr. Maxion simply did not have time to investigate before having to advise Mr. Grimes whether to

plead guilty and spend the rest of his life in prison.

In this respect, this case looks very much like *Powell v. Alabama* (1930) 287 U.S. 45. There, defendants were charged with capital murder. At arraignment, the trial court appointed "the members of the bar" as counsel for the defendants. Six days later, trial began. Two lawyers were representing the defendants although it was clear they had not had time to prepare or investigate. The defendants were convicted. In reversing, the Court made clear that appointing counsel under time constraints that preclude counsel from doing the job they were appointed to do is fundamentally improper:

> "It is not enough to assume that counsel thus precipated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. . . . [W]e hold that defendants were not accorded the right of counsel in any substantial sense." (287 U.S. at p. 59.)

The Court went on to note that the right to counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." (*Id.* at p. 71.)

That is precisely what occurred here. The state had offered Mr. Grimes a plea.

"The pleading -- and plea bargaining -- stage of a criminal proceedings is a critical stage . . . at which a defendant is entitled to the effective assistance of counsel . . . ." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) In competently advising a defendant in connection with a plea offer, counsel must "conduct a reasonable investigation of the case enabling counsel to make informed decisions about how best to represent the client." (*In re Resendiz* (2001) 25 Cal.4th 230, 246, *citing Wofford v. Wainwright* (11th Cir. 1984) 748 F.2d 1505, 1508 [holding that counsel must be familiar with the law and the facts and provide the defendant with an understanding of the law in relation to the facts].) Counsel's advice must be based on adequate investigation. (*See People v. Soriano* (1987) 194 Cal.App.3d 1470, 1482 [where defense counsel's advice in connection with guilty plea offer was "not founded on adequate investigation," that advice fell below the standard of care].) And defense counsel's investigation should include reviewing the state's evidence and assessing possible defenses. (*See People v. Gonzales* (1993) 13 Cal.App.4th 707, 718-719 [defendant did not receive ineffective assistance of counsel in connection with guilty plea where defense counsel "reviewed the prosecution evidence,

interviewed appellant, considered possible defenses and assessed probable trial outcomes."].)[8]

The trial court appointed Mr. Maxion 13 days before the prosecutor decided to seek death. Mr. Maxion then had 21 days to advise his client in connection with the plea. As the defense later made clear, because of the volume of materials in this case it was impossible for Mr. Maxion to come up to speed in this case in that time frame. In the language of the case law just discussed, and in the time frame he was given, Mr. Maxion was unable to "conduct a reasonable investigation of the case," review the state's case or investigate possible defenses. Here, just as in *Powell*, the right to counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid . . . ." (*Powell v. Alabama*, *supra*, 287 U.S. at p. 71.)

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[8] Federal law from around the country is in accord. Thus, to provide effective representation counsel must also investigate and inform defendant of possible defenses so that the defendant can make a knowing and intelligent decision. (*See, e.g., Langford v. Day* (9th Cir. 1996) 110 F.3d 1380, 1386-1387; *Owens v. Wainwright* (11th Cir. 1983) 698 F.2d 1111, 1114.) When defense counsel has not discussed the facts of the case or possible defenses with a defendant -- "the law in relation to the facts" -- counsel's performance has fallen below the requisite standard of care. (*See, e.g., Smith v. Mahoney* (9th Cir. 2010) 611 F.3d 978, 987-988; *Brown v. Butler* (5th Cir. 1987) 811 F.2d 938; *Kowalak v. United States* (6th Cir. 1981) 645 F.2d 534.) "Investigation of . . . potential defense[s] [is] a minimal requirement to provide adequate representation at the plea stage." (*Dando v. Yukinski* (6th Cir. 2006) 461 F.3d 791, 799; *See United States v. Kaufman* (3rd Cir. 1997) 109 F.3d 186, 190.)

In rejecting this argument, the trial court here did not find that Mr. Maxion could have (or did) come up to speed in this case in such a short period of time. (6 RT 2570-2572.) Instead, as noted above, the court found that Mr. Maxion could have gotten more time. (6 RT 2570-2572.)

With all due respect, this is not the *solution* to the problem, it *is* the problem. The fact that Mr. Maxion could have gotten more time to come up to speed on the case before advising Mr. Grimes makes his conduct in failing to get more time even more problematic. As co-counsel for the defense made clear in arguing the issue below, the fact of the matter is that Mr. Maxion was unable to come up to speed in the case in the short time frame he was given. The fact that Mr. Maxion could apparently have gotten sufficient time to fully learn the facts of the case before advising his client -- but elected not to do so -- does not cure the error. It makes the error worse.

Alternatively, respondent argues that the record does not show that with different advice (based on adequate time to investigate), Mr. Grimes would have pleaded guilty. (RB 118.) The state accurately notes that in the 16 months between the initial rejection of the plea, and the later decision to take the plea, "more than just trial counsel's knowledge of the case changed . . . ." (RB 117.) The state points out that some pretrial rulings were made and jury selection had begun. (RB 117-118.) The suggestion implicit in these

points is that it was not defense counsel's increased knowledge of the case, and informed advice to Mr. Grimes, that caused Mr. Grimes to change his mind and to be willing to take the plea, but something about the trial court's rulings or jury selection.

There is nothing wrong with the theory behind the state's argument. It is hypothetically true that a significant ruling against the defense could motivate a defendant to want to accept a previously rejected plea.

But respondent never identifies any such significant ruling in this case that could possibly have motivated a change in Mr. Grimes's plea decision. And the fact of the matter is that Mr. Maxion -- now fully up to speed on the case -- was conceding guilt of felony murder. It therefore seems extremely likely that the cause of Mr. Grimes's willingness to change his plea was not some unidentified ruling adverse to the defense, but was instead Mr. Maxion's now-informed appreciation that under the felony-murder rule there was no defense to the underlying murder charges. As this Court has stated, all the defendant must prove to satisfy the prejudice prong of an ineffective assistance of counsel claim in this situation is that "there is a reasonable probability that, but for defense counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 937.) And here, the record establishes this.

Sixteen months of trial preparation passed after the plea was turned down. In that time, Mr. Maxion had sufficient time to "conduct a reasonable investigation of the case," review the state's case, and investigate possible defenses. Equally important, Mr. Grimes would have known that any advice given after such an investigation was not simply speculation on counsel's part, but was now based on a firm understanding of the case. And the record shows unmistakably that Mr. Grimes was willing to plead guilty after receiving such advice. (22 RT 6149 ["Mr. Grimes made a decision that he was willing to plead guilty and accept a sentence of life without possibility of parole."].) Mr. Grimes has satisfied his burden of showing prejudice. Reversal of the death sentence is required.[9]

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[9] In aid of its contrary argument, respondent notes that the co-defendant Wilson also rejected the offer of life without parole even though his lawyer was not new to the case. (RB 118.) Respondent argues "it would seem" that both Wilson and defendant "had similar defenses." (RB 118.)

The record is obviously inadequate to assess the advice given by Mr. Wilson's counsel. But the irony of the state's observation should not be lost on the Court. Although the state refused to allow Gary Grimes to change his plea, it *did* allow Wilson to do so, and he later pleaded guilty in exchange for a life without parole sentence. (*People v. Wilson*, C033095, Docket Entries.) Moreover, as the state notes, both Wilson and Mr. Grimes were in the same general situation since Morris was the actual killer. Respondent never explains why it is that only Gary Grimes -- with his obvious mental deficiencies -- who got put on death row.

VII. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE PROSECUTOR THREATENED THAT IF MR. GRIMES DID NOT PLEAD GUILTY TO SPECIAL CIRCUMSTANCES MURDER, THE STATE WOULD SEEK DEATH.

Dennis Sheehy, the elected prosecutor of Shasta County, formally decided not to seek death against Mr. Grimes. (4 CT 667.) He resigned in April of 1997. (5 RT 2431.) On June 6, 1997, Mr. Sheehy's replacement MacGregor Scott advised Mr. Grimes in open court that unless Mr. Grimes waived his right to a jury trial and pled guilty within 21 days the state would seek death. (3 CT 323.) When Mr. Grimes refused to waive his rights and plead guilty, the prosecutor was true to his word and sought death. (3 CT 336.)

In his opening brief, Mr. Grimes contended it was unconstitutional for the prosecutor to threaten him with death unless he waived all his constitutional rights and pled guilty to special-circumstances murder. (AOB 177-184.) He relied on *United States v. Jackson* (1968) 390 U.S. 570, where the Supreme Court held that the Sixth Amendment was violated by a scheme under which a capitally charged defendant risked a death sentence if he asserted his right to a jury trial, but could avoid death by waiving that same right. (AOB 179-180. *See Jackson, supra*, 390 U.S. at p. 580 ["the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die."].)

Respondent disagrees for two reasons. First, respondent argues that *Jackson* is distinguishable because there, the defendant's choice to either (1) waive a jury trial and avoid a death sentence or (2) insist on a jury trial and run the risk of a death sentence was created by a statute rather than by the individual actions of a prosecutor exercising his discretion. (RB 127-128.) Respondent accurately notes that here, Mr. Grimes "was free to accept or reject the People's offer." (RB 128.) Respondent repeats this point later, again noting that Mr. Grimes "was free to accept or reject the People's offer." (RB 131.)

Of course, the defendant in *Jackson* was equally free to waive a jury trial and avoid a death sentence, or go to trial. But this did nothing to cure the constitutional violation. So this is certainly no distinction.

Equally significant, respondent never explains why it matters that *Jackson* involved a burden created by Congress rather than a prosecutor. No reason readily appears. After all, the Sixth Amendment secures for defendants the right to a jury trial, not simply the right to be free of unduly restrictive laws passed by Congress which impede that right. *Jackson* controls this case and reversal is required.

To its credit, respondent concedes the general rule is that prosecutors "are forbidden from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights." (RB 119.)

Here, that is exactly what the prosecutor did. The state had filed murder charges against Mr. Grimes. The prosecutor told Mr. Grimes that unless he waived his right to a trial within 21 days and pled guilty, the prosecutor would increase the charges and seek death. (3 CT 323.) And when Mr. Grimes did not waive his rights, that is exactly what the prosecutor did. (3 CT 336.) Under *Jackson*, reversal of the penalty phase is required.

In a second argument, respondent recasts Mr. Grimes's contention as a claim of prosecutorial vindictiveness. (RB 118-131.) Proceeding from this premise, respondent argues that because the prosecutor's action here was taken prior to trial, the Court cannot presume an improper motive on the prosecutor's part and, instead, Mr. Grimes was required to "prove objectively" that the prosecutor's decision was improperly motivated. (RB 120.) Respondent then performs a detailed analysis of prosecutor Scott's testimony and concludes that Mr. Grimes did not show an "improper motive." (RB 120-126.)

As discussed above, reversal is required under *Jackson*. Even if this were not the case, however, and the Court elected to analyze this case under a prosecutorial vindictiveness model, reversal of the penalty phase would still be required.

It is true, of course, that where a prosecutor adds additional charges *after* jeopardy has attached, a presumption of vindictiveness can arise which the state must then rebut. (*See In re Bower* (1985) 38 Cal.3d 865, 877-878.) There is no need to decide whether

this presumption can also apply in a pretrial setting, before jeopardy has attached. Here the prosecutor explicitly stated he would *not* add charges if Mr. Grimes waived his right to a jury trial. As discussed below, even assuming a presumption did not apply in this situation, reversal is still required.

Contrary to the suggestion in respondent's brief, this Court has made clear that the determination of whether a presumption of vindictiveness applies is not simply a matter of labels or timing -- before jeopardy or after. Thus, although the Court has noted that the attachment of jeopardy is an "important factor" in assessing vindictiveness (*People v. Edwards* (1991) 54 Cal.3d 787, 828), it has also noted that "*Edwards* did not prohibit a court from presuming vindictiveness in a pretrial setting . . . ." (*People v. Michaels* (2002) 28 Cal.4th 486, 515.) Ultimately, the test is a practical one based on facts, not labels; the presumption applies only when the facts present a "reasonable likelihood of vindictiveness . . . that would shift the burden of proof to the prosecution to show that the amendment 'was justified by some objective change in circumstances or in the state of the evidence." (*Id.* at p. 515.)

Edwards provides a useful example. There, only three days after a homicide the state filed murder charges against the defendant. Twelve days after defendant's arrest, the state added a lying-in-wait special circumstance allegation. Defendant claimed the charges were added because of the early involvement of the public defender's office in

his case. The Court refused to presume vindictiveness because the original charges were filed so quickly and "[i]t is not surprising the prosecution did not fully assess a possible lying-in-wait special circumstance while defendant was still at large and the most pressing need was to obtain an arrest warrant." (54 Cal.3d at p. 828.) The allegation was added "within days of defendant's arrest" and there was "no hint, much less an affirmative showing, of vindictive prosecution." (*Ibid.*)

Michaels presents an equally useful example. There, defendant was charged with murder without special circumstance allegations. At his preliminary hearing, he sought to plead guilty. (28 Cal.4th at p. 512.) The prosecution asked the magistrate not to accept the plea because it wanted to add special circumstance allegations. (*Ibid.*) The magistrate refused to accept the plea and the state amended the complaint to add special circumstance allegations. (*Ibid.*) After defendant was convicted and sentenced to death, he appealed, contending the presumption of vindictiveness should apply because the prosecutor was trying to punish defendant for waiving his right to a jury trial. (*Ibid.*) This Court quite properly rejected that argument because the facts did not show a "reasonable likelihood of vindictiveness" that would justify shifting the burden of proof. (*Ibid.*)

What these cases show is that the question to be resolved is not simply when the prosecutor's actions occurred, but what those actions were. Where the actions reflect a

"reasonable likelihood of vindictiveness" a presumption is appropriate.

In making this determination, this case stands in sharp contrast to both *Edwards* and *Michaels*. Unlike *Edwards*, this case does not present a situation where the state had insufficient time to assess its case initially and so there is a reasoned explanation for the additional charges. To the contrary, Mr. Sheehy initially filed charges against Mr. Grimes in October of 1995 and it was only after 15 months of consideration that he decided he would *not* pursue death. (1 CT 1-4; 4 CT 667.)

This case is also unlike *Michaels*. There, the state added charges after defendant tried to *waive* his right to a jury trial. Clearly in that situation there is no "reasonable likelihood" that the prosecutor was trying to punish the defendant for asserting his constitutional rights. And defendant in that case certainly had no right to plead guilty before the state even decided what the charges would be.

Here, the state did the exact opposite of what it did in *Michaels*. The state said it would seek death only if Mr. Grimes *asserted* his right to a jury trial. This is a patently different situation than *Michaels*. Indeed, here there should be little doubt -- the prosecutor stated in no uncertain terms that if Mr. Grimes waived his right to a jury trial, he would not face death. Thus, the evidence shows more than a "reasonable likelihood" that the new charges were added because Mr. Grimes asserted his right to a jury trial. In

this situation, the presumption should certainly apply even though the action was taken prior to trial.

But as mentioned above, there is no need to resolve this question. As respondent recognizes, even if the presumption did not apply, Mr. Grimes had only to prove that "the charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do." (RB 120, citing *People v. Jurado* (2006) 38 Cal.4th 72, 98.)

Here, the law plainly allowed Mr. Grimes to exercise his right to a jury trial. And the prosecutor made clear he would pursue death unless Mr. Grimes waived his right to a jury trial and plead guilty.

It is true, of course, that the prosecutor did not testify he was trying to "punish" Mr. Grimes. Instead, as respondent notes, Mr. Scott stated that his decision was based on a reevaluation of the case. (RB 121-122, 125.) Respondent makes much of this, arguing that Mr. Scott's testimony shows no improper motive.

As this Court has held, however, the absence of vindictiveness is not established by a prosecutor's statements that he or she was motivated by "a reassessment of the evidence against the defendant rather than by any desire to punish the exercise of the protected right." (*In re Bower*, *supra*, 38 Cal.3d at p. 879.) Instead, an increase in

charges is proper only when "justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and [where] . . . the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." (*Ibid.*)

The state offered no such evidence. On this record -- where the prosecutor told Mr. Grimes that unless he waived his right to a jury trial within 21 days, the state would seek death -- Mr. Grimes has shown a "reasonable likelihood" of vindictiveness. Because nothing in Mr. Scott's testimony rebutted this showing, reversal is required.

In aid of its contrary argument, respondent cites *People v. Jurado*, *supra*, 38 Cal.4th 72. (RB 119, 128-130.) *Jurado* does not aid the state here.

In that case, defendant was charged with special circumstances murder. (38 Cal.4th at p. 93.) The state initially decided not to seek death. (38 Cal.4th at p. 98.) On the defendant's section 995 motion, the trial court dismissed the special circumstance allegations. (38 Cal.4th at p. 93.) Defendant then pled guilty to the murder charge. (*Ibid.*) The prosecution refused to sign the change of plea form, and challenged the trial court's ruling. (*Ibid.*) The Court of Appeal reversed the trial court and ordered the special circumstance allegations reinstated. (*Id.* at p. 94.) The state then indicated it would seek death. Defendant withdrew his guilty plea; after a trial he was sentenced to

death. (*Id.* at p. 99.)

On appeal, defendant contended that the state's decision to seek death was intended "to punish him for challenging the validity of the special circumstance allegation through his section 995 motion . . . ." (*Ibid.*) This Court rejected the claim, noting that between the state's initial decision not to seek death and the new decision to seek death the prosecutor (1) obtained new evidence from one witness regarding defendant's plan to kill a witness, (2) performed a conditional examination of the witness and (3) assessed the strength of its case in a trial of a co-defendant. (38 Cal.4th at p. 100.)

Jurado does not aid the state here. There, the state presented the precise type of evidence this Court discussed in *Bower*, evidence showing an "objective change in circumstances or in the state of the evidence which legitimately influenced the charging process . . . ." (*In re Bower*, *supra*, 38 Cal.3d at p. 879.) The showing in *Jurado* stands in sharp contrast to this case, where the prosecutor made clear he had not learned any new evidence at all, but simply reevaluated the case. *Jurado* shows the kind of evidence that was missing from this case; in the absence of such evidence, the penalty phase must be reversed.

VIII. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT ANN CLINE'S STATEMENTS ABOUT THE 1985 ROBBERY HAD TO BE CORROBORATED AND SHOULD BE VIEWED WITH CAUTION.

At the 1998 penalty phase, the state (1) called Anna Cline to testify about a 1985 robbery of James Leonard which she and Mr. Grimes committed and (2) introduced prior statements Ms. Cline made about the 1985 robbery in 1985 (to Detective Roy Cash) and in 1996 (to Sergeant Michael Ashmun). (36 RT 9705-9715, 38 RT 10014.) Because Cline was an accomplice to the 1985 robbery, defense counsel asked the trial court to instruct the jury that her testimony and prior statements (1) should be viewed with caution and (2) needed to be corroborated. (39 RT 10401.) The court refused to instruct the jury that Cline needed to be corroborated. (39 RT 10402-10404.) The court agreed to instruct the jury that Cline's testimony and prior statements should be viewed with caution. (39 RT 10402-10406.)

At the court's request, defense counsel submitted instructions which were to reflect the court's rulings. (39 RT 10405-10406.) Defense counsel submitted written instructions telling the jury that Cline's testimony should be viewed with caution, but forgot to include an instruction explaining that her prior statements should also be viewed with caution. (4 SCT 25, 26.)

In his opening brief, Mr. Grimes's claim of error was three-fold. First, Mr. Grimes contended the trial court erred in refusing to instruct the jury that Cline's 1985 and 1996 statements needed to be corroborated. (AOB 201-205.) Second, Mr. Grimes contended that defense counsel deprived Mr. Grimes the effective assistance of counsel by failing to provide an instruction which conformed to the trial court's ruling and advised the jury that Cline's prior statements should be viewed with caution. (AOB 200.) Finally, Mr. Grimes contended that because the prosecutor relied heavily on Cline's statements in his penalty phase argument, and the jury never knew it should view these statements with caution and could not rely on these statements unless they were corroborated, the two errors could not be deemed harmless and required reversal of the death sentence. (AOB 200, 205-209.)

Respondent's response is likewise three-fold. First, respondent argues that because Cline's 1985 and 1996 statements related to adjudicated conduct, the trial court did not err in refusing to instruct the jury that the statements required corroboration. (RB 141.) Alternatively, respondent argues that the court's instructional error was harmless. (RB 142.) Finally, although it does not dispute that defense counsel was ineffective for failing to submit an instruction that the statements should be viewed with caution, respondent nonetheless argues that counsel's failure was harmless as well. (RB 142.) Respondent's arguments must be rejected.

A. Because The Prosecution Introduced Evidence Relating To Unadjudicated Aspects Of The 1985 Burglary, The Trial Court Was Required To Instruct The Jury That The Evidence Must Be Corroborated.

Mr. Grimes contended that the trial court erred in refusing to instruct the jury that Cline's 1985 and 1996 statements about the 1985 robbery had to be corroborated. Although respondent recognizes that the "general rules requiring accomplice instructions" apply to the penalty phase of a capital trial, it first argues that the general rule does not apply here because Cline was testifying about a crime to which Mr. Grimes had pled guilty. (RB 140-141; *see* 36 RT 9588; 28 CT 8374.) Alternatively, respondent argues that Mr. Grimes's own statements about the 1985 crime corroborated Clines's testimony. (RB 141.) Neither of respondent's arguments have merit.

To its credit, respondent recognizes that "it is well-settled that when the prosecution seeks to introduce evidence of a defendant's *unadjudicated* criminal conduct at the penalty phase, the jury should be instructed that accomplice testimony must be corroborated . . . ." (RB 140 [emphasis in original].) According to respondent, this rule does not apply here because "this Court has recognized an exception to the statutory requirement of corroboration when the accomplice testimony relates to previously *adjudicated* criminal conduct." (RB 140 [emphasis in original].) According to respondent, "Cline's testimony and extrajudicial statements related to appellant's

previously adjudicated 1985 residential robbery . . . and the trial court was not required to instruct that Client's testimony and extrajudicial statements must be corroborated . . . ." (RB 141.)

Respondent paints with too broad a brush. The exception to the statutory requirement of corroboration does not apply to accomplice testimony which simply "relates" to previously adjudicated criminal conduct. Instead, the exception only applies where the conduct itself has been previously adjudicated. Under those circumstances, no corroboration is necessary because the jury has before it sufficient evidence to conclude that the accomplice is telling the truth about what occurred and thus, the statutory purpose of the corroboration requirement is otherwise satisfied.

In this regard, section 1111 serves to ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132; *People v. Belton* (1979) 23 Cal.3d 516, 526.) The corroboration requirement acknowledges this danger in the context of accomplices who may be motivated by self-interest to offer inaccurate testimony adverse to the defendant. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1132.)

That danger was directly implicated here with respect to Cline's prior statements to law enforcement; the statements to Detective Cash were made the day after the robbery

when Cline had a hope of gaining leniency or immunity and the statements to Sergeant Ashmun were made when Cline was admittedly still angry with Mr. Grimes because "he rolled over on her when they got busted." (36 RT 9711; 38 RT 10014.) Thus, in light of Cline's self-serving motives, the jury should have been told that Cline's prior statements about Mr. Grimes's involvement in the 1985 robbery required corroboration. (*Accord People v. Mincey* (1992) 2 Cal.4th 408, 461; *People v. Varnum* (1967) 66 Cal.2d 808, 814-815; *People v. McClellan* (1969) 71 Cal.2d 793, 807-808; *People v. Miranda* (1987) 44 Cal.3d 57, 100.) Only with such corroboration could the jury conclude beyond a reasonable doubt that Cline was telling the truth at the time she made the statements to police about what had occurred. (*See People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1132 [corroborating evidence must establish accomplice's credibility].)

Of course, if an accomplice testifies or otherwise gives a statement that defendant committed a prior crime, no corroboration on that point is necessary where the commission of the crime had already been adjudicated and a jury found defendant committed the crime beyond a reasonable doubt. The same would presumably be true if the defendant freely admitted he committed the crime, or if the details of a prior crime were the subject of a prior adjudication -- for example, where a prior jury found true a firearm use finding and the accomplice in a subsequent proceeding testified that defendant used a gun in the prior crime. Under such circumstances, no corroboration would be necessary because the truth of the accomplice's self-serving statements

implicating defendant in the commission of the offense would be conclusively established. (*See People v. Easley* (1988 46 Cal.3d 712, 734 [accomplice's testimony that defendant committed a crime did not require corroboration because defendant's guilt of the crime had been previously adjudicated and "a jury ha[s] already found defendant guilty, beyond a reasonable doubt]; *People v. Williams* (1997) 16 Cal.4th 153, 276 [same].)

Here, Mr. Grimes not only pled guilty to residential robbery, but later admitted to his probation officer that (1) he and Cline committed the robbery, (2) no one was hurt and he apologized to the victim and (3) it was Cline's idea to commit the robbery. (36 CT 9609-9611, 9613.) These admissions directly corroborated Cline's penalty phase *testimony* in which she stated that (1) she and Mr. Grimes committed the robbery, (2) both agreed that no one would be hurt and (3) it was all Cline's idea to commit the robbery. (36 RT 9584-9585, 9601.) Thus no corroboration of Cline's testimony was necessary.

But the prosecutor went well beyond this evidence. Instead, the prosecutor introduced Cline's prior statements about how the 1985 robbery occurred, including her statements that (1) it was Mr. Grimes who "forced her to rob [Leonard]," (2) Mr. Grimes struggled with Leonard and "wanted to hurt the old man" and (3) gave police the overall impression that the robbery was "Gary's idea." (36 Rt 9705-9706, 9714; 38 RT 10014.) As the trial court itself found, the prosecutor introduced these statements "for the purpose

of showing the extent and nature of [Grimes's involvement]" and "[t]hose are the facts and circumstances relating to the '85 burglary robbery" which "have not been adjudicated." (39 RT 10403.) Because these facts and circumstances had not been previously adjudicated -- and respondent does not suggest otherwise -- the exception to the statutory corroboration requirement simply does not apply to Cline's prior statements. Respondent's argument to the contrary must be rejected.

Respondent also argues that "appellant's own statements that were introduced into evidence amply connected appellant with the 1985 residential robbery and corroborated Cline's testimony describing 'the nature and extent' of his involvement.'" (RB 141.) As noted above, Mr. Grimes entirely agrees that his statements connected him to the 1985 robbery. After all, Mr. Grimes's guilty plea and statements to his probation officer about his involvement in the robbery directly corroborated Cline's *testimony* about the robbery.

But whether Mr. Grimes was culpable for the 1985 robbery, and the credibility of Cline's actual testimony, are not at issue here. The fact remains that there was no evidence -- and respondent cites to none -- which corroborated Cline's *prior statements* to police about Mr. Grimes's involvement in the robbery. Under these circumstances, the jury should have been told that Cline's prior statements to police required corroboration. Respondent's argument to the contrary must be rejected.

B. The Trial Court's Refusal To Instruct The Jury That Cline's Prior Statements Required Corroboration Cannot Be Deemed Harmless.

Respondent's finally argues that "even assuming the court's accomplice instructions were incomplete, appellant cannot demonstrate prejudice." (RB 142.) There are three parts to respondent's harmless error argument: (1) the jury was fully aware of the problems with Cline's testimony and prior statements (RB 142), (2) Cline's prior statements were corroborated by Mr. Grimes's own statements (RB 143) and (3) in closing argument, the prosecutor relied on Mr. Grimes's own statements about the 1985 robbery, and not Cline's prior statements. (RB 144-145.) Respondent's arguments must be rejected.

Respondent first argues that "the jury was fully aware of the inconsistencies throughout Cline's testimony and out-of-court statements, and her motivation to minimize the extent of involvement and shift the blame to appellant when speaking to law enforcement." (RB 142.) Respondent does not explain, however, how these inconsistencies obviated the need for an instruction which informed the jury that it could not rely on Cline's prior inconsistent statements unless they were corroborated by independent evidence.

Respondent next argues that "appellant's own statements to law enforcement not

only corroborated Cline's testimony that he had participated in the crime, but corroborated much of Cline's testimony and prior statements as to the 'nature and extent of his involvement.'" (RB 143.) Relying on Mr. Grimes's admissions to his probation officer that he brought a pipe and held it in a threatening manner during the course of the 1985 robbery, respondent argues "[a]ppellant's own statements demonstrate appellant's use or attempted use of force during the robbery." (RB 144.) Of course, these statements corroborated Cline's prior statements that Mr. Grimes committed a forcible robbery.

But the fact that Mr. Grimes was involved in committing forcible robbery was not the import of Cline's prior statements. Instead, as the trial court recognized, Cline's prior statements were introduced to show "the extent and nature of Mr. Grimes's involvement" in the forcible robbery. And under the version Cline gave to police (1) Mr. Grimes "came busting inside the house and forced her to help him rob [Leonard]," (2) Mr. Grimes's struggled with the victim and "wanted to hurt the old man and take money from him," and (3) it was "Gary's idea." (36 RT 9705-9706, 9714; 38 RT 10014.) There is not a scintilla of evidence that corroborates this version of events. Respondent's argument to the contrary must be rejected.

Finally, respondent concedes that the prosecutor "did rely on evidence about the 1985 robbery to rebut the defense's portrayal of appellant," but claims "the evidence the prosecutor relied on was primarily appellant's, not Cline's, statements to law

enforcement." (RB 144.) In fact, the prosecutor relied on the entire event of the 1985 robbery to directly rebut the defense theory that Mr. Grimes "was a follower" and a "hyperactive, impulsive person" who "had a borderline IQ." Although it is certainly true that the prosecutor referred to Mr. Grimes's statements about the robbery itself in closing argument, the actual gist of the argument was clear.

According to the prosecutor, the robbery proved that Mr. Grimes was actually "not a follower," but "a leader" who was "able to plan," and "was smart enough to blame other people for the crimes that he committed." (41 RT 10812, 10813, 10814, 10877-10878.) Contrary to respondent's argument, the prosecutor was certainly not relying on Mr. Grimes's version of events to support this theory. Indeed, under Mr. Grimes's version of events, of course, the exact opposite was true. After all, Mr. Grimes told his probation officer that (1) he and Cline committed the robbery, (2) no one was hurt and he actually apologized to the victim, and (3) it was Cline's idea. (36 CT 9609-9611, 9613.) In short, the record simply will not support the idea that the prosecutor was relying on Mr. Grimes's version of the robbery in urging the jury to impose death.

Instead, the prosecutor was most certainly relying on Cline's version of events to police. It was Cline who told police (1) Mr. Grimes "came busting inside the house and forced her to help him rob [Leonard]," (2) Mr. Grimes's struggled with the victim and "wanted to hurt the old man and take money from him," and (3) it was "Gary's idea." (36

RT 9705-9706, 9714; 38 RT 10014.) Plainly it was Cline's testimony that supported the state's theory that Mr. Grimes was not a follower or a planner. Respondent's argument to the contrary must be rejected.

On this record, where no evidence corroborated Cline's prior statements to police, and where the prosecutor heavily relied on this evidence to urge the jury to reject the defense theory of the case and impose death, the error cannot be deemed harmless under any standard of prejudice. Reversal of the penalty phase verdict is required.

C. Defense Counsel's Failure To Ensure The Jury Was Told Cline's Prior Statements To Police Should Be Viewed With Caution -- Which Respondent Does Not Dispute Fell Below An Objective Standard Of Care -- Cannot Be Deemed Harmless.

As noted above, there was a second problem with the accomplice instructions. On defense counsel's timely objection the trial court agreed to instruct the jury that Cline's prior statements and her in-court testimony should be "viewed with caution." (39 RT 10402, 10404, 10406.) The trial court asked defense counsel to submit instructions which reflected the court's ruling. (39 RT 10405-10406.) Counsel submitted written instructions which told the jury that "[t]o the extent that an accomplice gives *testimony* that tends to incriminate the defendant, it should be viewed with caution." (4 SCT 25, 26 [emphasis added].) Yet despite the court's ruling, counsel failed to submit a standard

instruction explaining that "testimony" of an accomplice which should be viewed with caution includes the accomplice's prior statements to police. (*See* CALCRIM 3.11 [defining testimony as "including out-of court statements purportedly made by an accomplice"].)

To its credit, respondent does not dispute that defense counsel was ineffective for failing to submit the limiting instruction which the trial court had already agreed to give. (RB 142.) Respondent does not dispute this point for good reason.

In this regard, the Sixth Amendment guarantees criminal defendants the right to effective representation. The responsibility of ensuring that the jury is fully instructed does not fall upon the trial judge alone. Many types of instructions fall outside the area of the trial court's *sua sponte* instructional obligation. (*See*, *e.g.*, *People v. Rincon-Pineda* (1975) 14 Cal.3d 864; *People v. Sears* (1970) 2 Cal.3d 180.) In each of these areas, it is the obligation of defense counsel specifically to request the appropriate instructions. (*See People v. York* (1966) 242 Cal.App.2d 560, 572.) This Court itself has "emphasize[d] that the duty of counsel to a criminal defendant includes careful preparation of and request for all instructions which in his judgment are necessary . . . ." (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, n.7, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142.)

Generally, of course, a reviewing court will not find ineffective assistance of counsel where the challenged omission could have been the result of an informed reasonable tactical choice rather than of neglect. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426.) In some cases, however, "there simply could be no satisfactory explanation." (*Id.* at p. 426.) Where there is no conceivable rational tactical justification for an omission, nothing more is necessary to establish the counsel's conduct fell below counsel's incompetence. (*See, e.g., People v. Jackson* (1986) 187 Cal.App.3d 499, 505-506; *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, n.3; *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366; *People v. Rosales* (1984) 153 Cal.App.3d 353, 360-362; *People v. Farley* (1979) 90 Cal.App.3d 851, 858-868.)

That is the situation here. Defense counsel himself requested the appropriate instructions related to accomplices. (39 RT 10401.) The trial court agreed to instruct the jury that the accomplices statements should be "viewed with caution." (39 RT 10402, 10406.) The court asked defense counsel to submit instructions which reflected this ruling. (39 RT 10405-10406.)

But defense counsel did not. To be sure, as noted above, counsel submitted written instructions which told the jury "[t]o the extent that an accomplice gives *testimony* that tends to incriminate the defendant, it should be viewed with caution." (4 SCT 25, 26 [emphasis added]. *See* CALCRIM 3.18.) Counsel omitted a standard instruction which

would have told the jury that "testimony" of an accomplice included any of the accomplice's prior statements to police. (*See* CALCRIM 3.11 [defining testimony as "including out-of court statements purportedly made by an accomplice"]. *Accord People v. Carter*, *supra*, 30 Cal.4th 1166 [trial court must instruct that "out-of-court statements to police by accomplices" must be viewed with caution].)

Of course, without this instruction, the jury never knew that it should view Cline's prior statements to police with caution -- the exact reason counsel sought accomplice instructions in the first place. Counsel's failure to follow through on instructions which the trial court agreed to give fell below an objective standard of reasonableness. Respondent's implicit concession of this point warrants no further reply.

Instead, respondent argues that defense counsel's error was harmless. (RB 142.) According to respondent, "[t]he trial court instructed the jury that Cline was an accomplice in the 1985 robbery, and accomplice *testimony* should be viewed with caution." (RB 142 [emphasis added].)

These instructions are well and good. But nothing in these instructions told the jury how it must treat Cline's *prior statements* to police. That is the real problem here.

In this regard, where defense counsel has provided ineffective assistance, reversal

is required whenever there is a "reasonable probability" that absent the error the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693.) "Reasonable probability" does not require defendants to show that "counsel's conduct more likely than not altered the outcome of the case." (*Id.* at p. 693.) Instead, reasonable probability is merely a "probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

Here, as discussed above, Cline's in-court testimony entirely corroborated Mr. Grimes's admissions that (1) she and Mr. Grimes committed the Leonard robbery, (2) both agreed that no one would be hurt, indeed no one was hurt, and Mr. Grimes apologized to the victim afterwards and (3) the robbery was Cline's idea. (*Compare* 36 RT 9584-9585, 9601 [Cline's testimony] *with* 36 CT 9609-9611, 9613 [Grimes's plea and admissions to Little].)

But Cline's prior statements to police told a far more nefarious version. Under this version, (1) Mr. Grimes "came busting inside the house and forced her to help him rob [Leonard]," (2) Mr. Grimes's struggled with the victim and "wanted to hurt the old man and take money from him," and (3) it was all "Gary's idea." (36 RT 9705-9706, 9714; 38 RT 10014.) The trial court properly ruled that the jury should be told to view Cline's prior statements with caution. (39 RT 10402, 10406.) But under the instructions actually submitted by defense counsel, the jury was told only that it should view Cline's

"testimony" with caution. (4 SCT 26.) The jury was never told it should view her statements with caution as well.

Ironically, Cline's testimony -- which the jury was told to view with caution -- was the version of the robbery most favorable to the defense. Under that version, Mr. Grimes was a follower who did not want to hurt anyone. More important in connection with this claim, because of counsel's error, the jury never knew it was supposed to view Cline's prior statements to police with caution.

For many of the same reasons discussed in Argument VIII-B, above, this was a serious error here. The prosecutor took full advantage of counsel's error, telling the jury that Cline's statements to police proved that Mr. Grimes was "a leader" who was "able to plan," and "was smart enough to blame other people for the crimes that he committed." (41 RT 10812, 10813, 10814, 10877-10878.)

And this was simply not a typical capital case or capital defendant. In comparison to the unusually heinous crimes often seen in capital cases, this crime involved a single homicide committed during a robbery where Mr. Grimes was not the actual killer and indeed, may not have even intended to kill. In comparison to the unusually heinous defendants often seen in capital cases, Mr. Grimes had a lesser criminal history.

On this record, counsel's failure to ensure that the jury actually received a cautionary instruction which the trial court had already agreed to give undermines confidence in the outcome of this case. Respondent's argument to the contrary must be rejected and reversal of the penalty phase verdict is required.

IX. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE PROSECUTOR URGED THE JURY TO RETURN A DEATH VERDICT BASED ON MR. GRIMES'S FAILURE TO PRESENT EVIDENCE THE TRIAL COURT HAD EXCLUDED AT THE PROSECUTOR'S OWN REQUEST.

In urging the jury to find the special circumstances true on an intent to kill theory, the prosecutor -- in her own words -- relied "primarily" on the testimony of Jonathan Howe in urging the jury to find Mr. Grimes had the requisite intent to kill. (35 RT 9212.) According to Howe, Mr. Grimes confessed to ordering Morris and Wilson to kill the victim. (31 RT 8380, 8381; 5 CT 1020.) Similarly, during the penalty phase the prosecutor again urged the jury to rely on Howe. (41 RT 10879-10880.)

The defense tried to attack Howe's credibility, offering evidence from Morris's own mouth that he alone made the decision to kill the victim and in fact, Mr. Grimes was shocked when it unexpectedly happened. Morris told Albert Lawson that Mr. Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house." (24 RT 6747, 6797.) He told Misty Abbott that (1) Mr. Grimes "did not take part in the killing," (2) Mr. Grimes had not "participated in the killing" and (3) after he "did the lady" Mr. Grimes "looked at him as if [he was] saying, what in the hell are you doing, dude." (24 RT 6750, 6797.) On the prosecutor's objection, the trial court ruled this evidence inadmissible. (24 RT 6750-6753, 6759-6761, 6784-6791, 6797.)

Although the court had ruled this evidence inadmissible on the prosecutor's own motion, in her penalty phase closing argument the prosecutor explicitly relied on the absence of this exact same evidence:

> "When the Defense talks about lingering doubt, Jonathan Howe is not a factor in it. *They've never given you a reason to doubt his testimony.*" (41 RT 10879-10880, emphasis added.)

In his opening brief, Mr. Grimes contended that the prosecutor committed misconduct in urging the jury to sentence him to death based on the absence of evidence which (1) she knew existed and (2) which was excluded on her own motion. (AOB 224-232.) He cited and relied on a number of cases involving this identical situation, including *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197. (AOB 226-227.) Because the prosecutor's comments went to the heart of a key penalty phase issue, reversal was required. (AOB 228-232.)

Respondent disagrees for three reasons. First, respondent argues that the claim is waived by defense counsel's failure to object and request an admonition. (RB 160-162.) Because Mr. Grimes anticipated this issue in his opening brief, there is no need to respond in any detail. (AOB 230-232.) If an admonition from the trial court could genuinely have cured the error, there is no tactical reason for counsel not to have requested one, and the issue is properly reviewed here, albeit through the lens of an

ineffective assistance of counsel claim. If an admonition from the court could not have cured the error, then any objection would have been futile and the issue is properly raised here in the first instance.[10]

Second, respondent argues there was no error; the prosecutor's argument was entirely proper. (RB 162-164.) Respondent correctly notes that a prosecutor may comment on a criminal defendant's failure to "call logical witnesses or present evidence to rebut the People's case." (RB 163.)

Mr. Grimes quite agrees. But respondent ignores each and every authority cited in Mr. Grimes's opening brief, including *Paxton*, which directly stand for the proposition that it violates Due Process for a prosecutor to ask a jury to convict because a defendant has failed to introduce evidence which the court has specifically excluded on the prosecution's own motion. (*Paxton v. Ward*, *supra*, 199 F.3d at pp. 1217-1218; *United States v. Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-1441, abrogated on other grounds, *Huddleston v. United States* (1988) 485 U.S. 681; *United States v. Toney* (6th Cir. 1979)

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[10] Respondent suggests defense counsel may have made a tactical decision not to object to the misconduct to avoid bringing attention to the prosecutor's comment. (RB 161-162.) But if respondent is right -- and counsel decided that an objection and admonition would not have cured the harm but would instead have exacerbated the misconduct by focusing the jury's attention on the improper comment -- then it is clear he thought there was no admonition which could genuinely cure the misconduct. In this situation -- where an admonition will not cure the harm -- review is proper. (*People v. Clair* (1992) 2 Cal.4th 629, 662 [appellate review of misconduct claim proper absent trial objection where objection and admonition would not have cured the harm].)

599 F.2d 787, 790-791; *State v. Bass* (N.C. 1996) 465 S.E.2d 334, 337-338; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757-758 (1990); *People v. Varona* (1983) 143 Cal.App.3d 566, 570. *See United States v. Cruz-Garcia* (9th Cir. 2003) 344 F.3d 851, 857 n.5; *Franklin v. Duncan* (N.D. Cal. 1995) 884 F.Supp. 1435, 1454 n.19.) And that is exactly what occurred here: defense counsel offered specific evidence to show the jury that Howe's testimony was false and that Morris acted alone, the trial court excluded that evidence at the prosecutor's request, and the prosecutor then urged the jury to find the special circumstance true because the defense had "never given you a reason to doubt [Howe's] testimony." (41 RT 10879-10880.)

Finally, respondent argues that any error was harmless because "appellant cannot demonstrate any prejudice." (RB 162.) As an initial matter, the suggestion that Mr. Grimes has to demonstrate prejudice from this error is wrong. As the Tenth Circuit Court of Appeals noted in *Paxton*, a prosecutor's reliance of the absence of evidence that she herself has kept out of evidence on timely motion violates the defendant's federal constitutional rights "to rebut evidence and argument used against him, and to confront and cross-examine the state's witnesses." (199 F.3d at p. 1218.) Because this constitutes federal constitutional error, reversal of the penalty phase is required unless the state can prove this error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.)

But as Mr. Grimes contended in his opening brief, even if the *Chapman* standard did not apply here, a new penalty phase would be required. The state's principle reason for arguing that the misconduct as harmless was because "it is unlikely the jurors would have focused" on the prosecutor's remark or Howe's testimony during the penalty phase because "they would have already addressed and considered Howe's testimony during the guilt phase deliberations." (RB 162.)

With all due respect, this argument completely ignores the defense theory of the case presented at the penalty phase, and the prosecutor's separate reliance on Howe at the penalty phase in urging the jury to reject that defense and impose death.

Thus, a main theme of the defense was that although Mr. Grimes was liable for murder as an accomplice to the felonies, he should not be given a death sentence at least in part because of lingering doubt as to his relatively minor role in the murder itself. (41 RT 10865-10869.) Defense counsel explained to the jury that there was "a concept called lingering doubt." (41 RT 10865.) Counsel explicitly tied his lingering doubt argument to Jonathan Howe:

> "Let me repeat this. You can use that [lingering] doubt as a mitigating factor. You can use that doubt as a reason to vote for life, and let me show you how lingering doubt would apply in our case and I want to talk briefly about Jonathan Howe." (41 RT 10865.)

Defense counsel then went over Howe's testimony in detail, explaining why Howe should not be believed. (41 RT 10865-10869.)

The prosecutor responded to this specific lingering doubt argument, telling the jury that "[w]hen the defense talks about lingering doubt, Jonathan Howe is not a factor in it." (41 RT 10879.) According to the prosecutor, this was because "[t]hey've never given you a reason to doubt his testimony." (41 RT 10880-10881.) In other words, there was no lingering doubt because of Howe's testimony.

In short, respondent makes its harmless error argument without reference to either the defense theory of the case, or the state's reliance on Howe at the penalty phase. (RB 162.) As this Court has noted for many decades, this approach will not fly. In assessing prejudice, the prosecutor's reliance on Howe's evidence shows not only how important Howe's evidence was to the state's theory, but how prejudicial it was for the prosecutor to enhance Howe's credibility by relying on the absence of evidence she herself kept out of evidence. (*See People v. Powell* (1967) 67 Cal.2d 32, 56-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same].) As Judge Kozinski has noted, in assessing prejudice "closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318.) Reversal of the penalty phase is required.

X. THE TRIAL COURT VIOLATED STATE AND FEDERAL LAW IN (1) FINDING THAT JUROR 27417 COMMITTED MISCONDUCT WHICH WAS SUFFICIENT TO DISCHARGE HIM FROM THE PENALTY PHASE, (2) REFUSING TO DECLARE A GUILT-PHASE MISTRIAL BASED ON THE MISCONDUCT IT HAD JUST FOUND BY JUROR 27417 AND (3) REFUSING TO GRANT A PENALTY-PHASE MISTRIAL BASED ON JUROR 24777'S CONVERSATIONS WITH NONJURORS.

A. Introduction.

After the jury had convicted Mr. Grimes of capital murder, and in the midst of the penalty phase, the court learned that Juror 27417 had violated the trial court's admonition not to talk about the case with non-jurors. The court learned that the conversations with non-jurors had occurred during both the guilt and penalty phases. The court found "serious and willful misconduct" and discharged the juror from further service on the penalty phase. (42 RT 11083-11084.) When defense counsel then asked for a mistrial as to the guilt phase -- in light of the court's specific finding of "serious and willful misconduct" during that phase -- the court denied the motion. (42 RT 11087.)

After the jury returned a sentence of death, defense counsel brought a new trial motion alleging that during the penalty phase, another juror had discussed the case with non-jurors. (6 CT 1485-1487.) At a hearing on this motion, three witnesses testified in detail as to the statements made by Juror 24777 about the case: Kathleen Hash, Tina Ferreria and Susan Mayberry. (43 RT 11195-11196 [Hash]; 43 RT 11229-11234

[Ferreria] and 11246-11251 [Mayberry].) For her part, juror 24777 denied speaking to Hash, she denied speaking to Ferreria and she denied speaking to Mayberry. (43 RT 11259, 11261, 11263.) The trial court found (1) Juror 24777 credible, (2) Hash less than credible and (3) made no finding at all about the credibility of Ferreria and Mayberry. (43 RT 11310.) Instead, the court ruled that even if Juror 24777 had spoken to Ferreria and Mayberry, there was no misconduct. (43 RT 11310-11311.)

In his opening brief, Mr. Grimes raised three contentions. First, the trial court improperly discharged Juror 27417 from jury service in the penalty phase because his misconduct was insubstantial. (AOB 248-253.) Second, if Juror 27417's misconduct was sufficient to merit discharge, then a mistrial should have been granted in connection with the guilt phase since the misconduct occurred during the guilt phase of trial. (AOB 253-255.) Finally, a new penalty phase was required because Juror 24777 committed misconduct in speaking about the case with non-jurors during the penalty phase. (AOB 256-259.)

Respondent disagrees on all counts. Respondent argues that Juror 27417's misconduct was substantial enough to merit discharge. (RB 182-184.) According to respondent, however, it was not sufficient to merit a mistrial as to the guilt phase because "Juror 27417 testified that he had not been influenced in any way by the communications he had with nonjurors" and therefore the "presumption of prejudice has been rebutted . . .

." (RB 184.) Finally, Juror 24777 did not commit misconduct because (1) the trial court found witness Hash not credible, and that finding is supported by the evidence, (2) although the court made no finding about Mayberry and Ferreria, the statements she made to them were "factually correct and not inflammatory," generic" and she did not receive improper information from any of the people to whom she spoke. (RB 191-192.) Respondent's arguments must be rejected.

B. The Court Erred In Discharging Juror 27417 But Then Refusing To Grant A Mistrial As To The Guilt Phase.

Respondent first argues that the trial court did not err in discharging Juror 27417 because the juror "repeatedly and intentionally discussed issues relevant to guilt and penalty." (RB 183.) Of course this relatively simple analysis cannot be the end of the story.

In fact, when a juror discusses a pending case with a nonjuror in violation of the standard instruction forbidding such discussions, courts may not reflexively discharge the juror. Instead, the court must look to "the nature and seriousness of the misconduct and the probability that actual prejudice may have ensued." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) "Trivial violations that do not prejudice the parties do not require removal of a sitting juror." (*Id.*) Thus, given Juror 27417's forthright admissions that he

did indeed discuss the case with nonjurors, the only real question here is whether these discussions were "trivial violations" or whether they instead affirmatively established to a "demonstrable reality" that "actual prejudice may have ensued." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 840.)

As discussed in the opening brief, Juror 27417's comments did not establish a "demonstrable reality" that "actual prejudice may have ensued." As an initial matter, Juror 27417 did not deliberately and willfully disobey the trial court's admonishment. Instead, the juror told the court that he was well aware of the court's order "not to discuss the case," and he "tried to do that" and "not discuss it." (42 RT 11075.) He did not think his superficial chats with coworkers were actually "discussions" in violation of the court's order. (42 RT 11075.) Indeed, he was genuinely surprised when the court informed him that it would consider the chats to be "discussions," exclaiming, "Oh, you would? Okay." (42 RT 11076.) He also apologized to the court and parties for what he did. (42 RT 11089.) Put simply, this was not a juror who deliberately and willfully refused to follow the court's instructions. (*See People v. Holloway* (2004) 33 Cal.4th 96, 125 [no error for failing to discharge juror who "had not thought" he violated admonition because he "did not see" conversation with nonjuror as "'talking about' or 'discuss[ing]'" the case].)

Indeed, Juror 27417 was very conscientious about his duties as a juror. Prior to deliberating in the penalty phase, he brought his "concerns" about the penalty phase to the

court's attention. (6 CT 1427; 28 CT 8266, 8267; 41 RT 10902.) He assured the court he was "willing" and "able" to deliberate and "follow the instructions." (41 RT 10943.) Indeed, according to his coworkers, the juror wrangled with the meaning of the phrase "reckless indifference to human life" to make the right decision in the guilt phase and then, during the penalty phase, was "actively reviewing the case, conscientiously" to make this "difficult" decision. (42 RT 11030, 11049.)

Respondent ignores the record of Juror 27417's genuine attempts to comply with the instructions and fulfill his duty as a juror. Instead, respondent simply argues that "[t]he fact that juror 27417 had been surprised to learn that his comments to nonjurors qualified as 'discussing' the case does not undermine the court's finding of prejudicial misconduct" because "[i]t was not unreasonable for the court to have taken little, or no, comfort in juror 27417's misunderstanding of what qualified as 'discussing' the case when it concluded that the juror could not longer be counted on to follow the court's instructions in the future." (RB 184.) Respondent does not explain its reasoning. Indeed, given Juror 27417's history of trying to conscientiously follow the trial court's instructions, there was no reason to believe that once publicly admonished for the discussing the case at all, Juror 27417 would not strictly adhere to the court's instructions not to discuss the case in the future.

Respondent also ignores the trivial nature of Juror 27417's discussions.

Kimmelshue testified that Juror 27417 (1) made general comments about the case, (2) indicated a struggle with the phrase "reckless indifference to human life" and was "one of the last people to come around to those terms" and (3) said the jury was undecided "between death penalty and life in prison." (42 RT 11026, 11030, 11032.) Urkov testified that Juror 27417 (1) indicated he did not understand the consequences of the first phase and regretted his decision, (2) said the jury was deciding between "a death penalty sentence and life without parole," and (3) told him the case involved an elderly woman who was killed by two while the defendant was present. (42 RT 11048, 11049, 11053.) In response to all his comments, these coworkers had responded, "Uh-huh, I see" or "I'm glad I'm not in your shoes." (42 RT 11080.) According to Juror 27417, nothing "ha[d] been said to influence [him] in any way." (42 RT 11074, 11080.)

Thus, as noted in the opening brief, these were not in depth conversations about the case which could have had an affect on the juror's ability to impartially deliberate. (*See* AOB 252-253. *Compare People v. Wilson*, *supra*, 44 Cal.4th at p. 839 [juror improperly discharged when voiced out loud "various concerns about the case"] *with People v. Ledesma* (2006) 39 Cal.4th 641, 743 [juror properly discharged who "needed to "'straighten things out in [his] head,'" so "recounted the story of the case to his wife" who then "gave some opinion [sic] which left me with the same decision that I had before."]; *People v. Daniels* (1991) 52 Cal.3d 815, 863, 866 [juror properly discharged when he discussed the details of the case with nonjurors and expressed his belief that he

"couldn't see how a man that was in a wheelchair could shoot another man and get out of the wheelchair and get another gun to shoot the other officer" and "can't see how that nigger was able to kill two policemen."].)

Put simply, the trial court erred in discharging Juror 27417. Respondent does not explain why Juror 27417 was anything other than a conscientious juror who had merely voiced general concerns to his coworkers about the case. This was a "trivial violation" and did not establish to a "demonstrable reality" that "actual prejudice may have ensued." (*See People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) The penalty phase must be reversed.

But assuming respondent is correct, reversal of the guilt phase is required. As explained in the opening brief, the record shows that Juror 27417 spoke about the case throughout both the guilt and penalty phases. (AOB 253-254.) The trial court itself recognized that "there's reason to believe there may have been -- although it's not clear, some communication prior to [the penalty phase]." (42 RT 11087.) In fact, there was overwhelming evidence that this is exactly what took place. (*See*, *e.g.*, 42 RT 11027 [first conversation took place "early in service" during guilt phase]; 11028, 11040 [second conversation took place at "the end" of guilt phase]; 11047-11048 [conversations started during jury selection process].) Thus, as detailed in the opening brief, if Juror 27417 committed such wilful and serious misconduct which demonstrated an inability to serve as a juror during the penalty phase, the same misconduct warranted a mistrial as to the

guilt phase. (AOB 253-255.)

Respondent does not dispute that Juror 27417 committed misconduct in the guilt phase of trial. (RB 182.) Instead, respondent accurately notes that "Juror 27417 testified that he had not been influenced in any way by the communications he had with nonjurors." (RB 184.) Relying on this testimony, respondent argues that the trial court did not err in denying Mr. Grimes's motion for a mistrial because the "presumption of prejudice has been rebutted . . . ." (RB 184.) Respondent's argument must be rejected.

As an initial matter, evidence of Juror 27417's thought process in reaching his guilt phase verdict cannot be considered in determining whether misconduct occurred. Evidence Code Section 1150, subdivision (a) provides that "[n]o evidence is admissible to show the effect of such a statement . . . upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Thus, "jurors may testify to 'overt acts' . . . but may not testify to 'the subjective reasoning processes of an individual juror." (*In re Stankowitz* (1985) 40 Cal.3d 391, 397.) Here, contrary to respondent's suggestion, Juror 27417's statement that "he had not been influenced in any way by the communications" cannot be used to show that the juror was indeed not influenced.

But even putting this aside, respondent's reliance on Juror 27417's thought process

is somewhat perplexing. If Juror 27417's thought process -- and assurances that he was not influenced in any way by the communications -- rendered him capable of carrying out his duties in the guilt phase, it becomes difficult to see how these same assurances did not render him capable of carrying out his duties in the penalty phase. Put simply, respondent cannot have it both ways. If Juror 27417's conduct in speaking to nonjurors rendered him incapable of fulfilling his duties as a juror, then he was incapable of doing so in both phases and the mistrial motion should have been granted. (*Compare People v. Wilson*, *supra*, 44 Cal.4th at p. 841 [trial court discharges juror for bias during penalty phase, on appeal defendant argues that reversal of guilt phase was also required; held, because evidence did not support finding that juror was biased during penalty phase, court presumes juror was also not biased at guilt phase].)

Respondent also argues that because Juror 27417 "struggled with the meaning of reckless indifference to life and its application to the facts of the case" and "had been 'frustrated' by other jurors whom he believed had not 'given a fair chance to the defense's story," Juror 27417 "was not biased against appellant." (RB 184.) But respondent forgets the nature of the misconduct here. The trial court dismissed Juror 27417 because it found "this juror repeatedly and admittedly discussed this case with outsiders and that he was aware of the court's admonition when he did it." (42 RT 11084.) According to the court, "this juror is unable to perform his duties as a juror." (42 RT 11084.) If the court was correct, and the juror was unable to perform his duties

during the penalty phase, there is no reason to believe this same misconduct and inability to follow instructions was any less harmful at the guilt phase simply because he "struggled with the meaning of reckless indifference to life" and was frustrated with other jurors not giving a "fair chance to the defense's story." The fact remains that (1) Juror 27417 returned a verdict of guilt and (2) during the guilt phase he committed misconduct which was identical to the misconduct which the trial court ultimately found rendered him incapable of performing his duties. Respondent's argument must be rejected.

C. The Trial Court Erred In Refusing To Grant A Mistrial In Connection With Juror 24777.

Respondent's arguments as to Juror 24777 fare no better. Juror 24777 denied she had ever discussed the case with nonjurors Hash, Ferreria and Mayberry. The trial court found her "entirely credible" and concluded "no discussion of this case was done by [Juror 24777] as suggested by any of these witnesses." (43 RT 11310.) Respondent argues "substantial evidence supports the trial court's finding that juror 24777 did not talk to any nonjurors about appellant's trial." (RB 191.)

But respondent offers no explanation of the three separate witnesses coming forth with detailed testimony that the discussion *did* take place. Indeed, these three witnesses all corroborate each other's stories that this discussion took place in each other's presence

near December 1 in the child care room at Trinity House. (43 RT 11195-11196, 11215, 11230, 11234, 11246, 11246, 11251.) In stark contrast, Juror 24777's story that she was completely innocent of any wrongdoing and said not a word to anyone went entirely uncorroborated. The court itself only found that Hash was "less than credible" (43 RT 11310), and made no finding as to the credibility of the two remaining witnesses who themselves had no reason to lie about the conversations, or otherwise provided some explanation as to why three witnesses would come forward with the same story if it were not true. On this record, contrary to respondent's argument, the court's credibility determination is simply unsupported by any evidence and cannot be accepted. (*See People v. Danks* (2004) 32 cal.4th 269, 304 [a court's credibility determination can be accepted only where "supported by substantial evidence."].)

Respondent alternatively argues that "even assuming juror 24777 made the statements attributable to her, there was no prejudice." (RB 191.) According to respondent, Juror 24777's discussions were "generic" and "factually correct and not inflammatory," and she did not receive "improper information" from any of the people to whom she spoke. (RB 191-192.) Respondent's attempt to trivialize the nature of these discussions should be rejected for two reasons.

First, there is no "generic" or "factually correct" exception to the rule against disobeying the trial court's admonition not to talk about the case. Respondent never

explains why Juror 27417's "generic" and "factually correct" remarks constituted "serious and willful misconduct," but Juror 24777's comments constituted "generic" and "factually correct" remarks which were just fine. After all, once the Court "assum[es] juror 24777 made the statements attributable to her," it is clear Juror 24777's remarks were far less "generic" -- and she provided far more detail about the facts of the case -- than Juror 27417. (*Compare* 42 RT 11053 [Juror 27417 told Urkov "[a] woman, elderly woman, was beaten and killed by two other people and the defendant was present."] *with* 43 RT 11201, 11202 [Juror 24777 told Hash "[t]here was three men, and the one man that actually -- the one man that actually did the killing to the elderly lady killed himself in jail" and "[t]he guy had driven the truck into the lake"] *and* 43 RT 11230 [Juror 24777 told Ferreria it was "[t]he one with the old lady that they stole her car and left it in the lake"].) And unlike Juror 27417's comments -- which received innocuous responses like ""Uh-huh, I see" and "I'm glad I'm not in your shoes" -- Juror 24777's comments actually prompted one nonjuror to declare her beliefs about the death penalty. (42 RT 11080; 43 RT 11222.)

Second, respondent notes there is no evidence that Juror 24777 received "improper information" from any of the people to whom she spoke. (RB 192.) But this applies with equal force to Juror 27417. Respondent never satisfactorily explains why the two jurors should have been treated so differently.

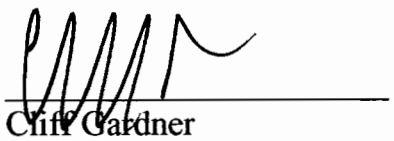
Put simply, if Juror 27417's misconduct demonstrated a substantial likelihood of actual bias, it cannot be said that Juror 24777's more egregious misconduct did not do the exact same and then some. Respondent's argument to the contrary must be rejected.

CONCLUSION

For all these reasons, and for the reasons set forth in Mr. Grimes's opening brief, reversal of the guilt and penalty phases is required.[11]

DATED: 4-21-11

Respectfully submitted,



Cliff Gardner
Attorney for Appellant

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[11] Mr. Grimes has filed this Reply Brief in connection with those issues where additional briefing appears likely to be helpful to the Court in deciding this case. As to those issues on which Mr. Grimes does not provide additional briefing here, Mr. Grimes notes that both sides have thoroughly briefed the issues presented and he believes these other issues are fully joined by the briefs currently on file with the Court. The absence of additional briefing on these other issues is not intended as a concession of any nature or as a lack of confidence in the merits of the matters not addressed. (*See People v. Hill* (1992) 3 Ca1.4th 959, 995, fn. 3.)

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 26462 words in the brief.

Dated: 4-21-11.

Cliff Gardner

CERTIFICATE OF SERVICE

I, Cliff Gardner, am over 18 years of age. My business address is 1448 San Pablo Avenue, Berkeley, California, 94606. I am not a party to this action.

On 4/26/11 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 4/26/11 in Oakland, California.

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