IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JOHNNY DUANE MILES, Appellant.	S086234 San Bernardino Case No. FSB09438

APPELLANT'S REPLY BRIEF

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

Honorable James A. Edwards, Judge

CLIFF GARDNER
(State Bar No. 93782)
CATHERINE A. WHITE
(State Bar No. 193690)
1448 San Pablo Avenue
Berkeley, CA 94702
Tel: (510) 524-1093
Fax: (510) 527-5812
Casetris@aol.com

Attorney for Appellant
Johnny Duane Miles

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

ARGUMENT

I. THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO STRIKE TWO PROSPECTIVE AFRICAN-AMERICAN JURORS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

Defendant is a black man charged with raping and murdering a white woman. After hardship and *Hovey* voir dire, 12 jurors were randomly called into the jury box for general voir dire and the exercise of peremptory challenges. (6 RT 1684.) Among this first group of 12 jurors were two prospective jurors who were also black: prospective jurors SG and KC. (6 RT 1685; 21 CT JQ 5975; 24 CT JQ 6825.)

KC was a former marine who had been married to a correctional officer, he agreed he could vote for death, he had no opposition to the death penalty and he believed prosecutors were trying "to protect the community . . . against those that would cause harm or have harmed." (24 CT JQ 6828- 6830, 6842, 6849-6852.) SG "favored the death penalty," thought it was fairly used in California and would not be reluctant to impose it, his father worked as a DEA agent and he himself had considered a career as a police officer. (21 CT JQ 55983, 5985, 6001-6002.) The prosecutor used peremptory

challenges to discharge both KC and SG. (6 RT 1705, 1708.)

Defense counsel made a *Wheeler/Batson* motion. (6 RT 1719.) The trial court itself made clear that in light of the answers given by both KC and SG, it did not understand why the prosecutor challenged them:

> "I don't understand [the challenges] as to [KC] and as to [SG]. You'll have to explain those." (6 RT 1720.)

The prosecutor gave three reasons for each discharge. (6 RT 1720-1722.) The trial court then denied defense counsel's motion because "I cannot say [the prosecutor's reason] is not legitimate." (6 RT 1722.) Ultimately, there was not a single black juror among the 12 jurors seated to try the case; of the 6 jurors eventually seated as alternates, there was a single black. (5 CT JQ 1009 [alternate juror 2].)

In his opening brief Mr. Miles contended that reversal was required for four reasons. First, the legal premise of Mr. Miles's argument was that in evaluating the trial court's ruling here, this Court should consider four types of evidence: (1) whether the reasons given by the prosecutor applied equally to white jurors who were not discharged, (2) whether the prosecutor's reason are unrelated to the case, (3) whether jurors KC and SG would have been favorable jurors for the prosecution and (4) whether the process

which resulted in the use of peremptory challenges suggested pretext (as where the prosecutor fails to question a discharged juror on an area he later says is critical). (Appellant's Opening Brief ("AOB") 52-54.) Second, as to prospective juror SG, the prosecutor's stated reasons for the discharge were a pretext for discrimination; these reasons were equally applicable to white jurors who were not struck, SG was a juror the prosecutor should have wanted on this capital jury and the prosecutor selectively questioned (or failed to question) the discharged and seated jurors. (Appellant's Opening Brief ("AOB") 55-63.) Third, as to prospective juror KC, the prosecutor's stated reasons for the discharge were also a pretext for discrimination; these reasons were equally applicable to white jurors who were not struck and the prosecutor again selectively questioned the seated and discharged jurors. (AOB 64-75.) Finally, if the Court found some of the prosecutor's reasons invalid -- and that race played some role in the prosecutor's decision to discharge either SG or KC -- then reversal was required because race should have played no role at all in the process of selecting the jury. (AOB 76-80.)

The state's position as to the initial legal premise of Mr. Miles's argument is not entirely clear. The state concedes the essential question to be resolved at the third stage of a *Batson* inquiry is "whether the prosecutor's race-neutral explanation for a peremptory challenge should be believed." (Respondent's Brief ("RB") 24.) The state suggests, however, that there "will rarely by much evidence bearing on" this question. (RB 24.)

In fact, the outlook is not nearly as glum as the state suggests. The case law discussed in Mr. Miles's opening brief shows that there are many different types of evidence which bear on this question.

The state concedes that comparative juror analysis is a "form of circumstantial evidence that is relevant." (RB 25.) In light of the case law, the concession is entirely warranted. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."].)

In addition to comparative juror analysis, however, and as Mr. Miles pointed out in his opening brief, other forms of evidence bear on this question as well. Thus, where a prosecutor's stated reasons for a discharge are unrelated to the case itself, this too is circumstantial evidence that is relevant to the question of whether race-neutral reasons are a pretext for discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768; *Batson v. Kentucky* (1986) 476 U.S. 79, 98; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 359.) Where prospective black jurors who are struck would otherwise have been favorable jurors for the prosecution, this too is a factor demonstrating pretext. (*See, e.g., Miller El v. Dretke, supra*, 545 U.S. at p. 232; *People v. Allen* (2004) 115 Cal.App.4th 542, 550.)

And where a prosecutor fails to question a prospective juror on an area he later alleges is critical to the discharge decision, this too demonstrates pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246. *Accord Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 376; *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1033.) This Court has quite recently noted the importance of examining the prosecutor's pattern of questioning in evaluating a claim of pretext. (*See People v. Chism* (2014) 58 Cal.4th 1266, 1317 [prosecutor states that he discharged a Black prospective juror because she had no supervisory work experience; held, court rejects claim of pretext where prosecutor questioned both minority and non-minority prospective jurors on this subject].)

Moving beyond the relatively uncontroversial legal premise of Mr. Miles's argument, and as noted above, the state recognizes that the key question is "whether the prosecutor's race-neutral explanation . . . should be believed." (RB 24.) Mr. Miles entirely agrees. The state argues that as to prospective juror SG, the record does not support a finding of pretext. (RB 25-31.) The state makes a similar argument as to prospective juror KC. (RB 31-36.) And the state argues that even if the prosecutor based his decision to strike SG or KC partly on race, that is entirely permissible and reversal is not required. (RB 36-38.)

None of the state's arguments have merit. Reversal is required.

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

SG was a 24-year-old African-American. (21 CT JQ 5975.) It is difficult to imagine a more favorable juror in a capital case. SG favored the death penalty, he believed death was a proper sentence for serious crimes, he would vote for the death penalty if it was on the ballot, he believed the death penalty was used fairly in California, he would not be reluctant to impose death and he would sign the verdict form and face the condemned with his verdict. (21 CT JQ 5983, 6001-6002.)

Nevertheless the prosecutor used his fourth peremptory challenge to discharge SG from this capital case. (6 RT 1708.) Given that SG was so favorably inclined towards the death penalty, and would therefore have been an excellent juror for the prosecution, the trial court stated that it did not understand why the prosecutor would challenge SG. (6 RT 1720.) The prosecutor gave three reasons for the discharge: (1) SG said in answering question 68 on the questionnaire he was not upset at the O.J. Simpson verdict and the prosecutor was discharging prospective jurors regardless of color if they "were not upset by the O.J. Simpson verdict," (2) SG said in answering question 74 that if he felt "that defendant might not have done it, he['s] innocent" and (3) SG said in answering question 35 that he "like[d] [his own] opinion over other people[']s." (6 RT 1720-1721; *see* 21 CT JQ 5982, 5993-5994.)

In his opening brief, Mr. Miles contended that none of these reasons held up under scrutiny. (AOB 55-64.) The state defends each and every one. (RB 25-31.) They will be discussed in turn.

1. The prosecutor's stated concern that SG was not upset about the O.J. Simpson verdict.

Question 68 in the jury questionnaire asked jurors if they were "upset with the jury's verdict in the O.J. Simpson case." SG checked a box that said he was not. (21 CT JQ 5993.) During voir dire, the prosecutor did not ask SG a single question about this response. (6 RT 1699-1702.) Nevertheless, SG's answer to this question was one of three reasons the prosecutor gave in explaining his discharge of SG, adding that he had excused jurors of all races where "the common denominator is that they were not, were not upset by the O.J. Simpson verdict." (6 RT 1721.)

As Mr. Miles explained in his opening brief, the problem here is that there really was nothing common about the prosecutor's "common denominator" after all. Prospective jurors who were *not* black -- like alternate juror 5 and seated juror 6 -- both gave answers that were *identical* to SG, explaining that they too were not upset by the O.J. Simpson verdict. (4 CT JQ 1179, 1197; 5 CT JQ 1401.) Nevertheless, the

prosecutor simply discharged SG -- while keeping alternate juror 5 ("AJ5") and seated juror 6 ("SJ6") -- explaining that the "the common denominator" in his discharge decisions was the answer to question 68.

The following chart starkly illustrates why the prosecutor's "common denominator" theory does not add up:

Juror	Question 68	Answer	Race	Result
SG	"Were you upset with the jury's verdict in the O.J. Simpson case?"	"No."	Black	Discharged.
AJ 5	"Were you upset with the jury's verdict in the O.J. Simpson case?"	"No."	Not Black	Seated
SJ 6	"Were you upset with the jury's verdict in the O.J. Simpson case?"	"No."	Not Black	Seated

Whatever else this chart shows, it makes clear that the "common denominator" in the prosecutor's decision to strike prospective jurors was *not* the prospective jurors' views about the O.J. Simpson case. If views as to the O.J. Simpson verdict were really the "common denominator," then both AJ5 and SJ6 would also have been discharged. A comparative juror analysis shows that the reason given by the prosecutor for striking SG stated applied equally to non-black jurors who were not struck. As such, the prosecutor's

reliance on the O.J. Simpson answer is plainly a sign of pretext. Indeed, if anything, the above chart suggests that the real "common denominator" in the discharge decision was the prohibited category of race.

But it is not just the comparative juror analysis that points to a finding of pretext. As noted above, although the prosecutor stated that the answer to the O.J. Simpson question was a critical factor in his decision to strike jurors -- the prosecutor himself called it the "common denominator" which he applied "across the board" -- he did not ask SG about it before striking him, and he did not ask seated juror 6 or alternate juror 5 about it before deciding to ignore their identical answers entirely. This too suggests pretext. (*See Miller-El v. Dretke, supra*, 545 U.S. at p. 246 [prosecutor's failure to question a prospective juror on an area the prosecutor later alleges is critical to the discharge decision is evidence of pretext]; *United States v. Williamson* (5th Cir. 2008) 533 F.3d 269, 276-277 [when a prosecutor identifies a given area as a factor in his decision to strike a black juror, the prosecutor's failure to inquire into that same area with white jurors is a plain sign of pretext].)

The state does not dispute either these facts or the law. Instead, the state argues the comparative juror analysis and the prosecutor's failure to question do not matter. As to the comparative juror analysis, the state makes two points. First it notes that the

prosecutor *did* discharge several other prospective jurors who also said they were not upset at the O.J. Simpson verdict. (RB 28.)

While the factual point is accurate, it is entirely beside the point. The goal of comparative juror analysis has never been to compare answers given by jurors who are discharged with answers given by other jurors who are discharged. That tells a reviewing court very little. The goal of comparative juror analysis is to compare answers given by jurors who are discharged with answers given by jurors who are *not* discharged so the reviewing court can compare the two and make an assessment of pretext:

> "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

The state's alternative point as to the comparative juror analysis is equally unavailing. The state notes that although the answers of alternate juror 5 and seated juror 6 were *identical* to SG in connection with the O.J. Simpson question, this does not matter because their answers on other parts of the questionnaire were not identical. (RB 28.)

Mr. Miles will start with a point of agreement. *Of course* the other answers given by alternate juror 5 and seated juror 6 were not identical to the answers given by SG in all

other parts of the questionnaire. It was, after all, a 130-question questionnaire. But as discussed below, the conclusion the state urges the Court to draw from this fact -- that the comparative juror analysis is therefore not evidence of pretext -- is made not by relying on binding authority from the United States Supreme Court (*Miller-El*) but by ignoring it completely.

The record shows -- and the state concedes -- that it was the prosecutor himself who identified the answer to question 68 as the "common denominator" which explained his decision to discharge jurors "across the board." The record shows -- and the state concedes -- that black prospective juror SG's answer to question 68 was identical to two non-black jurors who were not discharged. That is all that is required for an inference of pretext. Contrary to the suggestion in the state's brief, the Supreme Court has *explicitly* rejected the notion that comparative juror analysis requires the discharged and non-discharged juror to be "identical in all respects." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, n.6.)

Significantly, the facts of *Miller-El* show that the Supreme Court was faced with -- and rejected -- the *identical* argument the state makes here. There, defendant contended the prosecutor had improperly discharged black jurors Billy Fields and Joe Warren. (545 U.S. at pp. 242, 247.) The trial prosecutor explained these discharges, relying on (1) Mr.

Fields's specific answers to a question regarding rehabilitation and (2) Mr. Warren's specific answer to a question on what the death penalty accomplished. (545 U.S. at p. 243 [Fields] and 247-248 [Warren].) On appeal, the defense relied on the fact that numerous seated white jurors had given identical responses to these questions. (545 U.S. at pp. 244-245 [Fields] and 248 [Warren].) The state made the same argument the state makes here, arguing that the white jurors identified by the defense were not similarly situated to the discharged black jurors because -- *as to other questions* -- the discharged jurors gave different answers than the white jurors. (*Miller-El v. Dretke*, 03-9659, Brief for Respondent at pp. 19-20 [Fields] and 22 [Warren], 2004 WL 2446199 at *11-17 .) The Supreme Court acknowledged that these answers to other questions showed "some differences" between the discharged and seated jurors but nevertheless rejected the state's argument:

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

The state does not address this aspect of *Miller-El*. Courts around the country, however, have recognized their obligation to follow *Miller-El*; the notion that jurors must be identical before an inference of pretext may be drawn had been consistently rejected.

(*See, e.g., Reed v. Quarterman, supra,* 555 F.3d at p. 376; *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 927 n.3; *United States v. Torres-Ramos* (6th Cir. 2008) 536 F.3d 542, 559; *United States v. Williamson, supra,* 533 F.3d at p. 274 n.14; *Green v. LaMarque, supra,* 532 F.3d at p. 1030, n.3; *United States v. Odeneal* (6th Cir. 2008) 517 F.3d 406, 420; *Kesser v. Cambra, supra,* 465 F.3d at p. 366.) It should be rejected here as well.

Turning to the prosecutor's failure even to question SG, seated juror 6 or alternate juror 5 on their identical answers to the critical O.J. Simpson question, the state argues this does not matter because the prosecutor *did* question SG on his answer to question 74. (RB 29.) The state's apparent thesis is that the failure to question prospective jurors in an area which the prosecutor himself later relies on as a reason to discharge the juror is somehow less probative of pretext when the prosecutor *has* questioned the prospective juror in a different area.

The state's thesis makes little sense in light of the facts of *Miller-El.* In that case, during voir dire the prosecutor questioned prospective juror Fields (who was Black) extensively about his views on the death penalty. (*Miller-El v. Dretke,* No. 03-9659, Joint Appendix, 2004 WL 2899955 at ** 173-189.) The prosecutor also questioned Mr. Fields very briefly about his brother who had been convicted of a drug offense, learning that he

was not close to his brother. (*Id.* at p. 189.) The prosecutor later used a peremptory challenge to discharge Mr. Fields, stating two reasons to support the discharge: (1) Mr Fields would not give death if rehabilitation were possible and (2) Mr. Fields's brother had a criminal conviction. (545 U.S. at p. 243, 246.) After finding that the first reason was a pretext, the Supreme Court addressed the second reason. Although there had been *extensive* voir dire by the prosecutor on Mr. Fields's death penalty views -- and even some voir dire on Mr. Fields's relationship with his brother -- the Supreme Court nevertheless concluded that the prosecutor's reliance on the conviction suffered by Mr. Fields's brother was a pretext precisely because "the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered." (545 U.S. at p. 246.)

In other words, *Miller-El* holds that where a prosecutor fails to question a prospective juror in an area he (the prosecutor) later alleges is critical to the discharge decision, that is a sign of pretext. The fact that the prosecutor engaged in extensive voir

dire of that same juror in a *different* area does *not* undercut the significance of this failure as a sign of pretext.[1]

Alternatively, the state suggests that the prosecutor's failure to question SG about his views on the O.J. Simpson verdict is less probative of pretext since the jurors filled out long questionnaires in the case. (RB 29.) The state cites numerous decisions of this Court for the proposition that when a lengthy juror questionnaire has been completed, a prosecutor's failure to question in a particular area may be less probative of pretext. (RB 30.)[2]

---

[1] The state's appellate lawyers assure the Court that the prosecutor's exchange with SG about his answer to question 74 involved the "topic that concerned [the prosecutor] the most." (RB 29.) The state cites nothing in the record to support this insight into the trial prosecutor's concerns.

The Court need not linger over the absence of record support for the state's assertion. In light of the facts in *Miller-El*, the state's factual observation -- even if supported by the record -- would again be legally irrelevant.

In *Miller-El*, the prosecutor extensively questioned prospective juror Fields on the "topic that concerned him the most" -- Fields's views on the death penalty. (*Miller-El v. Dretke*, No. 03-9659, Joint Appendix, 2004 WL 2899955 at ** 173-189.) Nevertheless, once the prosecutor sought to justify discharging Mr. Fields by relying on the fact that Fields had a brother who had been convicted of a crime, the prosecutor's failure to question Mr. Field's about his relationship with his brother was a plain sign of pretext. In other words, affirmative questioning in a primary area of concern does not undercut the probative value of a prosecutor's total failure to question in another area which the prosecutor himself alleges is critical to the discharge decision.

[2] The state cites *People v. Edwards* (2013) 57 Cal.4th 658, *People v. Taylor* (2010) 48 Cal.4th 574, *People v. Dement* (2011) 53 Cal.4th 1 and *People v. Bell* (2007) 40 Cal.4th 582 to support its position. (RB 30, 36.)

In evaluating the meaning of these state-court decisions it is worth noting that in *Miller-El* -- the very case in which the Supreme Court articulated the rule that a prosecutor's failure to question may be a factor demonstrating pretext -- the parties used a very extensive jury questionnaire at trial. (*See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 242 [referring to the questionnaire "filled out by all panel members"], 297 [Thomas, J., dissenting] [referring to "question 58" on the jury questionnaire].) In its contrary argument, the state ignores this aspect of *Miller-El* entirely.

But neither Mr. Miles nor this Court have that same luxury. The fact of the matter is that *Miller-El* itself involved an extensive jury questionnaire. Nevertheless, the Supreme Court held that where a prosecutor fails to question a prospective juror in an area he later alleges is critical to the discharge decision, this affirmatively demonstrates pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246.) In light of the actual facts of *Miller-El*, the state simply cannot contend that the presence of an extensive jury questionnaire precludes a reviewing court from considering a prosecutor's complete failure to question prospective jurors in an area he later says is critical as evidence of pretext.

Indeed, in light of the facts of *Miller-El*, it is not surprising that the state-court decisions relied on by the state here do not stand for any such broad proposition. In

People v. Edwards, *supra*, 57 Cal.4th 658, for example, a prospective capital case juror filled out a jury questionnaire which had a detailed section regarding death penalty views. The prospective juror indicated her ambivalence about the death penalty in this detailed section of the questionnaire. The prosecutor affirmatively asked the juror about this on voir dire, learning she was still ambivalent. This Court held that in this situation, the failure to question the juror more extensively in this area was not a sign of pretext. (57 Cal.4th at p. 698-699. *Accord People v. Dement* (2011) 53 Cal.4th 1, 20-21 [in a capital case involving an extensive jury questionnaire, the prosecutor's failure to question discharged jurors was not evidence of pretext where the prospective jurors "were asked questions as a group by the parties that did not require a response unless a prospective

juror had a question or comment about that area" and "the prosecutor could observe the prospective juror' demeanor as each . . . question was asked."].)[3]

Given the facts of *Miller-El*, *Edwards* and *Dement* stand for the proposition that where a prosecutor has sufficient information in a particular area -- either because a juror questionnaire covered that area in detail or the jurors were asked questions by the parties or court itself -- the prosecutor's failure to question extensively in that area is not necessarily evidence of pretext. In that situation -- when sufficient information is

---

[3] As noted above, the state also relies on *People v. Taylor*, *supra*, 48 Cal.4th at p. 615 and *People v. Bell*, *supra*, 40 Cal.4th at pp. 598-599 for the proposition that a prosecutor's failure to ask any questions of discharged jurors should not be considered evidence of pretext when there is an extensive juror questionnaire. (RB 30, 36.) Reliance on these two cases is distinctly odd.

In *Taylor*, this Court held that a prosecutor's failure to question prospective jurors prior to discharge was not a sign of pretext where "at the time of defendant's trial in 1996, the trial court, not the parties, had primary responsibility for conducting voir dire. . . . Neither the prosecutor nor defense counsel asked questions of any prospective juror during voir dire in open court. Thus, the prosecutor's failure to ask T.B. any questions is not significant here." (48 Cal.4th at p. 615.) Mr. Miles quite agrees that where the trial court is conducting the voir dire pursuant to state law, a prosecutor's failure to question jurors is not evidence of pretext. But even the state itself does not contend that is what happened here. *Taylor* does not aid the state's case.

Bell is equally inapplicable. There in analyzing defendant's *Batson* claim this Court actually recognized the relevance of a prosecutor's failure to question discharged jurors but noted that the prosecutor in that case "*had* asked the [discharged jurors] questions" and that as a consequence, the defendant there did *not* "assert the prosecutor engaged these prospective jurors in particularly 'desultory' questioning on voir dire." (40 Cal.4th at pp. 598-599 and n. 5, emphasis in original). Thus, *Bell* did not even involve a claim that a prosecutor's failure to question jurors was evidence of pretext.

provided by other sources for a prosecutor to distinguish one set of answers from another -- there may be no need for a prosecutor to ask questions in a particular area and the failure to do may not be probative of pretext.

But that is certainly not the case here, nor does the state even argue otherwise. The jury questionnaire asked one question -- and one question only -- about the O.J. Simpson case. It asked prospective jurors if they were upset by the verdict. (21 CT JQ 5993.) SG checked the box that said he was not upset. (21 CT JQ 5993.) Alternate juror 5 and seated juror 6 did the same. (4 CT JQ 1197, 5 CT JQ 1401.) No other question in the questionnaire, and no other questions during voir dire, covered this subject. On this record, if the prosecutor had genuine concerns about a prospective juror's views on the O.J. Simpson case, he would certainly have asked alternate juror 5 and seated juror 6 about their answers since nothing else in the questionnaire or the court's voir dire touched on this subject area. The fact that the prosecutor did not ask *any* questions in this area -- while discharging SG but not discharging alternate juror 5 or seated juror 6 -- is powerful evidence of pretext. Contrary to the state's suggestion, that there was a lengthy juror questionnaire covering *other* subjects (like publicity, views of law enforcement, views on the death penalty) really has nothing at all to do with the prosecutor's failure to ask questions about the one area that was, *in the prosecutor's own words*, the "common denominator" to his discharges.

The state notes that the prosecutor did not discharge alternate juror 2, who was black, even though she was not upset with the Simpson verdict. (RB 30.) The state cites the prosecutor's conduct as reassuring evidence proving the prosecutor was not using the Simpson verdict as a pretext to discharge black prospective jurors. (RB 30, 36.)

It proves nothing of the kind. The state is correct that after defense counsel alleged the prosecutor improperly struck SG and KC because of their race, the prosecutor refrained from discharging alternate juror 2. (6 RT 1759-1762.) But the balance of the state's factual premise is flawed; although this juror checked a box saying she was not upset with the Simpson verdict, she explained "the evidence was there which told me he was guilty." (4 JQ 1027.) In context, it appears this juror simply checked the wrong box.

But even accepting the state's premise entirely -- and assuming the prosecutor here genuinely believed alternate juror 2 was not upset with the Simpson verdict -- his decision not to discharge her actually confirms that his explanation for discharging SG and KC was pretextual. At stage three of a *Batson* inquiry -- after the prosecutor has stated race neutral reasons for a discharge -- the question is whether the prosecutor's stated reasons are bona fide or pretextual. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) Here, the prosecutor explained his discharge of SG and KC by telling the trial court that "across the board" -- meaning regardless of race -- he was striking *all* jurors who were not

upset with the Simpson verdict. (6 RT 1721.) This was, he explained, the "common denominator" in his discharge decisions. (6 RT 1721.) Of course, if this explanation had been genuine (as opposed to a pretext), the prosecutor certainly *would* have discharged alternate juror 2. But as the state recognizes, the prosecutor did no such thing.

The state never explains how the prosecutor's post-*Batson* motion *departure* from his stated "across the board/common denominator" policy *supports* the state's current position that his policy was genuine. The state has simply lost sight of the inquiry *Batson* requires be made at stage three: was the prosecutor's explanation genuine? Contrary to the state's implicit argument, the prosecutor's departure from his stated explanation does not show his explanation was genuine, it shows exactly the opposite.

To be sure, the question remains as to what explains the prosecutor's decision to depart from his "across the board/common denominator" policy and *not* discharge alternate juror 2. The most likely explanation, as noted above, is he thought she simply checked the wrong box. In any event, the Court need not dwell on this question; step three of the *Batson* inquiry requires the Court to answer a much simpler question: was the explanation given by the prosecutor genuine or a pretext? And here, the prosecutor's failure to question either SG or KC about an area he himself identified as critical, his failure to ask any questions in this area of seated white jurors who were also not upset

with the Simpson verdict and his failure to discharge these same jurors all establish the prosecutor's stated explanation was a pretext. Under this circumstance, the fact that after the *Batson* motion was brought the prosecutor decided to depart from his policy -- and permit seating of a single African-American alternate juror -- is not germane to the *Batson* calculus:

> "Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*." (*Lancaster v. Adams* (6th Cir.2003) 324 F.3d 423, 434.)

The prosecutor's stated reliance on SG's answer to the O.J. Simpson question was evidence of pretext.

2. The prosecutor's stated concern that if SG felt Mr. Miles did not commit the crime, he would not convict.

Question 74 asked prospective jurors if they could follow the court's instruction on the presumption of innocence. SG said in his questionnaire that he could, assuring the court that if he felt "that defendant might not have done it, he['s] innocent." (21 CT JQ 5994.) In context, the answer was plainly intended to assure the court and both parties that SG would not convict someone he felt was innocent.

The prosecutor asked SG about this answer during voir dire. SG explained this his written comment was intended to convey that "if the evidence showed that there wasn't -- that there was some reasonable doubt, then I probably would not accuse him . . . ." (6 RT 1700.) He confirmed that his decision would not be based on a "feeling," but on the evidence. (6 RT 1700.)

The state now rips SG's written answer on the questionnaire entirely out of context and argues that his answer was "alarming." (RB 26.) The state explains the cause for its alarm. *Ignoring the actual voir dire entirely*, the state reasons that in his questionnaire SG was really saying he would decide this case based on his "feelings" rather than the evidence. (RB 27.) The state goes on to suggest -- without citation to the record -- that this "is what troubled the prosecutor the most about SG." (RB 27.)

In evaluating the state's position, the facts of *Miller-El* are again instructive. There, prospective juror Fields was "a black man who expressed unwavering support for the death penalty." (545 U.S. at p. 242.) He "believed in capital punishment" and "had no religious or philosophical reservations about the death penalty" and could impose death. (*Ibid.*) During his voir dire by the prosecutor Fields said that rehabilitation might be relevant to his decision to impose death. (*Ibid.*) He then told the prosecutor that his belief that someone could be rehabilitated "would not stand in the way of a decision to

impose the death penalty." (*Ibid.*) The prosecutor discharged Fields, giving as one reason that Fields would not give death if a person could be rehabilitated. (*Id.* at p. 243.)

The Supreme Court first noted that in light of the actual voir dire, this was a plain mischaracterization of Fields's response. (545 U.S. at p. 244.) The Court recognized that the prosecutor could have misunderstood Fields, but in that situation "we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." (545 U.S. at p. 244.)

The same is true here. Like prospective juror Fields in *Miller-El*, SG here was a very favorable juror for the prosecution. SG "favor[ed] the death penalty." (21 CT JQ 6002.) SG had no moral, religious or philosophical objection to the death penalty. (21 CT JQ 5999.) He felt it was fairly used in California and he would vote to keep it if it appeared as a ballot measure. (21 CT JQ 6000, 6001.) He was not personally reluctant to vote for death and could impose a death sentence in the case. (21 CT JQ 6001.)

In the final analysis, suggesting that SG would vote to acquit based on a "feeling" as opposed to the evidence is a mischaracterization of SG's responses which -- just as in *Miller-El* -- simply ignores the actual voir dire. (6 RT 1700 [SG advises prosecutor that

"if the evidence showed that there wasn't -- that there was some reasonable doubt, then I probably would not accuse him . . . ."].) On this record -- just as in *Miller-El* -- even if there was some kind of misunderstanding, in light of SG's "outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." (545 U.S. at p. 244.)

"A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) In context, there was nothing "alarming" about SG's answer at all. In ignoring SG's actual voir dire, the state here is doing exactly what the state attempted in *Miller-El*. Trying to make SG's answer something it plainly was not does not make it so.

3. The prosecutor's stated concern that SG liked his own opinion.

Question 35 of the questionnaire asked jurors if they viewed themselves as a leader or a follower, and then asked for an explanation. In his written questionnaire, SG said he was a leader, explaining that he "like[d] [his own] opinion over other people[']s." (21 CT JQ 5982.) Seated juror 1 -- who was white -- answered that she too was a leader and explained that she "like[d] to make [her] own decisions." (4 CT JQ 1152.) The

following chart illustrates the discharge:

QUESTION 35

"Would you describe yourself as a leader or follower? Why?"

Juror	Answer	Race	Result
SG	"Leader. I like my own opinion over others people[']s."	Black	Discharged
SJ1	"Leader. I like to make my own decisions."	Not Black	Seated

The prosecutor did not ask seated juror 1 or SG even a single question about their nearly identical answers to this question. (6 RT 1699-1702, 1714-1715.) Nevertheless, when it came time to exercise peremptory challenges, the prosecutor cited this answer as a reason to discharge SG (who was black) but did not discharge seated juror 1 (who was white). (6 RT 1720-1721.)

As Mr. Miles explained in his opening brief, under the legal criteria discussed above, this was evidence of pretext for two reasons. First, a comparative juror analysis shows that the answer SG gave was in all material respects identical to seated juror 1 -- a white juror -- who was *not* discharged. Second, although the prosecutor stated this area was critical to his discharge decision, he asked neither SG nor seated juror 1 any questions in the area at all. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 246. *Accord Reed v. Quarterman, supra*, 555 F.3d at p. 376; *Green v. LaMarque, supra*, 532 F.3d at p.

1033.)

The state disagrees. As to the comparative juror analysis, the state notes that seated juror 1 was different in other areas -- areas which the prosecutor did not reference. For example, although seated juror 1 was identical to SG in viewing herself as a leader and liking to make her own decisions, the state notes juror 1 and SG gave different responses to question 36. (RB 29.)

Question 36 asked jurors if they had ever "worked with a group of people to make a decision." Seated juror 1 said that she had, and explained that she had previously served on a jury, which reached a verdict." (RB 29 *citing* 4 CT JQ 1152.) In contrast, the state notes that SG said he had not "worked with a group of people to make a decision," adding that it would be a "very interesting" experience. (21 CT JQ 5982.)

The state's observation is entirely accurate. But not only is the observation legally irrelevant, it actually furnishes additional evidence of pretext. This may explain why the trial prosecutor himself did not rely on SG's answer to question 36.

Mr. Miles will start with the law. The fact that two jurors do not have identical answers in an extensive jury questionnaire does not undercut the inference of pretext to be

drawn when the prosecutor discharges a minority juror for giving an answer that is identical to a white juror who is not discharged. As discussed in some detail above, the Supreme Court could not have been clearer in rejecting this exact argument:

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

Even putting *Miller-El* to the side, however, there is a much more basic flaw in the state's position. Fairly read, the state is arguing that although SG and seated juror 1 were similarly situated in connection with their nearly identical answers to question 35: (1) they were not similarly situated with respect to question 36 and (2) question 36 was really what the prosecutor was concerned about.

As noted above, the prosecutor himself did not place any reliance at all on question 36 in discharging SG. For good reason it turns out.

There were other seated jurors who, just like juror 1 and SG, answered question 35 by saying they were leaders. If the state's newly minted "question 36" premise was correct, of course, then one would expect these other seated jurors to have answered

question 36 just like seated juror 1 -- explaining that they had indeed "work[ed] with a group of people to make a decision." After all, in connection with juror 1 and SG who both answered question 35 by saying they were leaders, this is what the state now says really distinguishes them -- a history of "work[ing] with a group of people to make a decision."

But the record does not support this premise at all. Seated juror 3 -- who was *not* Black -- also viewed himself as a leader. (4 CT JQ 1050.) Just like SG, however, (and unlike seated juror 1) he answered question 36 by explaining that he never "had to work with a group of people to make a decision." (4 CT JQ 1050.) The prosecutor did not discharge him, nor did it even ask him a single question about this area that the state's appellate lawyers assert was critical to the prosecutor's discharge decision.

Similarly, seated juror 4 was white. (5 CT JQ 1485.) Like SG, he too viewed himself as a leader. (5 CT JQ 1492.) Juror 4 did not even answer question 36, putting a question mark. (5 CT JQ 1492.) Yet again, the prosecutor did not discharge this white juror, nor did he even bother to find out if he ever "had to work with a group of people to make a decision." (6 RT 1748-1749.)

The following chart shows the fallacy of the state's current theory. Contrary to the

state's theory, the answer to question 36 was not what really distinguished (1) those prospective jurors who viewed themselves as leaders and were *seated* as jurors from (2) those prospective jurors who viewed themselves as leaders but were *discharged*:

QUESTION 36

"Have you ever worked with a group of people to make a decision?"

Juror	Question 35 Answer	Question 36 Answer	Race	Result
SG	Leader.	"No."	Black	Discharged
SJ3	Leader.	"No."	Not Black	Seated
SJ4	Leader.	"?"	Not Black	Seated

In short, it is true that seated juror 1 and SG gave different answers to question 36. But the prosecutor did not rely on answers to question 36 in justifying his discharge of SG -- he relied on the answers to question 35. When a prosecutor has given a specific reason for discharging a minority juror, the *Batson* analysis "stand[s] or fall[s] on the plausibility of the reasons he gives." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) If the "stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, [or a state's appellate advocate] can imagine a reason that might not have been shown up as false." (*Ibid.*) Yet again the state is simply ignoring *Miller-El*. (*See also Green v. Lamarque*, *supra*, 532 F.3d at p. 1030; *People v. Lenix* (2008) 44 Cal.4th 602, 625 ["efforts by a trial or reviewing court to 'substitute' a reason will not

satisfy the prosecutor's burden of stating a racially-neutral explanation."].)

But even putting this aside, as discussed above there was good reason the trial prosecutor did not rely on answers to question 36. If he had, an equally strong inference of pretext would have arisen because (1) SG's answers were no different than seated juror 3, (2) if question 36 was really important to the prosecutor, he would at least have asked seated juror 4 to explain his answer and (3) the prosecutor did not ask either SG, seated juror 3 or seated juror 4 any questions about their answers to question 36.

The prosecutor's stated reliance on SG liking his own opinion was evidence of pretext.

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

Prospective juror KC was a high school graduate, married with three children, who had been employed full time since 1988 and had served four years in the United States Marines from 1984 through 1988. (24 CT JQ 6825, 6828.) He believed prosecutors were trying "to protect the community . . . against those that would cause harm or have harmed" and he agreed he could vote for a death sentence. (24 CT JQ 6828-6830, 6842, 6852.) During his voir dire he explained that he did not "have a problem" voting for

death if aggravation outweighed mitigation. (6 RT 1632.) The prosecutor used his second peremptory challenge to discharge KC. (6 RT 1705.) In light of the record, and just as it did with SG, the trial court said that it did not understand why the prosecutor would challenge KC. (6 RT 1720.)

The prosecutor gave three reasons for the discharge: (1) in his questionnaire, KC said that DNA evidence "was not a for sure thing" (2) KC's questionnaire and voir dire made KC appear "tentative" about the death penalty and (3) in his questionnaire, KC was "very skeptical of the O.J. Simpson case." (6 RT 1720.) The prosecutor put on the record his belief that "[t]his is a DNA case very much like [Simpson]. He [KC] stated biases created the circumstantial evidence in the O.J. Simpson case." (6 RT 1720.)

In his opening brief, Mr. Miles contended that none of these reasons held up under scrutiny. (AOB 64-75.) The state defends each and every one. (RB 31-36.) They will be discussed in turn.

1. The prosecutor's stated concern about KC's view on DNA evidence.

Question 62B asked jurors if they had an opinion about DNA evidence. (24 CT JQ 6842.) KC stated that in his view like a polygraph examination it was "not a for sure

certain." (24 CT JQ 6842.) The prosecutor did not ask KC a single question about this subject before discharging him. (6 RT 1685-1705.)

In his opening brief, Mr. Miles conceded this reason was race-neutral and therefore complied with *Batson*'s second step. (AOB 67.) But the prosecutor's stated concern with KC's views on DNA evidence was a pretext, and floundered at *Batson*'s third step, for two reasons.

First, a comparative juror analysis showed that the prosecutor's stated concern about prospective jurors who had qualms about DNA evidence was extremely selective. Seated alternate juror 5 effectively compared DNA evidence to the type of inherently unreliable evidence that required corroboration, sating that it was "ok but shouldn't be only evidence used." (4 CT JQ 1196.) Seated juror 10 was unwilling to accept DNA evidence on faith alone, stating that such evidence "should be admitted if can show + prove accuracy." (4 CT JQ 1128.) Seated juror 11 stated that the use of DNA evidence was proper only "if its true evidence." (5 CT JQ 1298.) And seated alternate juror 1 said that DNA evidence should be treated like any other evidence -- "all evidence if more conclusive than not should be considered." (4 CT JQ 1094.) Each of these jurors was white. (4 CT JQ 1111 [seated juror 10]; 5 CT JQ 1281 [seated juror 11]; 4 CT JQ 1179 [alternate juror 5]; 4 CT JQ 1077 [alternate juror 1].) The prosecutor did not discharge

any of these white jurors.

Perhaps even more important to the question of whether the prosecutor's stated concern with the views of prospective jurors on DNA evidence was a pretext, however, *the prosecutor did not ask any of these white jurors even a single question about their views on DNA evidence.* (5 RT 1354-1357 and 6 RT 1685-1702 [prosecutor does not question juror 10 on DNA evidence]; 5 RT 1594-1596, 1703-1704 [prosecutor does not question juror 11 on DNA evidence]; 5 RT 1393-1396 and 6 RT 1761-1762 [prosecutor does not question alternate juror 5 on DNA evidence]; 6 RT 1750-1754 [prosecutor does not question alternate juror 1 on DNA evidence].) If the prosecutor had *genuinely* been concerned about the views of prospective jurors about DNA evidence, he would not have completely ignored the area with every one of these white jurors. (*See Miller-El v. Dretke, supra*, 545 U.S. at p. 246; *United States v. Williamson, supra*, 533 F.3d at pp. 376-377.)[4]

---

[4] As Mr. Miles noted in his opening brief, the sincerity of the prosecutor's stated concern about how prospective jurors would view DNA evidence was belied by other evidence as well. Alternate juror 4 was also white. (5 CT JQ 1519.) Alternate juror 4 stated he had "no opinion" on the use of DNA evidence. (5 CT JQ 1536.) The prosecutor did not ask alternate juror 4 even a single question about this. (6 RT 1557, 1756-1757.) If the prosecutor had genuinely been concerned about the views of prospective jurors on DNA evidence, he would not have completely ignored the area with alternate juror 4 either.

The state again argues that neither the comparative juror analysis, nor the failure to question, mean anything at all. As to the comparative juror analysis, the state argues that none of the other jurors "say[] anything that remotely suggests that they believed DNA evidence is comparable to controversial polygraph testimony" which is "commonly known to be inadmissible in court because of its unreliability." (RB 32.)

The state has lost sight of the forest because of the trees. The inquiry at *Batson*'s third stage has a real-world purpose: to try and determine if race-neutral reasons are a pretext for discrimination. It is not an exercise in seizing upon words or phrases and trying to imbue them with significance that common sense dictates they do not have.

The prosecutor stated that one reason he discharged KC was because he did not think DNA evidence was "a for sure thing." (6 RT 1720.) Fair enough. But if the views of prospective jurors as to DNA evidence were genuinely important to the prosecutor (as opposed to a pretext for discrimination) it is inconceivable he would not have questioned alternate juror 5 who said, in effect, that DNA evidence needed to be corroborated. (4 CT JQ 1196 [DNA evidence "shouldn't be the only evidence used."].) It is equally unlikely he would have failed to at least ask alternate juror 4 about her views when she said she had "no opinion" on DNA evidence. (5 CT JQ 1536.) The failure to discharge a white juror who thought DNA evidence needed to be corroborated, and the failure to ask any of

these jurors (including KC) even a single question about DNA evidence plainly supports a finding of pretext.

As noted, in making its contrary argument the state suggests that what was really bothering the prosecutor was KC's passing reference to a polygraph examination. The prosecutor was concerned, the state now argues, because KC compared DNA evidence to polygraph testimony which the state earnestly describes as "controversial testimony." (RB 32.) Citing Evidence Code section 351.1 and this Court's decision in *People v. Wilkinson* (2004) 33 Cal.4th 821 the state argues that KC's polygraph reference is problematic because polygraph evidence is "commonly known to be inadmissible in court because of its unreliability." (RB 32.)

Properly understood, then, the state's argument is this. The prosecutor was not concerned with KC's views (or the views of any other juror) on DNA evidence generally. Instead, the prosecutor's real concern with KC's answer was his comparison of DNA evidence to a polygraph examination. Without asking KC even a single question, the prosecutor assumed KC was aware of Evidence Code section 351.1 and this Court's 2004 decision in *Wilkinson*. Thus, when KC compared DNA evidence to a polygraph examination in his answer to question 62, he was really saying that DNA evidence is as unreliable as polygraph evidence (1) had been held to be in this Court's 2004 decision in

Wilkinson and (2) has been viewed by the Legislature in Evidence Code section 351.1. Although other prospective jurors may have had some doubt about DNA evidence, the state's argument goes, the prosecutor's only real concern was with prospective jurors who were so skeptical of DNA evidence they would compare it to the "commonly known" unreliable and controversial polygraph test. Therefore the comparative juror analysis should be rejected.

The state's assumption that KC was aware of Evidence Code section 351.1 and this Court's decision in *Wilkinson*, and its subsequent argument that his reference to a polygraph test could be viewed as problematic, might make sense if Bernard Witkin had been the prospective juror. But he was not, and in the real world the state's argument defies common sense.

In reality, the prosecutor's stated concern was that KC said he did not view DNA evidence as a "for sure" thing. The prosecutor did not discharge white jurors who expressed qualms about DNA evidence. The prosecutor did not question KC about his view and he did not question any of the white jurors who expressed qualms about DNA evidence. He did not even question a white juror who refused to give his opinion on DNA evidence.

The state concedes that the prosecutor did not question any of these prospective jurors about their views on DNA evidence. (RB 36.) But the state repeats its earlier argument that the failure to question jurors on this does not matter at all because the prosecutor had a lengthy juror questionnaire from the jurors. (RB 36.)

Mr. Miles has already addressed the flaws in this argument above. As discussed in detail there, in *Miller-El* itself the United States Supreme Court rejected this argument, explicitly holding that despite the presence of an extensive jury questionnaire a prosecutor's failure to question prospective jurors in an area he later identifies as critical to the discharge was indeed evidence of pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246.) The state again ignores this aspect of *Miller-El* entirely. (RB 36.) And the state's vague references to "the information otherwise available to the prosecutor regarding the prospective jurors" (RB 36) cannot conceal the fact that as to the jurors' views on DNA evidence, *there was no other evidence available to the prosecutor at all.*

Both the comparative juror analysis, and the prosecutor's pattern of questioning, show the same thing. The prosecutor's stated concern about the views of prospective jurors on DNA evidence was a pretext.

2. The prosecutor's stated concern about KC's death penalty views.

The second reason the prosecutor gave for discharging KC was that his views on the death penalty were "tentative." In his opening brief, Mr. Miles conceded that this too was race neutral. (AOB 68.) But a comparative juror analysis showed that the prosecutor's stated concern with KC's views on the death penalty was a pretext, and floundered at *Batson*'s third step. (AOB 68-71.) The argument was simple.

In his questionnaire, KC agreed to consider aggravation and mitigation, some people "do bad things and don't deserve to be here," and "don't deserve life." (24 CT JQ 6489-6451.) KC neither opposed nor favored the death penalty. (24 CT JQ 6852.) He said he had been opposed to the death penalty at one point in his life, but on reflection he had changed his views and now believed it was proper in certain situations. (24 CT JQ 6850.) KC stated, however, that his general reservations as to the death penalty were based on his belief that "God should decide life or death." (24 CT JQ 6849.)

Numerous other jurors answered the jury questionnaire in the same way as KC. Perhaps of most importance, was seated juror 2 -- who was white. Juror 2 explicitly stated that he was "not in favor of the death penalty." (5 CT JQ 1271.) When asked if he had "moral, philosophical, or religious objections to the death penalty," he explained that

he *did* have such objection, because he did not believe the death penalty was a deterrent. (5 CT JQ 1271.) He stated that he believed the death penalty was used too often and that the death penalty in California was "unfair." (5 CT JQ 1272.) He admitted he was reluctant to face a defendant with a death verdict. (5 CT JQ 1273.)

The following charts provides a useful comparison of KC and seated juror 2 with respect to their views on the death penalty:

QUESTION 96

"What are your general feelings about the death penalty?"

Juror	Answer	Race	Result
KC	"There are members of society that do bad things and don't deserve to be here; can I kill them? Unknown at this time."	Black	Discharged
SJ2	"I am not in favor of the death penalty."	White	Seated

QUESTION 100

"Do you have any moral, philosophical, or religious objection to the death penalty?"

Juror	Answer	Race	Result
KC	"Yes. God should decide life or death, but some don't deserve life."	Black	Discharged
SJ2	"Yes. I do not believe it deters."	White	Seated

QUESTION 104

"Have your feelings about the death penalty changed in the last 10 years?"

Juror	Answer	Race	Result
KC	"Yes. At first against but now feel it is needed in special circumstances."	Black	Discharged
SJ2	"No."	White	Seated

QUESTION 104

"Do you feel the death penalty law in the State of California is fair?

Juror	Answer	Race	Result
KC	""Unfair. Mainly because I don't know it completely."	Black	Discharged
SJ2	"Unfair."	White	Seated

QUESTION 111

"Please . . . check the one that best describes you."[5]

Juror	Answer	Race	Result
KC	"Group 3: I neither favor nor oppose the death penalty."	Black	Discharged
SJ2	"Group 4: I have doubts about the death penalty, but I would not vote against it in every case."	White	Seated

[5] Question 111 asked jurors to put themselves in one of five groups: Group 5 was the most defendant-friendly group (indicating strong opposition to the death penalty and a refusal to vote for life) while Group 1 was the most prosecution-friendly group (indicating a refusal to vote for life).

But seated juror 2 was not alone in answering his questionnaire in a very similar manner to KC. Alternate juror 1 and seated juror 8 -- both of whom were white -- affirmatively stated that they had doubts about the death penalty in their questionnaire. (4 CT JQ 1104 [alternate juror 1]; 5 CT JQ 1478 [juror 8].) Like KC, seated jurors 5 and 9 and alternate juror 4 -- all of whom are white -- stated that they neither opposed nor favored the death penalty. (*See, e.g.*, 4 CT JQ 1002 [juror 9]; 5 CT JQ 1342 [juror 5], 1546 [alternate juror 4].) Seated juror 8 went further than KC and said that life without parole was a more suitable punishment than the death penalty. (5 CT JQ 1475 [juror 8].)

The prosecutor did not discharge *any* of these white jurors with death penalty views that were either similar to those of KC or even more hostile to the state's position. The prosecutor *did* discharge KC.

If anything, the actual voir dire highlighted the disparate nature of the prosecutor's concern about KC's death penalty views. During voir dire KC stated that since he lived in the community, it was his responsibility to decide the penalty in this case, he did not "think [he would] have a very big problem, depending on evidence or what is in front of me" and his views on the death penalty would not interfere with his ability to apply the law. (6 RT 1631-1632.) KC assured the prosecutor he could vote for death. (6 RT

1632.)

Seated juror 6 told the prosecutor she was "not so sure" about voting for death, conceded she did not know if she could even vote for death and concluded she was reluctant to vote for death. (6 RT 1553.) Seated juror 8 felt that the death penalty was used too often and that life without parole was a "more suitable" sentence; he conceded that his preference for life without parole might even affect how he viewed aggravating and mitigating evidence. (6 RT 1588, 1589.) Like KC, both juror 6 and 8 assured the prosecutor they could vote for death. (6 RT 1554, 1589.)

In sum, these three prospective jurors were similar as far as the death penalty was concerned -- if anything, KC was a *better* juror that jurors 6 and 8 on this issue. KC, juror 6 and juror 8 all assured the prosecutor they could vote for death. The prosecutor struck KC -- who was black -- and permitted jurors 6 and 8 to remain on the panel.

Despite this evidence, the state argues that KC was not similarly situated to *any* of the other jurors. The state does not dispute that seated juror 2 -- who was white -- opposed the death penalty, had moral objections to it, did not believe it was a deterrent, thought it was unfairly applied and had doubts about it. (RB 33.) But according to the state, the prosecutor's failure to challenge juror 2 "does not establish pretext" because the

source of juror 2's opposition to the death penalty was different than the source of KC's opposition:

> "It is one thing for a prospective juror like Juror 2, to have reservations about the death penalty because he thinks it does not do what it is supposed to do. It is quite another for a prospective juror, like KC, to have a religious conviction against the death penalty." (RB 33.)

First things first. The state's characterizations of both juror 2 and KC in this argument are worth noting; they bear little resemblance to the actual questionnaires. The state blandly describes juror 2's death penalty views as simple "reservations about the death penalty." It then colorfully describes KC's views as a "religious conviction against the death penalty."

The Court is, of course, perfect capable of recognizing an advocate's hyperbole. In fact, it was *juror 2* that said he was "not in favor of the death penalty." (5 CT JQ 1271.) It was *juror 2* who added that his views had not changed in 10 years. (5 CT JQ 1271, 1274.) And it was *juror 2* who classified himself as a Group 4 opponent to the death penalty in answering question 111 -- stating he had doubts about the death penalty. (5 CT JQ 1274.)[6]

---

[6] As noted above, question 111 asked jurors to put themselves in one of five groups: group 5 was the most defendant-friendly group while group 1 was the most prosecution-

In contrast, KC said his views *had* changed in the last 10 years. (21 CT JQ 6850.) It was KC who explained that although he had originally been against the death penalty, *he no longer harbored that view and now believed the death penalty was needed in certain cases*. (21 CT JQ 6850.) And it was KC who classified himself as a Group 3 individual in response to question 111: as a person who neither favored nor opposed the death penalty. (21 CT JQ 6852.)

In sum, saying that juror 2 (who affirmatively said he opposed the death penalty) simply had "reservations about the death penalty" while KC (who agreed the death penalty was needed in certain cases) had a "religious conviction against the death penalty" is hyperbole. By any objective standard, the views of seated juror 2 as to the death penalty were more adverse to the state's position than those of KC.[7]

Putting this aside, the state's factual observation about the source of KC's discomfort -- as opposed to the source of juror 2's actual opposition to the death penalty -- is accurate. Juror 2's "reservations" about the death penalty were based on moral grounds while KC's were based on religious grounds. The state argues that opposition to (and apparently a vote against) death based on moral grounds is "quite another [matter]"

---

friendly group (indicating a refusal to vote for life).

[7] The state accurately adds that in his voir dire, seated juror 2 said he could vote for death. (RB 33.) But in no uncertain terms, so did KC. (6 RT 1632.)

from opposition to (and a vote against) death based on religious grounds. (RB 33.)

Beyond this stark *ipse dixit*, however, the state never actually explain *why* this is so. And the reality of capital trial work certainly lends no support to the state's position.

After all, a juror voting against the death penalty for moral reasons is just as bad a juror for the state as a juror who votes against the death penalty for religious reasons. Either vote, if the sole vote for life, hangs a jury. Either vote, if the twelfth vote for life, imposes a life term. The state simply cannot explain why a vote for life based on moral grounds would be less of a concern to a death-seeking prosecutor than a vote for life based on religious grounds.

In fact, a real-world prosecutor would not make a distinction between the two, and permit people who were opposed to the death penalty on moral or philosophical grounds to sit on a capital jury while discharging those with religious views only. And the state certainly never explains why -- as in this case -- the prosecutor would discharge someone who was *not* opposed to the death penalty and who recognized there were cases in which it was proper (KC) but seat someone who actually *was* opposed to the death penalty (juror 2). Contrary to the state's argument here, the comparative juror analysis as to KC's views on the death penalty cannot be explained away. This stated reason too was evidence of

pretext.

3. The prosecutor's stated concern that KC was skeptical of the result in the O.J. Simpson case.

As discussed above, question 68 of the jury questionnaire asked prospective jurors whether they were "upset with the jury's verdict in the O.J. Simpson case." (24 CT JQ 6877.) KC indicated that he was not upset with the verdict, explaining it was "hard to believe one man did it all, I believe biases created a lot of the circumstantial evidence." (24 CT JQ 6877.) The prosecutor focused on this answer in his third reason for justifying his discharge of KC, noting that KC was "very skeptical of the O.J. Simpson case. This is a DNA case very much like that. He stated biases created the circumstantial evidence in the O.J. Simpson case." (6 RT 1720.)

As discussed in some detail above, the prosecutor's stated concern about jurors who were not upset with the Simpson verdict was very selective. Alternate juror 5 and juror 6 each answered question 68 by saying that, like KC, they were *not* upset with the verdict in the Simpson case. (4 CT JQ 1197; 5 CT JQ 1401.) Alternate juror 5 offered not a word of explanation, and juror 6 felt the Simpson "evidence [was] not clear." (4 CT JQ 1197; 5 CT JQ 1401.) The prosecutor did not discharge either of these jurors. If the prosecutor had genuinely believed "this is a DNA case very much like [the Simpson

case]," he would at the very least have questioned these two jurors on this critical subject before allowing them to be seated. (5 RT 1393-1396; 6 RT 1761-1762 [prosecutor does not question alternate juror 5; 6 RT 1552-1554, 1685-1702 [prosecutor does not question juror 6 about Simpson verdict]. *See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246; *United States v. Williamson*, *supra*, 533 F.3d at pp. 276-277.) Instead, the prosecutor did not ask either of these jurors even a single question on this topic.

The state has a ready explanation. In the state's view, these other jurors are not really comparable to KC at all because although they expressed "comfort with the O.J. Simpson verdict" this "is not the same thing as implying that O.J. Simpson was framed." (RB 35.) Without citing any statement of the prosecutor, the state argues that "[t]he prosecutor was concerned that SG [sic] suggested that he though O.J. Simpson was framed by planted evidence." (RB 35.)

If, in fact, KC had said he thought police framed Simpson and the prosecutor had given this as a reason for the discharge, the state's point would be valid. After all, striking a jury who believes police would plant evidence to frame a defendant is a perfectly valid, race-neutral reason for a discharge.

But that is not what KC said. What KC said was that in the Simpson case, he

believed that "biases created a lot of the circumstantial evidence." In fact, in light of the evidence of bias introduced about the state's main witness in the Simpson case, KC's statement is an entirely accurate description of what happened in the Simpson case. It has nothing to do with police framing Simpson.

In the Simpson case, the state relied heavily on the testimony of Detective Mark Fuhrman. Fuhrman testified that it was he who found the blood-stained glove which was later tested for DNA evidence. The defense theory was that Fuhrman had planted the glove. To provide a motive for such an act, the defense introduced numerous witnesses who testified to racist comments Fuhrman had made involving blacks. The defense relied on Fuhrman's bias as circumstantial evidence to support the defense theory.

KC described these events with some precision in his questionnaire, explaining his belief that "biases created a lot of the circumstantial evidence." KC was correct; Fuhrman's bias had indeed created substantial circumstantial evidence. The suggestion now made by the state's appellate lawyers here -- that KC was really stating his belief that Los Angeles police framed Simpson -- ignores not only what KC actually said and but

what actually happened in the Simpson case.[8]

The prosecutor's disparate treatment of white jurors who were not upset with the Simpson verdict shows that this stated reason was evidence of pretext.

D. If The Court Finds That Race Entered Into The Prosecutor's Decision To Strike Either SG Or KC, Reversal Is Required.

The prosecutor gave three reasons for his discharge of SG and three reasons for his discharge of KC. Mr. Miles has argued that applying the Supreme Court's *Batson* precedents shows that each of these reasons was a pretext for discrimination.

In his opening brief Mr. Miles recognized that the Court might find some of these reasons were pretexts for discrimination, but not all. (AOB 76-80.) Mr. Miles recognized that that this Court had not yet resolved the mixed-motive issue, and he articulated the two approaches which had been developed: (1) a *per se* approach (holding that any

---

[8] It also ignores the rest of KC's questionnaire. KC spent four years as a tank commander in the United States Marines. (21 CT JQ 6830.) After leaving the Marines, he considered applying for a law enforcement position in Los Angeles -- the same police department involved in the Simpson case. (21 CT JQ 6845.) He explained that he was attracted to the job because of the "community respect" for police officers. (21 CT JQ 6845.) Nothing in KC's questionnaire supports the suggestion of the state's appellate lawyers that KC believed Simpson was framed by Los Angeles police.

discrimination in the selection of jurors is too much) and (2) a burden shifting approach which requires the state to show that race was not the determinative factor in the decision to discharge the juror. (AOB 78-79.) He then explained why under either standard reversal was required here. (AOB 79-80.)

The state disagrees for two reasons. First, the state argues that none of the reasons given were pretexts for discrimination. (RB 37.) Mr. Miles agrees that if none of the stated reasons is invalid, then reversal is not required.

Turning to the actual merits, the state concedes that the Supreme Court has not resolved the standard to be applied in a mixed motive case, but argues that "even if this were a case where the prosecutor's peremptory challenges were based on both discriminatory and race-neutral reasons, reversal would not be required." (RB 37.) The state is wrong.

In *Snyder v. Louisiana* (2008) 552 U.S. 472 the Supreme Court did not decide between the *per se* and burden shifting alternatives, but noted that where the prosecutor proffers a reason which has been found to be a pretext for discrimination (as in that case), the state would *at least* have to prove that race was not the determinative factor in the decision. (*Id.* at p. 485.) The state does not argue that, in fact, it can meet this standard.

Instead, it argues as follows:

> "[T]o the extent that the prosecutor did not make this showing, it was because Miles did not meet his burden in the first place of demonstrating that any of the prosecutor's reasons were pretextual." (RB 39.)

In other words, the state's position is this. Even if the burden shifting standard applies, the state's failure to meet its burden is excused where the defendant was unable to persuade the trial court that one or more of the prosecutor's reasons was a pretext for discrimination.

The state cites no authority for this remarkable rule. Under the state's approach, reversal on appeal would be required in a mixed-motive case only where the defense at trial had affirmatively proven pretext at *Batson*'s third step. Of course, in cases where the defendant has proven pretext at *Batson*'s third step in the the trial court, there is no appeal. Instead, there is an immediate mistrial. So under the state's theory, reversal would be required only in cases where it was not needed.

The state's position on application of the burden shifting approach should be rejected. Of course, if the *per se* rule is applied, reversal is required in the mixed-motive context. And if the burden shifting approach is properly applied, reversal is still required

here because the state has not met its burden.[9]

---

[9] The state suggests that *Snyder* announced a possible third test for assessing whether a new trial was required after a finding of a racially discriminatory jury discharge -- a test that would require the court to decide if the discharge was "motivated in substantial part by discriminatory intent." (RB 38.) In the state's view, the burden of proving this rests with the defense. (RB 38.)

The state has confused the test for assessing whether a particular discharge was improperly motivated by race with the test for assessing whether a new trial should be granted. The language in *Snyder* to which the state refers -- discussing the question of whether discriminatory intent is a "substantial or motivating factor in an action taken by a state actor" -- refers to the question of whether a state actor has acted improperly in the first instance. It does not refer to the question of remedy at all. The Court was clear:

> "In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. . . . We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." (552 U.S. at p. 485. *See also People v. Chism* (2014) 58 Cal.4th 1266, 1339-1340 [applying the "substantial or motivating factor" test to determine if discharge of a prospective juror was motivated by race].)

II. BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED TWO PROSPECTIVE JURORS WHO WERE EQUIVOCAL ABOUT WHETHER THEY COULD IMPOSE DEATH, A NEW PENALTY PHASE IS REQUIRED.

Prospective jurors 44 and 63 were called for jury service in this case. The voir dire of both show they were equivocal about their ability to impose death.

Juror 44 explained that she was willing to consider all aggravating and mitigating evidence before making her decision as to the proper penalty. (8 CT JQ 1923.) In her questionnaire, she said (1) she "didn't like" the death penalty, did not know if she could vote for death, and would be reluctant to impose such a penalty but (2) she would not vote against it in every case. (8 CT JQ 1925-1926.) During her voir dire she was equally equivocal. She said she had "no idea" if her feelings would impact how she voted in the penalty phase, she "[didn't] think there[] [was] anything that would interfere with her ability" to follow the law but she just did not know if she could follow the law. (6 RT 1522, 1525-1526.) The court found that juror 44 was "*not* saying her views are such that it would substantially interfere with her ability to follow the instructions and her duty . . . ." (6 RT 1526, emphasis added.) Because juror 44 did not know if she could impose death, the court discharged her. (6 RT 1526, 1659.)

Juror 63 was also equivocal. In his questionnaire he stated that he had no "moral,

philosophical, or religious objection to the death penalty" and he would *not* be reluctant to impose death. (9 CT JQ 2161, 2163-2164.) During voir dire, however, he said he *would* be reluctant to vote for death, his feelings "might" impact how he viewed the trial court's penalty phase instructions, he did not know if he could follow the court's instructions and he did not think he would want to vote for death. (5 RT 1410-1411.) The court discharged juror 63 for cause. (5 RT 1412.)

In his opening brief, Mr. Miles contended that because these jurors were equivocal, under a proper reading of the voir dire in both *Adams v. Texas* (1980) 448 U.S. 38 and *Gray v. Mississippi* (1987) 481 U.S. 648, the state had not carried its burden of showing that they were properly discharged for cause. (AOB 81-91.) He recognized that the Court had rejected this argument in *People v. Schmeck* (2005) 37 Cal.4th 240, but explained why *Schmeck* was inconsistent with the actual jury voir dire in both *Adams* and *Gray*. (AOB 91-92.) Mr. Miles contended that because the erroneous granting of even a single challenge for cause requires reversal, reversal was required. (AOB 98; *see Gray v. Mississippi*, *supra*, 481 U.S. at p. 660.)

The state disagrees. The state's legal thesis is simple: if a trial court finds that a juror is equivocal in connection with his ability to impose death, the court may discharge that juror and the ruling is absolutely binding on this Court. (RB 44.) With respect to the

Supreme Court decisions in both *Adams* and *Gray* -- cases which reached a result squarely at odds with the state's thesis here -- the state criticizes Mr. Miles for "selectively citing some of the prospective jurors' supposedly equivocal responses in *Adams* and *Gray* . . . and arguing that, because the purported equivocal responses were insufficient in those cases, equivocal responses are therefore always insufficient." (RB 45.)

What is most noteworthy about the state's position, however, is not what the state disputes, but what the state does *not* dispute. The state does not dispute that the voir dire portions of *Adams* and *Gray* on which Mr. Miles has relied were entirely accurate. The state does *not* dispute that, in fact, the prospective jurors discharged in *Adams* and *Gray* were indeed equivocal about their ability to impose death. (RB 44-45.) The state does *not* dispute that the trial judges in both *Adams* and *Gray* made a judgment about these equivocal jurors and discharged them. (RB 44-45.) The state does *not* dispute that although the trial courts in both cases had excused equivocal jurors, the Supreme Court in both *Adams* and *Gray refused* to defer to the trial court and instead held that in this situation the state had *not* carried its burden of justifying the for-cause discharge under the substantial impairment test. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45, 49-50; *Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.) And the state does *not* dispute that in *Gray*, the Supreme Court rejected the *exact* argument the state makes here: that where a trial

judge discharged an equivocal juror, the Court was required to defer to the judgment of the trial court. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.)

Nevertheless, the state urges this Court to continue to adhere to the *exact* argument rejected in both *Adams* and *Gray* and find that where a trial court has discharged an equivocal juror "the trial court's findings are binding on appellate courts . . . ." (RB 44.) The state makes this argument even though the Supreme Court in both *Adams* and *Gray* *refused* to be bound by the trial court's findings.

In making this argument, the state does not discuss the voir dire of either *Adams* or *Gray*. (RB 45.) It does not distinguish either case. (RB 45.) Instead, the state accurately notes that in *Schmeck* -- and several cases which follow *Schmeck* -- this Court has rejected the argument that *Adams* and *Gray* preclude deference in this situation. (RB 46.)

This is true. But each of these cases rely on *Schmeck*. And as noted in Mr. Miles's opening brief, *Schmeck* did not discuss the actual voir dire in either *Gray* or *Adams*. The result the Court reached in *Schmeck* -- and the argument the state presents in its brief -- cannot be squared with the actual voir dire in either *Adams* or *Gray*. Nor can it be squared with the Supreme Court's explicit statement that a rule of deference to state trial judge findings in the context of *Witherspoon/Witt* challenges in capital cases does *not*

apply to "state appellate courts reviewing trial court's rulings on jury selection." (*Greene v. Georgia* (1996) 519 U.S. 145, 146.)[10]

The state does not dispute that if the trial court erred in discharging jurors for cause because of their views on the death penalty, reversal of the penalty is required. Because that is just what happened here -- the state discharged several jurors for cause as to whom the state had not carried its burden under the substantial impairment test. A new penalty phase is required.[11]

---

[10] The Supreme Court's observation in *Greene* makes clear why statements regarding deference to state trial-court findings in federal habeas cases like *Uttecht v. Brown* (2007) 551 U.S. 1, 22 have no bearing on the question of whether the same rule of deference applies on direct appeal. Significantly, in *Adams* and *Gray* -- the Supreme Court's only two direct appeal cases (cases not arising in federal habeas proceedings) -- the Court has *rejected* the argument that deference was required to a trial court's decision to discharge an equivocal juror.

[11] The state raises an alternative argument, contending that even if this Court is not bound by the trial court's decision to discharge, the discharge should be upheld as a proper exercise of the trial court's discretion. (RB 46-49.) Although this attempted end-run around both *Adams* and *Gray* is certainly clever, it is for naught.

Under *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423, if the state seeks to discharge a juror under the substantial impairment standard, it is the state's burden to prove the juror meets the criteria for discharge. In light of the actual voir dire in both *Adams* and *Gray*, when all the state has proven is that a juror is equivocal, the state has not carried its burden and the juror may not be discharged. That is exactly what happened here; trying to salvage the case by relying on the trial court's discretion does not change the result here any more than it would have changed the result in *Adams* or *Gray*. Put another way, the trial court had no discretion under the Sixth Amendment to discharge jurors simply because they were equivocal.

III. THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IN CAPITAL CASES IS INCONSISTENT WITH THE RIGHT TO A JURY TRIAL.

In deciding whether to discharge jurors because of their opposition to the death penalty, the trial court made clear it would permit a challenge to jurors whose views on capital punishment would "substantially interfere with [their] ability to follow the instructions and [their] duty." (6 RT 1526.) Applying this "substantial impairment" standard, the trial court permitted the prosecution to strike numerous prospective jurors because of their views on capital punishment. (5 RT 1372, 1382, 1412, 1417, 1421, 1428, 1431, 1445; 6 RT 1601, 1610, 1616, 1624, 1657, 1659.)

In his opening brief, Mr. Miles contended that this standard was improper. This contention had three premises:

(1) First, the substantial impairment test was developed in a series of Supreme Court cases decided between 1968 and 1980 which reflected a then-common approach to the Sixth Amendment. Under ths approach, the Court did not examine the intent of the Framers, but instead sought to identify and balance competing interests of the state and the defendant. (AOB 100-102.)

(2) Second, since 1999 the Supreme Court's approach to the Sixth Amendment has dramatically changed; rather than seeking to balance competing interests, the Court now looks to the intent of the Framers in enshrining the right to an "impartial jury" in the Constitution. (AOB 102-111.)

(3) Third, applying the Supreme Court's current approach, Mr. Miles contended that the substantial impairment test was inconsistent with the Sixth Amendment as well as the state constitutional right to a jury trial. (AOB 111-119.)

The state does not dispute any of these three premises. Thus, the state does not dispute that in developing the substantial impairment test, the Supreme Court did not look at the intent of the Framers in drafting the Sixth Amendment, but instead tried to balance competing interests of the state and the defendant. (RB 49.) Nor does the state dispute that the Supreme Court's current approach to the Sixth Amendment no longer attempts to balance competing interests, but instead seeks to effectuate the intent of the Framers in enshrining the right to an "impartial jury" in the Constitution. (RB 49.) Finally, the state does not dispute that a review of the history and intent behind the Sixth Amendment shows that the substantial impairment test is actually inconsistent with the Sixth Amendment as well as the state constitutional right to a jury trial. (AOB 111-119.)

Nevertheless, the state argues that the substantial impairment test should be upheld. The state's position is simple:

> "[I]t is up to the Supreme Court and this Court, not Miles to determine whether the substantial impairment standard is constitutional." (RB 49.)

Mr. Miles quite agrees with this penetrating analysis. But the illuminating fact that it is the courts that must resolve this question (as opposed to Mr. Miles himself) requires the parties to actually present arguments which assist the Court in resolving the issue. It may be that the state could persuasively argue that the substantial impairment test actually does advance the intent of the Framers. Or it may be the state could persuasively argue the intent of the Framers is irrelevant in applying the Sixth Amendment, and the Court was instead free to apply whatever test it felt best balanced competing interests. But the state has elected not to make any such arguments here.

In light of the state's approach, there is nothing to which Mr. Miles can reply. For the reasons identified in Mr. Miles's opening brief, the substantial impairment test is inconsistent with both the Sixth Amendment right to a jury trial and the state constitutional jury trial guarantee. Reversal of the penalty phase is required.

IV. BECAUSE DETECTIVE LORE MADE UP CRITICAL PARTS OF HIS AFFIDAVIT AND OMITTED KEY FACTS FROM OTHER PARTS, THE TRIAL COURT'S FINDINGS IN DENYING THE MOTION TO SUPPRESS WERE UNSUPPORTED BY THE RECORD AND REVERSAL IS REQUIRED.

On June 16, 1992, Detective Lore swore out an affidavit to obtain a search warrant. (3 RT 582-583.) Lore got the search warrant and, pursuant to the ensuing search, obtained blood samples which were later tested and paperwork from Mr. Miles's car. (16 CT 4772, 4769.) The paperwork from the car, and test results from the blood, were both introduced at trial. (10 RT 3717-3810; 11 RT 3915-4042.) Prior to trial, defense counsel moved to suppress the evidence seized pursuant to this warrant, contending that Lore misrepresented key facts in his affidavit. (10 CT 2836.) The trial court denied the motion. (5 RT 1236-1240.)

In his opening brief, Mr. Miles contended that reversal was required for three reasons. First, Lore made up key inculpatory facts in his affidavit and omitted key exculpatory facts, and the trial court's findings to the contrary were unsupported by the record. (AOB 124-131.) Second, taking out Lore's falsehoods and adding in the facts he omitted, the affidavit was insufficient to establish probable cause. (AOB 131-138.) Finally, because the prosecutor understandably placed heavy reliance on the evidence which was obtained as a result of this search, the error required reversal. (AOB 138-142.)

To its credit, the state does not dispute that if error occurred, reversal is required. (RB 50-61. *See People v. Bouzas* (1991) 53 Cal.3d 467, 480 [the state's failure to respond to an appellant's argument in its principal brief constituted a concession of the point]; *People v. Isaac* (2014) 224 Cal.App.4th 143, 147 [same]; *People v. Werner* (2012) 207 Cal.App.4th 1195, 1212 [same].) Instead, for two reasons, the state argues that no error occurred at all. First, the state notes that the trial court found Lore's false statements "ambiguous" and not "deliberately or "recklessly false," and found his omissions immaterial, and argues that these findings were supported by "substantial evidence." (RB 57-59.) Alternatively, the state argues that even absent the misstatements and omissions, the affidavit supported a finding of probable cause. (RB 59-61.) Respondent's arguments are without merit.

A. The Trial Court's Findings Were Not Supported By The Record.

Mr. Miles will start with a point that is no longer in dispute. The state does not dispute that Lore (1) made false statements in his affidavit that the Kleenex box from the Andersen robbery had been "linked to the suspect," (2) omitted from his affidavit the fact that Ms. Heynen -- the victim in the January 21, 1992 robbery -- picked a picture of someone *other* than Miles out of a photographic lineup as the person who could be her assailant and (3) told the magistrate that Mr. Miles "displays the physical characteristics

as described by the majority of the victims" of the uncharged crimes while omitting from his affidavit the fact that the physical descriptions actually given by the victims varied by as much as six inches in height and 60 pounds in weight from Mr. Miles's actual description. The state nevertheless defends the affidavit, arguing that the trial court made numerous factual findings which bind this Court. Specifically, the state urges deference to the following three findings of the trial court:

(1) At most, Lore was "negligent," in stating that Kleenex box found at the Andersen crime scene had been "linked to the suspect." (RB 54.)

(2) Lore's omission from the affidavit that Ms. Heynen identified another subject was not "material." (RB 58-59.)

(3) Lore's observation in the affidavit that Mr. Miles "matched" the "physical characteristics as described by the majority of the victims in these cases" -- although it omitted facts which proved the exact opposite -- was "not misleading or false." (RB 59-60.)

The state's position is simple. It argues that "[s]ubstantial evidence supported each of the trial court's findings." (RB 57.) Mr. Miles takes the state's arguments as to each finding in turn.

1. The trial court's finding that Lore was merely "negligent" in asserting that evidence was scientifically "linked to the suspect."

Detective Lore swore in his affidavit that scientific evidence -- blood found on a

Kleenex box at one of the crime scenes -- was "linked to the suspect." (16 CT 4742.) The state argues, "[a]s to the Kleenex box from the Andersen crime scene, the trial court noted that the affidavit's statement that the box was 'linked to the suspect' was susceptible to multiple interpretations." (RB 54, citing 16 CT 4742 and 5 RT 1235.) In fact, the trial court found that the statement could be interpreted only "in two ways." (5 RT1235.)

On the one hand, according to the trial court, the statement "would be as suggested by Mr. Miles, that the blood on the box had been scientifically matched to the suspect's blood. In this case, Mr. Miles." (5 RT 1235.) The court recognized, "[o]bviously, that would be a false statement, because no testing was done, or at least there was insufficient blood on the box to test." (5 RT 1235.) The court conceded:

> "Had the affiant known this at the time that he prepared the affidavit, there would be no question that he made a knowingly and intentionally false statement; and at the very least, he made a statement with a reckless disregard for the truth since he had no information that that was the case." (5 RT 1236.)

On the other hand, according to the trial court, "another interpretation would be that the box being linked to the suspect merely meant that the authorities collected the evidence, believed the blood on the box was that of the suspect when he forced entry into

the building." (5 RT 1236.) In other words, the court thought the statement *could* mean, "at the time [Detective Lore] prepared the affidavit, [he] believed there was a Kleenex box with blood on it, possibly the suspect's blood; and that the box was taken into evidence to be analyzed," but "did not mean to suggest that the analysis had been done and that the blood on the box was that of Mr. Miles." (5 RT 1236.)

Of course, the latter interpretation was utterly unsupported by the record. As an initial matter, Lore never once informed the magistrate that blood on the Kleenex box was "*possibly* the suspect's blood." (16 CT 4739-4749.) Nor did Lore say one word about the fact that the Kleenex box was taken into evidence for scientific analysis and results were pending. (16 CT 4739-4749.)

In fact, Lore did not say anything close to this. Lore's affidavit specifically identified "the suspect" to whom he was referring throughout the affidavit as "Johnny Duane Miles" (16 RT 4745), and then stated in no uncertain terms:

> "The Kleenex box *was collected and linked to the suspect.*" (16 CT 4742, emphasis added.)

But even if the affidavit itself did contain some kind of lingering ambiguity as to what Lore meant in referring to the Kleenex box, any ambiguity was resolved by Lore's

very specific testimony at the suppression hearing. Lore testified that the precise reason for including a statement about the Kleenex box in the affidavit was to suggest the existence of scientific evidence that directly connected *Mr. Miles* to the commission of the crimes. Lore could not have been clearer, admitting:

> "The purpose of that statement was to assert to the Magistrate . . . that somehow or another there was a scientific link that had been made between the substance on that box and Mr. Miles[.]" (3 RT 640-641.)

The state ignores Lore's testimony entirely. (RB 52-53.) But as John Adams said during closing arguments in his defense at the Boston Massacre trial of 1770, "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts . . . ." Put another way in the context of this case, ignoring Lore's testimony will not make it go away.

The fact of the matter is that Lore himself admitted his lie about the Kleenex box was *not* intended to suggest that the blood on the Kleenex box was only "*possibly* the suspect's blood," nor that the box was collected, being analyzed, and the results remained pending. Instead, he admitted under oath that his entire goal was to "assert to the Magistrate" (falsely) that the blood on the Kleenex box had indeed been scientifically "linked" to Mr. Miles.

Despite this record, the trial court found Detective Lore "did not mean to suggest that the analysis had been done and that the blood on the box was that of Mr. Miles." (5 RT 1236.) This finding is flatly contradicted by Lore's admission that his goal was to "assert to the Magistrate . . . that somehow or another there was a scientific link that had been made between the substance on that box and Mr. Miles." (3 RT 640-641.)

In reaching its contrary conclusion, the trial court relied on Detective Lore's testimony "that he later learned that the box could not be analyzed due to it having been wiped off." (5 RT 1236.) In other words, at the time he prepared his affidavit Lore did not yet know if the Kleenex box could be analyzed. As a result, the court concluded it could "not say [Lore] knowingly and deliberately included false information," but instead, "[a]t most, the Court would find a negligent mistake in drafting the affidavit in such a way that a Magistrate could mistakenly assume there was a scientific link . . . ." (5 RT 1236.) The state argues that this Court must defer to this finding.

The argument makes no sense. The fact that Lore admitted that when he prepared the affidavit he did not even know if a scientific analysis of the Kleenex box was possible does not aid the state's case. To the contrary, it affirmatively establishes that Lore was at least recklessly indifferent to the truth of his affidavit.

Lore admitted during the suppression motion that (1) at the time he wrote the affidavit, he only knew the Kleenex box "was sent to the San Bernardino Crime Lab," and (2) he did not learn until later that "the box had been wiped off, and there was nothing of use taken from the box." (3 RT 640; 5 RT 1192-1193.) In other words, at the time Lore swore out his affidavit, he was unaware of any test results at all. Thus, when he wrote in his affidavit that blood found on the Kleenex box was "linked to the suspect" (16 CT 4742) -- and later admitted that the entire purpose of this statement "was to assert to the Magistrate . . . that somehow or another there *was* a scientific link that had been made between the substance on that box and Mr. Miles" -- this was not mere negligence. Instead, he was representing a fact -- that scientific testing had been done on the Kleenex box which linked it to Mr. Miles -- which he knew was not true.

The trial court correctly recognized, if Lore had known at the time he prepared the affidavit that the Kleenex box had not been tested, "there would be no question that he made a knowingly and intentionally false statement; and at the very least, he made a statement with a reckless disregard for the truth since he had no information that that was the case." (5 RT 1236.) The trial court ignored that, in fact, Lore had already admitted that he knew the Kleenex box had not been tested when he prepared the affidavit, and his intent "was to assert to the Magistrate . . . that somehow or another there was a scientific link that had been made between the substance on that box and Mr. Miles[.]" (3 RT 640-

641.) The trial court's finding of mere negligence is unsupported by the record.

2. The trial court's finding that Lore's omission from the affidavit that Ms. Heynen tentatively identified another subject was not a "material" omission.

The trial court's next finding fares no better. In his affidavit, Lore told the magistrate that one of the victims -- Ms. Heynen -- "tentatively I.D.'d" her assailant when shown a photograph lineup; she pointed to Mr. Miles's photograph, stating, "[i]t could be him." (16 CT 4745.) Lore omitted entirely from his affidavit, however, that he himself had previously shown Ms. Heynen a different photographic lineup, and she made an equally persuasive "tentative" identification, pointing to a different suspect in the case -- Steven Dyer -- and stating, "[i]t could be him." (3 RT 643.)

The trial court did not address whether this omission was intentional or not. Instead, the court found that "[t]he identification by Miss Heynen is, at the very least, equivocal and falls short of a positive identification." (3 RT 1238.) Relying on *People v. Kurland* (1980) 28 Cal.3d 376, the state argues that Lore's omission was thus "not material," and the court's conclusion to that effect must be sustained. (RB 59.)

Of course, Mr. Miles entirely agrees with the trial court's finding that Ms.

Heynen's identification of Mr. Miles "fell short of a positive identification." After all, she only pointed to Mr. Miles's photograph, and claimed "[i]t *could* be him." (16 CT 4745, emphasis added.)

But this is not the end of the analysis, it is the beginning. This Court has recognized that an "affidavit need not disclose every imaginable fact," but instead "need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present." (28 Cal.3d at p. 384.) "[F]acts are 'material' and hence must be disclosed if their omission would make the affidavit substantially misleading." (*People v. Kurland, supra*, 28 Cal.3d at p. 385.) An affiant's duty to include facts -- or his duty not to omit facts -- applies only to "material or relevant adverse facts." *(Id.* at p. 384.)

Thus, the real question is not whether Ms. Heynen's identification of Mr. Miles "fell short of a positive identification." Instead, the question is whether Lore's omission of Ms. Heynen's identical identification of an entirely different man made this part of the affidavit "substantially misleading."

It did. Here, Detective Lore informed the magistrate that Ms. Heynen made an identification -- albeit a tentative one -- of Mr. Miles in a photographic lineup. Standing

alone, this fact was actually quite compelling. After all, Ms. Heynen was shown a series of photographs, and from that series, was able to exclude all but Mr. Miles as potentially being her assailant. Indeed, there could be no other reason for Lore to include the fact of Heynen's identification in the affidavit other than to persuade the magistrate that Mr. Miles was more probably than not, her assailant, and provide a compelling link between Mr. Miles and the crimes.

Of course, if the relevance and the probative value of Ms. Heynen's identification of Mr. Miles was sufficient for Lore to believe it should be included in the affidavit, *there was no logical reason to exclude the fact that she had identified someone else in the exact same language*. Lore would reasonably have known that Ms. Heynen's identification of Mr. Miles would be substantially undermined by an identically phrased identification of an entirely different person. Omitting this fact substantially mislead the magistrate into believing that Ms. Heynen's identification of Mr. Miles stood alone and had some probative value. On this record, Lore's omission of the fact that Ms. Heynen had tentatively identified someone other than Mr. Miles with the same certainty as her later identification of Mr. Miles was material. The trial court's finding to the contrary was unsupported by the record.

3. The trial court's finding that Lore's statement that Mr. Miles "matched" the "physical characteristics as described by the majority of the victims in these cases," while omitting facts which proved the exact opposite, was "not misleading or false."

Lore told the magistrate that Mr. Miles's description "matched" or was "similar to" the descriptions given by "a majority of the victims" in all the cases. (16 CT 4745.) At the time he made this statement, Lore knew full well (but failed to say) that (1) Miles was 6'6" tall and weighed 210 pounds, (2) *none* of the victims had reported a suspect matching this description, (3) the victims gave descriptions that were off by as much as 6 inches in height and 60 pounds in weight and (4) not a single description came even within 2 inches or 30 pounds of Miles's actual height and weight.

At the suppression hearing, when asked to explain both his misstatement and omissions, Lore explained, "After 25 years of law enforcement, you begin to realize that people are not very good with heights and weights." (3 RT 639.) The trial court relied on Lore's explanation, and concluded, "The Court does not find this information to be misleading or false . . . ." (5 RT 1238.) The state argues this finding is entitled to deference.

It is not. If Lore actually believed that eyewitness descriptions of the height and weight of a suspect could so easily be dismissed, there would have been no reason

whatsoever to inform the magistrate that Miles "matched" or was "similar to" these descriptions given by "a majority of the victims." After all, if Lore genuinely believed victims "are not very good with heights," there was little reason to include that information in an affidavit.

But the record as a whole undercuts Lore's testimony that he believed victims were "not very good with heights." In fact, Lore relied on this exact type of evidence when seeking warrants in connection with different subjects for the exact same crime.

Thus, when Lore wrote affidavits to support warrants in connection with initial suspect Orlando Boone -- a six foot tall man, weighing 175 pounds -- Lore specifically relied on an eyewitness's description of the suspect as six feet tall, medium build. (13 CT 3719; 16 CT 4777, 4782.) And when Lore wrote an affidavit to support a warrant in connection with initial suspect Steven Dyer, Lore again specifically relied on an eyewitness's description of the suspect as 6 feet to 6 feet, 2 inches, tall, weighing 150 to 165 pounds which enabled Lore to claim that the description matched Dyer to a tee. (13 CT 3719.)

Simply put, the record as a whole shows Lore's explanation that "[a]fter 25 years of law enforcement, you begin to realize that people are not very good with heights and

weights" smacks of afterthought. (3 RT 639.) When the descriptions of the victims *matched* the suspect for which he was seeking a warrant, Lore was entirely comfortable including the exact descriptions and relying on the victims' estimates. It was only when the descriptions did not match that Lore ignored the actual descriptions and instead relied on his "25 years of law enforcement" to use characterizations of the actual descriptions. Lore's omissions of the actual descriptions -- and his suggestion that Mr. Miles "matched" or was "similar to" the these descriptions given by "a majority of the victims" -- gave a patently false and misleading impression to the magistrate of the strength of the actual evidence. The trial court's finding to the contrary is unsupported by the record.

B. Absent Lore's False Statement About Scientific Evidence Linking Mr. Miles To The Crimes, And Including The Evidence Lore Omitted From The Affidavit, The Affidavit Fell Short of Probable Cause.

The state alternatively argues that "even assuming that Miles's claim that Detective Lore's statement about the Kleenex box was intentionally or recklessly false and that the affidavit should have included the omitted information regarding victims' descriptions and Heynen's second shaky identification, it would not make a difference." (RB 59.) According to the state, "[f]or the reasons that the trial court listed, which are entitled to deference," there "would have still been probable cause." (RB 60, *citing* 5 RT 1237.)

First things first. Contrary to the state's suggestion, the trial court *never* made any ruling that probable cause still existed if it were to excise Lore's statement about the Kleenex box and include all the omitted information regarding victims' descriptions and Heynen's second identification.

Instead, the trial court made an alternative ruling solely in connection with the false statement about the Kleenex box. Referring to the Kleenex box, the trial court stated that "assuming that a mistake was of such magnitude that it reached a level of recklessness, the Court does not agree with defendant that this was critical information that linked him to the crimes." (5 RT 1237.) The court relied on (1) the "substantial information that the same person likely committed the Willem, Castellanos, Davis/Osburn crimes"and that "Miles has the same blood type as that found at the Willem crime scene" and (2) "there was information that Miles was arrested as a suspect in a similar robbery/rape in Torrance." (5 RT 1237.) For this reason, the court concluded, "[s]o, even with the Kleenex box statement omitted, the Court would find probable cause." (5 RT 1237.)

In other words, the trial court never made the alternative ruling to which the state now urges deference. The trial court never excised the false statement about the Kleenex box, included all of Lore's omissions, and concluded there was still probable cause.

But even more important, although this Court is required to give a trial court's factual findings deference if these findings are supported by substantial evidence, a trial court's ultimate conclusion that probable cause exists is not a finding which is entitled to deference. Instead, this Court must independently determine whether probable cause exists. (*Ornelas v. United States* (1996) 517 U.S. 690, 696-697 [the question whether the facts presented established probable cause is subject to the reviewing court's independent review]; *People v. Alvarez* (1996) 14 Cal.4th 155, 182 [same].)

On this question, Mr. Miles will start with the fundamental principle applicable to warrants generally. "The task of the issuing magistrate is simply to make a practical, common-sense decision, whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability" of criminal activity. (*Illinois v. Gates* (1983) 462 U.S. 213, 238.)

Mr. Miles does not dispute the trial court's observation that "the same person likely committed the Willem, Castellanos, Davis/Osburn crimes" and that "Miles has the same blood type as that found at the Willem crime scene." And this evidence certainly remains in the affidavit even after the false statements are deleted, and the omissions

added.

But respondent does not cite -- nor can Mr. Miles find -- any case which has held that probable cause exists simply because a suspect has the same blood type as a blood type connected to a crime. This is so for good reason. "Blood types -- such as types A, B or O -- are class evidence with minimal probative value for establishing identity because so many people have the same blood types . . . ." (Signorelli, Criminal Law, Process and Procedure (2011) p. 337 [describing scientific evidence with sufficient individualized characteristics that may support a finding of probable cause].) Put simply, a matching blood type alone between Mr. Miles and evidence found at the Willem scene cannot support a finding of probable cause.

This leaves the trial court's statement that "there was information that Miles was arrested as a suspect in a similar robbery/rape in Torrance." (5 RT 1237.) This statement too is accurate; Lore had informed the magistrate that Mr. Miles had been arrested for a robbery/rape, kidnap and evading in Torrance, was shot three times, treated at the hospital and was currently booked in Los Angeles County Central Jail. (16 CT 4744.)

But the state never explains why the mere fact that Mr. Miles had been arrested for crimes in Torrance provided probable cause for a search in connection with the Nancy

Willem case. Although the affidavit shows that the Torrance crime had similarities to the Willem crime, nothing in Lore's affidavit (other than the arrest itself) explains how Mr. Miles was even connected to the Torrance crime. Thus, the fact of this arrest simply does not provide probable cause to search in connection with the Willem case.

Excising Lore's false statements about the Kleenex box, and adding to the affidavit the material facts Lore improperly omitted from the affidavit, probable cause for a search

warrant is lacking. Since the state does not dispute that Mr. Miles was prejudiced by the evidence seized pursuant to the search warrant, reversal is required.[12]

---

[12] In connection with Lore's omissions, and because the trial court did not find them to be material, the court did not make any finding as to whether these omissions were reasonable, negligent or intentional. The absence of such findings complicates the Court's review of the affidavit in connection with the information that was omitted.

This Court has held that if a material fact has been omitted "[t]he trial court must decide whether the material omission was (1) reasonable, (2) negligent or (3) *recklessly inaccurate or intentionally misleading*." (*People v. Kurland, supra*, 28 Cal.3d at pp. 387-388, emphasis in original.) If the affiant reasonably concluded that the omitted fact was immaterial, no sanction is imposed. (*Id.* at p. 388.) If the affiant was negligent, the reviewing court adds the omitted fact and retests the affidavit for probable cause. (*Ibid.*) If the affiant intentionally omitted the fact for the purpose of deceiving the magistrate or recklessly disregarded the accuracy and completeness of the affidavit, the warrant is quashed, regardless whether the omission was material. (*Id.* at p. 390.)

Here, Lore omitted the actual physical descriptions given by several victims, choosing instead to offer an inaccurate characterization of the actual descriptions. Lore's disparate treatment of the actual descriptions given by victims in the Boone and Dyer warrant affidavits (where he specifically used the victims' descriptions) and this case (where he did not) suggests that omission of this information here was not an accident, but was intentional. Similarly, Lore's decision to use Ms. Heynen's identification of Miles, but to omit her *identical* identification of Dyer, suggests the same.

Ultimately, however, there is no need to reach the question of whether Lore's omissions were intentional or merely negligent. As discussed above, even if the omissions were merely negligent, adding them into the affidavit (and deleting the false statement about the Kleenex box) leaves an affidavit that does not support probable cause.

V. THE TRIAL COURT IMPROPERLY AND PREJUDICIALLY PERMITTED THE PROSECUTOR TO CROSS-EXAMINE MR. MILES'S TRIAL ATTORNEY ABOUT HIS STRATEGIES AND TACTICS.

After the jury returned its guilt phase verdict, the trial court declared a doubt about Mr. Miles's competency and held a competency hearing. (14 RT 5029.) A different lawyer from the Public Defender's office appeared to represent Mr. Miles for the competency hearing.

The defense presented testimony from five experts who examined Mr. Miles and concluded he had suffered a schizophrenic disorder which affected his ability to participate and cooperate in his own defense. (14 RT 5031-5032, 5035-5044, 5070 [Dr. Richard Dudley]; 15 RT 5207-5236 [Dr. Joseph Wu]; 15 RT 5281-5283 [Dr. Ernie Meth]; 15 RT 5310-5319; 5364-5391 [Dr. Shoba Sreenivasan]; 15 RT 5373 [Dr. Lantz].) The state presented two experts who concluded Mr. Miles was competent, and opined that the expert conclusions to the contrary were the result of Mr. Miles's malingering. (16 RT 5431-5443 [Lee Guerra]; 16 RT 5557-5576 [Jose Moral].)

Defense counsel then called Joseph Canty -- the trial lawyer who represented Mr. Miles in the guilt phase -- to testify about his observations of Mr. Miles. Prior to Mr. Canty's testimony, the prosecutor warned that if the defense called Mr. Canty, he (the

prosecutor) would seek to cross-examine him not only about his observations of and discussions with Mr. Miles, but on "the strategic advantages to a finding of incompetency at this stage of the proceedings" so he (the prosecutor) could question counsel's "motive" in moving for a competency hearing. (15 RT 5127.) Defense counsel objected and the trial court ruled that if the prosecutor got "into an area of what we call strategy, motive, trial tactics, then let's address it before out of the presence of the jury so I can make a ruling on it." (15 RT 5128, 5132.)

Mr. Canty testified to his observations of and conversations with Mr. Miles. (15 RT 5166-5170, 5173, 5179.) On cross-examination, and over defense objection, the trial court permitted the prosecutor "to bring before the jury this question of motivation to bring this action, bring this competency hearing." (15 RT 5259.) The prosecutor then elicited from Mr. Canty that (1) in some capital cases a defense lawyer might seek a finding of incompetence and this would require a different jury to hear the penalty phase, (2) in one case, he (Mr. Canty) had done just that. (15 RT 5260-5262, 5293.) In closing argument, the prosecutor urged the jury to find Mr. Miles competent because "what is really going on here" is that Mr. Canty's "role is to use every legal means to insure that Miles escapes the death penalty" and "make no mistake that the competency is played as a tactic." (17 RT 5844.)

In his opening brief, Mr. Miles contended that a new competency hearing was required for two reasons. First, evidence of Mr. Canty's strategy and tactics was inadmissible for three reasons: (1) it was irrelevant to the jury's determination of competency, (2) it was protected from forced disclosure by the attorney-client privilege and (3) it was protected from disclosure by the work-product privileges. (AOB 187-194 [relevancy], 194-197 [attorney client privilege], 197-199 [work product privilege].) Second, given that the evidence on competency was otherwise close -- and in light of the prosecutor's reliance on this inadmissible evidence in urging the jury to find Mr. Miles competent -- the improper admission of this evidence was prejudicial and required a new competency hearing. (AOB 200-202.)

The state disagrees on all counts. The state first argues that evidence of Mr. Canty's strategy and tactics was admissible for three reasons: (1) it was relevant to the jury's assessment of competency, (2) it did not fall within the purview of attorney-client privilege and (3) it was not protected as work-product. (RB 77-79 [relevancy], 79-80 [attorney client privilege], 80-82 [work product privilege].) Alternatively, the state argues that any error was harmless. (RB 82-83.) The state's arguments must be rejected.

A. The Admission Of Evidence About Mr. Canty's Strategy and Tactics Was Error.

As noted, the state argues that evidence of Mr. Canty's strategy in other cases was relevant and not privileged. (RB 77-82.) Mr. Miles will address each contention.

1. The evidence was not relevant.

The state argues that evidence of Mr. Canty's tactics and strategy was relevant for two reasons. First, the state explains that the evidence was relevant to prove "Miles's very motive for faking." (RB 79.) Alternatively, the state explains the evidence was relevant to impeach Mr. Canty's testimony about his observations of Mr. Miles. (RB 79.) In other words, the evidence was relevant because either Mr. Miles or Mr. Canty, or both, were lying.

The state's first explanation -- that evidence as to Mr. Canty's strategy in tended to prove Miles's "motive for faking" -- is easily dismissed. The prosecutor said he would be questioning Mr. Canty about "tactics involving death penalty litigation in general [and] the advantages of having a separate panel impaneled for a new penalty phase that hasn't heard the guilt phase . . . ." (15 RT 5128.) The prosecutor was true to his word, pursuing these general topics with Mr. Canty. (15 RT 5201, 5132, 5202, 5260.) The prosecutor

also asked Mr. Canty about his strategy in another case he had handled involving a defendant named Cook. (15 RT 5262.)

At no point, however, did the prosecutor tie Mr. Canty's general thoughts about strategy and tactics in death penalty cases to Mr. Miles's conduct here. At no point did Mr. Canty indicate he had a general policy of sharing these kinds of tactical considerations with defendants. At no point did Mr. Canty say he shared his tactical considerations with Mr. Miles. And at no point did he indicate that he had told Mr. Miles about the Cook case. Absent some kind of tie in between Mr. Miles on the one hand and Mr. Canty's tactics and general approach to capital litigation on the other, the suggestion that this evidence from Mr. Canty was relevant to Miles's "motive for faking" is sheer speculation.

This Court has reached this precise result. Evidence of a third party's statements and conduct may *not* be introduced to prove motive for a defendant's act absent evidence showing defendant was aware of the third party's statements and conduct. (*See, e.g.*, *People v. Riccardi* (2012) 54 Cal.4th 758, 820; *People v. Tafoya* (2000) 42 Cal.4th 147, 165.) In *People v. Riccardi, supra*, for example, defendant was charged with murder. The state offered evidence about the victim's conduct to show the defendant's motive for the killing. This Court held the evidence was relevant and admissible to prove motive

"but only if there is independent admissible evidence that the defendant was aware of [the victim's conduct]." (54 Cal.4th at p. 820. *Accord People v. Tafoya, supra*, 42 Cal.4th at p. 165 [defendant charged with murder, defense offered victim's reputation for violence to prove defendant acted in self-defense; held, evidence was irrelevant absent "evidence that [defendant] knew of [victim's] reputation for dangerousness"].)

These cases apply here. The state cites to no evidence at all suggesting Mr. Miles was aware of Mr. Canty's prior cases, his strategy in other cases or his general approach to capital litigation. Absent such evidence, evidence about Mr. Canty's general tactics and strategy was completely irrelevant to Miles's "motive for faking." (RB 79.)[13]

This is especially true here. The idea that Mr. Miles was mentally ill was not fashioned out of whole cloth as some kind of clever defense tactic. In fact, Mr. Miles (1) showed symptoms of mental illness since he was a child, (2) had an IQ ranging from 74

---

[13] Indeed, not only does the state fail to argue there is evidence showing Mr. Canty communicated to Mr. Miles his strategy and legal opinions regarding competency, but the state goes further and relies on the very absence of any such communications to support its position that there was no violation of the attorney-client privilege. (RB 79.) As discussed more fully below, the state's belief that the attorney-client privilege is limited to communications was rejected more than three decades ago. For present purposes, however, the state's recognition that there was no evidence showing Mr. Canty communicated his general strategy regarding competency proceedings to Mr. Miles renders evidence of his strategy irrelevant to Mr. Miles's motive. (*See People v. Riccardi, supra*, 54 Cal.4th at p. 820; *People v. Tafoya, supra*, 42 Cal.4th at p. 165.)

to 77, and (3) had been examined by five medical and psychiatric experts who all testified consistently that he suffered a schizophrenic disorder and cognitive brain dysfunction. Even the state's own experts did not dispute these facts. (16 RT 5431-5443 [Guerra]; 5557-5576 [Moral].) On this record, the state's suggestion that this evidence from Mr. Canty was relevant to assess whether Mr. Miles manipulated the expert and medical findings because he was aware of Mr. Canty's tactics in capital cases goes well beyond speculation. The evidence was not relevant on this basis.[14]

The state proposes an alternative theory of relevance, arguing that "even if, as Miles contends, Canty's belief that an incompetence finding would help his client said nothing about Miles's competence, it *did* say something about Canty's credibility." (RB 77, emphasis in original.) In other words, according to the state, the evidence provided "a reason to question the credibility of Canty's testimony that Miles was incompetent" and

---

[14] A contrary ruling has troubling implications which the state ignores entirely. A principle that permits defense lawyers to be questioned about general tactics as a way to impeach the actions of their clients is difficult to cabin. Assume a defendant who has counsel testifies to self-defense or alibi. Is the state then permitted to call the defense lawyer to testify about the strategy behind presenting self-defense claims or alibi claims? Assume a defendant who has counsel then exhibits behavior consistent with innocence of criminal charges -- he does not flee, he waives *Miranda* and speaks with police, he provides DNA and handwriting samples willingly. Is the state then free to call the defendant's lawyer to testify about his experience in an effort to suggest this conduct by the defendant was simply a scam designed to trick the jury? And there is certainly no way to limit the doctrine to defense lawyers; presumably a prosecutor too may be questioned about general tactics as a way to impeach the actions of state witnesses.

"evidence bearing on a witness's credibility is always relevant." (RB 78, 79.)

As an initial matter, Mr. Canty never testified that Mr. Miles was incompetent. Instead, Mr. Canty testified to his observations of Mr. Miles during the time that he represented him. He testified that Mr. Miles believed he (counsel) was working with the prosecutor's office, he believed evidence had been planted by Los Angeles police, he believed he was being poisoned in jail, he suggested counsel should investigate a dentist in one of the business parks where the crime occurred, he told counsel that he (defendant) would "fix everything" because "there was some destiny involved in him taking the stand," and he changed his mind about testifying because the ghost of the victim told him to apologize to counsel and that he "shouldn't testify." (15 RT 5166-5170, 5173, 5179.)

But putting this aside, the real question is whether Mr. Canty's sworn testimony as an officer of the court about his observations of his client was undermined by evidence that as an experienced attorney, Mr. Canty knew there could be benefits for some clients of having a different jury for the penalty phase of trial. The answer must be no. Mr. Canty's tactical knowledge shed no real light on his credibility when describing on the stand what he saw and heard. This is especially true where Mr. Canty's observations were not only consistent with the medical and expert evidence presented at the competency hearing, but also corroborated by trial counsel throughout the proceedings,

along with numerous experts, who had told the court over and over again prior to the jury's guilt phase verdict that defendant was experiencing auditory hallucinations which were influencing his decision-making. (*See, e.g.*, 9 RT 3495-1, 3499-3504; 13 RT 4713-4716.)[15]

But even if tangentially relevant under the rubric posited by the state -- that "evidence bearing on a witness's credibility is always relevant" (RB 77) -- the evidence, as fully explained in the opening brief (AOB 191-194), should not have been admitted under section 352. The state disagrees, stating "Miles thinks that the evidence was prejudicial because it helped the prosecutor's case and damaged Miles's." (RB 78.)

That is certainly not the test for prejudice. In fact, Mr. Miles's prejudice argument was quite specific: the prosecutor introduced this evidence from Mr. Canty so he could argue the competency hearing was a ruse, a slick defense lawyer's trick, and the competency jury should not rob the guilt phase jury of its right to decide penalty. (AOB

---

[15] The state argues with some vigor that the fact that Mr. Canty was an officer of the court does not make him immune from cross-examination. (RB 77-78, n. 28.) The proposition is unassailable. But this Court should reject the state's implicit suggestion that Mr. Canty's status as an officer of the court describing observations of his own client is irrelevant. In fact, and precisely because defense lawyers are "responsible officers of the court," this Court has long recognized that even when they are not sworn as witnesses, their descriptions of their "personal experiences with and observations of" their clients are entitled to substantial weight and "tantamount to sworn testimony." (*People v. Laudermilk* (1967) 67 Cal.2d 272, 286.)

194.)

Ultimately, the flaw in the state's position as to prejudice in connection with the section 352 analysis is basic. It turns out that the prosecutor relied on this evidence from Mr. Canty *not* in connection with Mr. Canty's testimony about what he saw and heard when representing Mr. Miles. Instead, the prosecutor argued "what is really going on here" is that Mr. Canty's "role is to use every legal means to insure that Miles escapes the death penalty" and "make no mistake that the competency is played as a tactic." (17 RT 5844.) The prosecutor then urged the jury to see through the "tactic that [Mr. Canty's] used in this case" and concluded, "let the penalty phase jury proceed, the jury that's heard the evidence, that's dedicated a large part of this year to this case and let them decide what should properly be decided by them." (17 RT 5846, 5851.)

In sum, evidence of Mr. Canty's strategy and tactics was irrelevant and inadmissible as to Mr. Miles's "motive for faking." And whatever marginal value this evidence had in impeaching Mr. Canty's observations of Mr. Miles during his representation -- observations which were entirely consistent with the mental health testimony presented -- was outweighed by the prejudicial purpose for which the prosecutor actually used the evidence. Admission of the evidence was improper.

2. The evidence was protected from disclosure by the attorney-client privilege.

Even if evidence of Mr. Canty's strategy and tactics was relevant, however, and as noted above, Mr. Miles separately contended that the evidence was protected from disclosure under the attorney-client privilege. Mr. Miles explained that although Mr. Canty's strategy and tactic were not "confidential communications" between attorney and client customarily protected under the privilege, the privilege nonetheless applied because Mr. Canty's "legal opinions" about the case -- even if not communicated to the client -- were protected from disclosure. (AOB 194-197.)

The state disagrees. According to the state, "Miles does not identify a single communication between himself and Canty about which Canty was asked or forced to testify." (RB 79.)

The state has missed the issue. As Mr. Miles explained in his opening brief, and contrary to the state's suggestion, the attorney-client privilege is *not* limited to communications between an attorney and his client. (AOB 196-197.) Evidence Code section 952 -- which codifies the privilege -- specifically covers not only communications but "a legal opinion formed" by the lawyer. The case law has specifically held that this covers an attorney's legal opinion which has not been communicated to the defendant.

(*Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 99.) *Lohman* recognized that as a practical matter, leaving an attorney's legal opinion unprotected by the privilege -- even where that opinion had not been communicated to the client -- would "virtually destroy" the privilege. (*Ibid.*)

The state ignores this part of Evidence Code section 952. It ignores *Lohman* entirely. (RB 79-81.) In fact, Mr. Canty's legal opinions about the wisdom of competency proceedings -- whether communicated to Mr. Miles or not -- are exactly what both section 952 and *Lohman* envisioned.

The state argues that even if privilege applied, it was waived by Mr. Canty's testimony. (RB 81.) The argument need not long detain the Court.

Mr. Canty was not called by the defense to testify about his legal opinions on the case, his strategies or his tactics. He was called to testify about his observations. The state cites no authority at all for the proposition that calling Mr. Canty for this narrow purpose somehow constituted a broad waiver of the attorney-client privilege. No such authority exists.

3. The evidence was protected under the work-product rule.

Mr. Miles also contended that evidence of Mr. Canty's strategy and tactics was protected from disclosure under the work-product rule. In his opening brief he explained in some detail that for sound policy reasons the work-product privilege is *not* limited to written work. (AOB 198-199.) Section 2018.030 -- which codified the work-product privilege as to an "attorney's impressions, conclusions, opinions or legal research or theories" -- has been held to apply both to written and non-written work product. (AOB 198-199.)

The state disagrees. The state accurately notes that Mr. Canty was never forced to disclose any "any *writing* reflecting 'an attorney's impressions, conclusions, opinions, or legal research or theories.'" (RB 79-80, emphasis in original.) The state argues that in criminal cases, the work-product privilege only covers written material.

The state's position has breathtaking consequences. For example, Penal Code section 1054.6 provides that neither the defense nor the state in a criminal case need disclose work product. The state takes the position that this provision is limited to *written* work product. Accepting this proposition, of course, would mean that both the state and the defense could seek *non-written* work product from the other side since that is not

covered by section 1054.6. It would also mean that both the prosecutor and the defense lawyer could be called to testify about their "impressions, conclusions, opinions, or legal research or theories" so long as these had not been written down.

The United States Supreme Court has long rejected such a limited interpretation of the work-product rule. To the contrary, the Court has held that the work-product privilege must apply not only to written materials but to counsel's opinions and thoughts as well. (*Hickman v. Taylor* (1947) 329 U.S. 495, 511.)

So it is here. Although the state cites a number of cases which reference the actual language of section 2018.030 and Penal Code section 1054.6, the state cites to no holding of this Court (or any other court) where the prosecution in a criminal case was permitted to call the defense lawyer simply to solicit that lawyer's legal opinion and views as to strategy. No such case exists. Permitting the state to call Mr. Canty to testify about his strategy violated the work-product privilege.

B. The Error Was Not Harmless As To The Competency Hearing.

The state alternatively argues that "[e]ven if it was error for the trial court to permit the testimony at issue, reversal is not required." (RB 82.) According to the state,

"[t]he competency trial was fundamentally a battle of experts," and "the jury manifestly agreed with the prosecutor's experts that Miles was malingering." (RB 83.)

Unfortunately, and precisely because of the trial court's error, the competency hearing here was *not* simply a "battle of experts." A "battle of experts" would have involved a fair fight, which was heavily balanced in Mr. Miles's favor. After all, *five* defense medical and psychiatric experts examined and evaluated Mr. Miles, and *all* concluded that Mr. Miles suffered a schizophrenic disorder which affected his ability to participate and cooperate in his own defense. (14 RT 5031-5032, 5035-5044, 5070 [after examining defendant four times, Dr. Richard Dudley concludes that Mr. Miles suffered schizo-affective disorder since he was a boy, which now detrimentally impacted his ability to cooperate with counsel]; 15 RT 5207-5236 [Dr. Joseph Wu's concludes Mr. Miles's PET scan was consistent with the schizophrenia diagnosis]; 15 RT 5281-5283 [Dr. Ernie Meth concludes Mr. Miles's SPECT scan which showed Mr. Miles had "several areas, specifically in the front of the brain, that have holes" and "two horns" which "are not getting sufficient blood flow" were "very consistent" with Dr. Wu's findings]; 15 RT 5310-5319; 5364-5391 [Dr. Shoba Sreenivasan concludes the PET and SPECT scans were consistent with brain trauma and decreased cognitive functioning, and because of his psychotic and paranoid behavior, Mr. Miles was not competent to stand trial]; 15 RT 5373 [Dr. Lantz concludes Mr. Miles was schizophrenic, and suffered

"auditory hallucinations" where he "does truly hear voices" and suffers delusions, including "completely incorporat[ed] Wilhelmena into his life" who remains "alive in his mind;" defendant now trusted Wilhelmena more than his own attorneys, and she was "the person that he listens to . . . ."].) In stark contrast, the state presented two experts who concluded Mr. Miles was malingering, and moments of videotape of Mr. Miles in jail, where he appeared to be acting rationally. (16 RT 5431-5443 [Lee Guerra]; 5557-5576 [Jose Moral]; 5539-5543, 5737-5743 [videotape evidence].)

But because of the court's error, the competency hearing was not a battle of experts. Once the court admitted Mr. Canty's testimony, the prosecutor told the competency-phase jury in closing argument that the hearing was a result of Mr. Canty's manipulative tactics and he urged the competency phase jury to "let the penalty phase jury proceed, the jury that's heard the evidence, that's dedicated a large part of this year to this case and let them decide what should properly be decided by them." (17 RT 5846, 5851.) The state completely ignores this critical aspect of the state's argument at the competency hearing in making its harmless error analysis. (RB 82-83.) But as this Court has noted many times in assessing prejudice from a trial court's improper admission of evidence, the prosecutor's reliance on certain evidence in closing argument is a sound reflection of the importance of that evidence to the state's case. (*People v. Powell* (1967) 67 Cal.2d 32, 55-57.) When the prosecutor herself treats evidence as important to his case "[t]here is

no reason why we should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868.)

The prosecutor took full advantage of the court's error, and urged the jury to make the competency hearing *not* a battle of experts, but a referendum on defense counsel's attempted ruse. Regardless of the standard of prejudice the competency verdict should be reversed.

VI. IT VIOLATED THE EIGHTH AMENDMENT FOR THE PROSECUTOR TO ASK THE JURY TO SENTENCE MR. MILES TO DIE BASED, IN PART, ON PRIOR FELONY CONVICTIONS COMMITTED WHEN MR. MILES WAS A JUVENILE.

Prior convictions are admissible at a capital defendant's penalty phase pursuant to Penal Code section 190.3, subdivision (c). Under existing state law, it does not matter if the prior convictions were committed when the defendant was a child. (*People v. Pride* (1992) 3 Cal.4th 295, 256-257.) Pursuant to this rule, the prosecutor here introduced eight prior felony convictions which Mr. Miles suffered as a juvenile, and urged the jury to rely on this evidence in sentencing him to die. (18 RT 6100; 15 CT 4413 and n. 1.)

In his opening brief, Mr. Miles contended that admission of this evidence required a new penalty phase for three reasons. First, the rule permitting the use of juvenile convictions in aggravation of a capital sentence violates the Eighth Amendment, and must change, in light of three recent Supreme Court cases: *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011 and *Miller v. Alabama* (2012) ___ U.S. ___, 132 S.Ct. 2455. (AOB 203-208.) Second, the Eighth Amendment analysis is confirmed by an examination of objective indicia from around the country which reflect a societal consensus that juveniles are simply not mature enough to make decisions which can fairly be held to impact the rest of their life. (AOB 208-211.) Finally, on the facts of this case, the state will be unable to prove that admission of these

prior conviction allegations at the penalty phase was harmless. (AOB 211-215.)

The state disagrees, accurately citing four cases which reject the argument that *Roper* itself precludes consideration of juvenile convictions in penalty phase aggravation. (RB 84 *citing People v. Bivert* (2011) 52 Cal.4th 96, 123, *People v. Lee* (2011) 51 Cal.4th 620, 648-649, *People v. Taylor* (2010) 48 Cal.4th 574, 653-654 and *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) Although none of these cases considered the impact of either *Graham* or *Miller* (because they were decided before the Supreme Court decisions in those cases) Mr. Miles concedes that the rationale on which they reject his position is certainly broad enough to include those cases as well.

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

This distinction of *Roper* focused on in *Bramit* and its progeny -- and on which the state now places so much reliance -- made sense prior to 2014. After all, up to that point

it was entirely accurate to say -- as *Bramit* did -- that the Supreme Court's Eighth Amendment analysis was limited to assessing whether there was a "national consensus against a particular punishment."

But the United States Supreme Court has made clear this limitation on Eighth Amendment analysis is no longer true. (*See Hall v. Florida* (2014) ___ U.S. ___, 134 S.Ct. 1986). In *Hall*, the Court employed the identical Eighth Amendment analysis employed in *Roper* (and *Graham* and *Miller*) -- looking for a national consensus. But in *Hall*, the Court was not assessing whether there was a "national consensus against a particular punishment," but instead it was assessing whether an evidentiary rule enacted by the Florida legislature violated the Eighth Amendment.

In *Hall*, defendant was sentenced to death in Florida prior to the Supreme Court ruled in *Atkins v. Virginia* (2002) 536 U.S. 304 that the Eighth Amendment precluded execution of the mentally retarded. In response to *Atkins*, the Florida legislature enacted a rule of evidence which provided that unless a defendant introduced an IQ test with a score lower than 70, he could not "present[] any additional evidence of his intellectual disability." (134 S.Ct. at p. 1992. *See also id.* at p. 1994 [absent a test score under 70, the state statute "bar[s] [a defendants] from presenting other evidence that would show his faculties are limited."].) The Supreme Court granted certiorari to decide whether this rule

of evidence violated the Eighth Amendment.

Significantly, in evaluating this evidentiary rule under the Eighth Amendment, the Supreme Court applied the *identical* approach it had employed in *Roper* -- looking to see if this rule was consistent with a national consensus. (134 S.Ct. at pp. 1996-1998.) Because the Florida evidentiary rule was *not* consistent with the national consensus, it violated the Eighth Amendment. (*Id.* at p. 1998.) In light of *Hall*, the suggestion by this Court in *Bramit* that traditional Eighth Amendment analysis was limited to assessing the propriety of a "particular punishment" is simply no longer true.

Having said that, Mr. Miles recognizes that the actual holdings of *Roper*, *Graham* and *Miller* may not themselves control this issue. They are, after all, holdings about whether there is a national consensus against certain punishments for juveniles -- the death penalty and life without parole. And since the claim here is that evidence of juvenile convictions is not admissible, the actual holdings of *Roper*, *Graham* and *Miller* can be distinguished.

But the Eighth Amendment analysis of *Hall* cannot be distinguished; in light of *Hall*, the principles animating *Roper*, *Graham* and *Miller* may not be so easily brushed aside. After all, the entire reason prior crimes evidence is permitted under section 190.3,

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

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

criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2028.) And expecting deterrence from a conviction imposed on a juvenile -- as the state may legitimately expect from an adult -- is nothing but a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.)

Thus, in light of *Hall v. Florida*, *supra*, the principles on which *Roper*, *Graham* and *Miller* are based require a conclusion that juvenile convictions may not be introduced to aggravate punishment in a capital case. Given the Eighth Amendment analysis of *Hall*, this Court should interpret section 190.3, subdivision (c) in light of the rationale of *Roper*, *Graham* and *Miller*. (*See United States v. Graham* (6th Cir. 2010) 622 F.2d 445, 465, 469 [Merrit, J., dissenting] [relying on rationale of *Graham v. Florida* to reject reliance on juvenile conviction used to enhance adult conviction and impose life sentence].)

Alternatively, the state argues that any error was harmless. (RB 85.) The state's main thesis is that the aggravating evidence of the circumstances of the crime and other crimes committed as an adult was overwhelming. (RB 85.)

The state's focus on the remaining aggravating evidence is, of course, one legitimate part of the harmless error calculus. But contrary to the argument at least implicit in the state's analysis, it is not the only part. Instead, as both federal and state courts have long recognized, proper harmless error review requires an analysis of the entire record, not just those portions of the record which the state selectively culls to support its position. (*See, e.g., Rose v. Clark* (1986) 478 U.S. 570, 583; *People v. Galloway* (1979) 100 Cal.App.3d 551, 559.)

Here, as Mr. Miles recognized in his opening brief, the circumstances of the crime were indeed aggravating, as they are in all capital cases. But that does not mean the Court may ignore the mitigating aspects of the case which properly belong in a harmless error calculus.

This case was a single homicide and did not present the type of unusually heinous multiple murder the Court often sees in capital cases. (*See, e.g., In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnaping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering ten people].) The defendant here -- in contrast to defendants in some other capital cases -- did not have a history of prior murders.

(*Compare People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant had killed his three children in 1964 and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].)

Nor was this a case without mitigation. To the contrary, the defense presented (1) evidence of serious and debilitating mental impairments starting well before the crime itself and for which defendant had sought help, (2) evidence of a massive brain tumor which had been growing since 1987 and impacted cognitive functioning, (3) expert findings of severe mental illness including schizophrenia and low IQ and (4) mitigating evidence about defendant's upbringing and childhood and the onset of mental illness when he was still a child. (18 RT 6198-6218, 6227-6232, 6238-6256, 6371-6377,6390-6404, 6418, 6422-6428, 6464-6471; 19 RT 6582, 6585, 6588, 6591, 6599, 6603, 6606, 6613, 6620.)

But the mitigating evidence is not the only factor the state ignores. The state also ignores entirely how the harmless error test is applied at the penalty phase. In assessing all this evidence in mitigation, and in determining if an error is harmless or prejudicial, the question is not whether the jury would have unanimously imposed a life sentence absent the error. Instead, it is whether on this record a single juror could reasonably have

imposed a life sentence. (*See People v. Soojian* (2010) 190 Cal.App.4th 491, 521; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736; *People v. Brown* (1988) 46 Cal.3d 432, 471 n.1 [conc. on. of Brossard, J.] [noting that a "hung jury is a more favorable verdict" then a guilty verdict].) On this record, the error in permitting the state to introduce eight burglary convictions which Mr. Miles committed as a juvenile requires a new penalty phase.

VII. THE TRIAL COURT VIOLATED MR MILES'S CONSTITUTIONAL RIGHTS BY ADMITTING EYEWITNESS TESTIMONY AS TO UNCHARGED CRIMES WHICH DEFENSE COUNSEL COULD NOT CONFRONT BECAUSE THE STATE HAD DESTROYED THE IMPEACHING EVIDENCE.

A. Introduction.

At the penalty phase of trial, the state sought to introduce evidence of numerous uncharged acts of violence including (1) a January 6, 1992 robbery of Paula Yenerall, (2) a January 21, 1992 robbery of Janet Heyen, (3) a February 19, 1992 robbery of John Kendrick and (4) a February 21, 1992 robbery Arnold Andersen. At the penalty phase, the state presented eyewitness identification testimony from the victims in each of these cases identifying defendant as the person who committed the uncharged crime. (17 RT 5976-5988 [the January 6, 1992 robbery]; 17 RT 5993-5994, 6000-6001, 6006 [the January 21,1992 robbery]; 18 RT 6029-6032, 6039 [February 19, 1992 robbery]; 18 RT 6067, 6069, 6077, 6079 [February 21, 1992 robbery].)

As to each of these uncharged crimes, however, the record shows the state had destroyed evidence which impeached the very eyewitness testimony on which the state relied in the penalty phase. (10 CT 2707-2708 [impeaching the identification in the January 6, 1992 Yenerall robbery]; 7 CT 1988 [impeaching the identification in the January 21, 1992 Heyen robbery]; 10 CT 2709-2710 [same]; 2 RT 481 [same]; 2 RT 490-

494 [impeaching the identification in the February 19, 1992 Kendrick robbery]; 10 CT 2021 [same]; 10 CT 2011, 2044-2046 [impeaching the identification in the February 21, 1992 Andersen robbery]; 10 CT 2910 [same]; 4 RT 481 [same].) But the record showed more than that.

The record showed that the prosecutor himself conceded that the destroyed evidence was exculpatory. Thus, the prosecutor conceded that the failure to present this evidence to the grand jury required that the grand jury indictments on these four offenses had to be quashed. (2 RT 407-408, 421.) The prosecutor was direct and to the point -- this evidence "needed to be presented as exculpatory evidence to the Grand Jury." (2 RT 430.)

But the record shows even more. When defense counsel moved to dismiss charges on these counts, the judge hearing the motion "agree[d] with defense counsel and their characterization . . . of the importance of that evidence" and concluded that "the evidence that is gone to some extent is evidence of factual innocence, which is certainly important evidence, and is gone . . . ." (Pre-trial RT 185.) Still later, when defense counsel moved to sever trial on these charges, the trial judge noted that as to each of the identifications, "there is some evidence which would at least create a[n] argument that the identification should be viewed with some caution or suspicion . . . ." (2 RT 513-514.)

Prior to the penalty phase, when the state sought to introduce the eyewitness testimony as to the four uncharged crimes in which it had lost this "exculpatory evidence," the defense objected and moved to exclude the identification testimony. (10 CT 2993; 11 CT 3025; 15 CT 4344.) The trial court denied this motion. (13 RT 4667.)

In his opening brief Mr. Miles contended that the state's admission of and reliance on this eyewitness testimony in aggravation required a new penalty phase. His argument was simple. Admission of this aggravating evidence violated the reliability requirements of the Eighth Amendment because the state had destroyed evidence which the defense could have used to impeach the evidence. (AOB 232-240.)

Although the state ultimately disagrees with Mr. Miles's contention, it is again worth nothing what the state does *not* dispute. Thus, the state does not dispute:

(1) The prosecutor himself conceded that the evidence the state had lost was "exculpatory evidence with regard to some either misidentifications or prior identifications made by some of the victims in the case of Mr. Miles" and "needed to be presented as exculpatory evidence to the Grand Jury." (2 RT 407, 430. RB 86-100.)

(2) The trial court "agree[d] with defense counsel and their characterization . . . of the importance of that evidence" and concluded that "the evidence that is gone to some extent is evidence of factual innocence, which is certainly important evidence, and is gone . . . ." (Pre-trial RT 185. RB 86-100.)

(3) The trial court concluded that as to each of the identifications on which the state had lost evidence "there is some evidence which would at least create a[n] argument that the identification should be viewed with some caution or suspicion . . . ." (2 RT 513-514. RB 86-100.)[16]

Despite these admissions from the prosecutor, and findings by the trial court, the state nevertheless argues that no error occurred. As an initial matter, the state's brief makes clear that the parties disagree over exactly what evidence the state destroyed. (*See* RB 86-89, 94 n.32, 95, n.33.) Mr. Miles will discuss this aspect of the state's position in Argument VII-B below. As discussed there, the majority of the state's suggestions as to what evidence was destroyed are incorrect.

Turning to Mr. Miles's actual legal claim, the state argues that the trial court's rulings were correct. Mr. Miles will discuss this aspect of the state's position in Argument VII-C below. As discussed there, the state ignores the basic distinction between a Fourteenth Amendment Due Process claim (which Mr. Miles is *not* making) and an Eighth Amendment claim (which he is making).

---

[16] Mr. Miles does not want to leave a false impression. While it is true that the state did not dispute any of these facts, in point of fact the state did not mention them at all in its brief.

Finally, the state makes a brief harmless error argument. (RB 99-100.) Mr. Miles will address this in Argument VII-D. As discussed there, reversal of the penalty phase is required.

B. The Destroyed Evidence.

There were four different uncharged offenses as to which the destroyed was relevant: (1) the January 6, 1992 crime involving Paula Yenerall, (2) the January 21, 1992 crime involving Paula Heynen, (3) the February 19, 1992 crime involving John Kendrick and (4) the February 21, 1992 crime involving Arnold and Sharyn Andersen. There is no disagreement as to what evidence the state destroyed in connection with the Kendrick and Andersen incidents.

At trial, Mr. Kendrick identified Mr. Miles as the person who robbed him on February 19, 1992. (18 RT 6031-6032, 6039.) Prior to trial, however, Mr. Kendrick had been shown a photographic lineup in which he identified a man named Randy Winters as the person who robbed him, with a degree of certainty at 8 out of 10. (2 RT 490; 7 CT 2021.) At trial, the prosecutor conceded that police destroyed this lineup prior to trial and it was never disclosed. (2 RT 494.) The state repeats this concession on appeal. (RB 89.)

Similarly, at trial Mr. Andersen identified Mr. Miles as the person who robbed him on February 21, 1992. (18 RT 6069.) Prior to trial, however, Mr. Andersen had been shown a photographic lineup in which he identified a man named Roger Egans as the person who robbed him, saying he "about eighty percent sure." (7 CT 2011, 2046; 10 CT 2910.) At trial, the prosecutor conceded that police destroyed this lineup as well prior to trial and it was never disclosed. (2 RT 481.) The state repeats this concession on appeal. (RB 89.)

There are, however, factual disputes in connection with both the January 6, 1992 and January 21, 1992 incidents. As discussed below, for the most part, the record does not support the state's positions.

1. The January 6, 1992 incident.

At trial, Ms. Yenerall identified Mr. Miles as the person who robbed her on January 6, 1992. (17 RT 5984-5985.) She admitted that prior to identifying Mr. Miles, she was shown a photographic lineup and identified a man named Orlando Boone as the robber. (17 RT 5988-5990.) She apparently changed her mind when shown a photographic lineup showing Mr. Miles and a composite sketch of someone she said "resembled" the robber. (5 CT 1497- 6 CT 1500; 6 CT 1509-1511.) In his opening brief,

Mr. Miles contended that the photographic lineup which changed her mind, and the composite sketch, were never disclosed. (AOB 222.)

The state disagrees. As to the photographic lineup, the state says that no such lineup was ever shown to Ms. Yenerall and she was simply "confused." (RB 87, *citing* 12 CT 3406-3407.) As to the sketch, and in a footnote, the state argues that the sketch was "available" to defense counsel. (RB 94, n.32 *citing* 5 CT 1274 and 12 CT 3407.)

Here is what the record shows. At the preliminary hearing, Ms. Yenerall testified under oath that (1) she was shown a photographic lineup by police which included Mr. Miles's picture and (2) she was shown a composite sketch prepared by police as well. (5 CT 1499 [lineup]; 1510-1511 [sketch].) Defense counsel asked for a copy of both the lineup and the sketch. (10 CT 2907-2908.)

The prosecutor responded. The prosecutor told the court in a declaration that (1) Ms. Yenerall had been contacted by police after her preliminary hearing testimony and (2) she told police that she was nervous when she was answering questions. (5 CT 1273-1274.) Based entirely on this general expression of nervousness -- *without any reference at all by Mr. Yenerall to being mistaken about the lineup* -- the prosecutor then reasoned as follows:

> "It is believed that the alleged line-up for which no evidence exists never took place." (5 CT 1274.)

This is the basis of the state's claim that no lineup occurred. Notably, the trial prosecutor elected *not* to present a declaration from Ms. Yenerall about her post-preliminary hearing interview with police. And the prosecutor elected *not* to present a declaration from the police officer who performed the interview.

As to whether the sketch had been disclosed, the prosecutor initially advised the trial court the sketch had "been provided." (5 CT 1274.) Later, however, the prosecutor retreated from this position, telling the court that "all the composites are available." (12 CT 3407.) It is this latter assertion that the state's appellate lawyers adopt and repeat; thus, the state does not argue that any composites were actually provided to the defense but simply that they were "available" to the defense. (RB 94, n.32.)

The defense responded to the prosecutor's declaration by performing its own interview with Ms. Yenerall. In precise accord with her sworn testimony, Ms. Yenerall repeated that she was "quite certain" she had been shown a lineup with Mr. Miles in it. (10 CT 2956.) As such, the defense again requested a copy of the lineup. (10 CT 2956.) In light of the prosecutor's reliance on a police interview with Ms. Yenerall to support the state's assertion that she was confused about having been shown a lineup, defense

counsel requested an opportunity to cross-examine both detective Lore (who performed the interview) and Ms. Yenerall. (10 CT 2908, n. 1.) As to the composite sketches, the defense noted that although various composite sketches were available, since police could not recall which sketch had been shown to Ms. Yenerall, whatever value there was in the sketches was gone. (10 CT 2707-2708; 11 CT 3000, 3003.)

This is where the matter now stands. As for whether there was a photographic lineup shown to Ms. Yenerall, the record contains (1) Ms. Yenerall's sworn testimony at the preliminary hearing that she *did* see such a lineup, (2) a hearsay declaration from the prosecutor that Ms. Yenerall was nervous at the preliminary hearing and (3) a hearsay declaration from defense counsel in which Ms. Yenerall confirmed seeing a lineup just as she testified. The trial court made no finding that supports the state's current position, and the evidence on which the state now relies does not remotely suggest any reason to doubt Ms. Yenerall's sworn testimony. Moreover, in responding to Mr. Miles's section 995 motion to dismiss the case because of inadequate identification testimony, the state explicitly *relied* on Ms. Yenerall's preliminary hearing testimony that she saw a photographic lineup "in which Mr. Miles was included, that she selected Mr. Miles and she was very sure he was the right one." (10 CT 2760.) Having relied on Ms. Yenerall's sworn testimony that she *did* see a photographic lineup, the state cannot now be permitted -- without any real contrary evidence -- to simply maintain a starkly opposite position.

(*Compare New Hampshire v. Maine* (2001) 532 U.S. 742, 749-750 [judicial estoppel doctrine protects "the integrity of the judicial process . . . [by] prohibiting parties from deliberately changing positions according to the exigencies of the moment."].)

As to the composite sketches, the trial court *did* make at least an implicit finding. Because police could not determine which sketches were shown to which witnesses, the trial court recognized that the sketches too were effectively lost; Judge McCarville "characterize[d] [the missing evidence] generally as the lost either photographs, composites or photo spreads." (Pre-trial RT 184.)

2. The January 21, 1992 incident.

At trial, Ms. Heynen identified Mr. Miles as the person who robbed her on January 21, 1992. (17 RT 5994, 6000-6001.) She admitted that prior to identifying Mr. Miles, she had been shown several photographic lineups. (6 CT 1543, 1548.) In addition, detectives Lore and Mendenhall both recalled that she was shown at least one composite sketch of the robber. (7 CT 1994, 2038.)

Detective Lore testified that one of the photographic lineups contained a photograph of Steven Dyer, one contained a photograph of Orlando Boone. (7 CT 1986-

1990.) Lore conceded that at the Orlando Boone lineup, Ms. Heynen picked out photograph number 5 as the person who robbed her. (7 CT 1987-1990.) Lore's handwritten notes show that as to the Dyer lineup, Ms. Heynen picked out Steven Dyer and said that "it could be him." (10 CT 2709.) In his opening brief, Mr. Miles contended that three items had been lost: (1) the photographic lineup containing the Dyer picture, (2) the picture she picked out of the Orlando Boone lineup and (3) the composite sketch which she was shown. (AOB 224.)[17]

The state does not dispute that it destroyed the Dyer lineup. (RB 87-88.) The state argues, however, that this does not matter since Heynen did not identify Dyer in that lineup after all, *citing* 5 CT 1274, 7 CT 1987-1988. (RB 88.)

At 5 CT 1274, the prosecutor stated under oath that the Dyer lineup had been destroyed. (5 CT 1274, lines 9-12.) Nothing else on that page has anything to do with the Dyer lineup. This citation certainly does not aid the state.

The next supporting cite in Respondent's Brief is 7 CT 1987-1988. This portion of the Clerk's Transcript references detective Lore's preliminary hearing testimony. Lore

---

[17] In connection with the Orlando Boone lineup, the state argues the photograph Ms. Heynen picked out was not destroyed, but was in fact "available to the defense" citing 5 CT 1274, 7 CT 1991 and 12 CT 3407. (RB 88.) The state is correct. (10 CT 2710, n.58.)

showed the Dyer lineup to Ms. Heynen on March 12, 1992 and made contemporaneous notes of the identification process. (7 CT 1987.) Lore testified that Ms. Heynen did not "make an identification" of Dyer. (7 CT 1987.) This is what the state relies on to suggest that the Dyer lineup was not important.

But the state has taken Lore's response entirely out of context. In fact, Lore's contemporaneous notes of the March 12, 1992 photographic lineup show that although Ms. Heynen did not make a formal identification of Dyer, she picked Dyer out and said "it could be him." (10 CT 2709. *See* 3 RT 643-645; 10 CT 2709, 2909; 2 RT 500.) And, as Judge Edwards noted, "the identification evidence [as to Dyer] was sufficiently strong that a search warrant was issued." (2 RT 483. *See* 13 CT 3719, n.19.) The trial prosecutor, aware of Lore's contemporaneous notes of March 12, did not dispute them; instead, when the trial prosecutor addressed this issue, he contended only that as to the Dyer lineup "it is uncertain if she made a selection." (12 CT 3407.) And Lore admitted in open court that before Ms. Heynen ever identified Mr. Miles, she looked at a photographic lineup which did not include him and picked someone else, saying "it could be him." (3 RT 643.)

Mr. Miles will not quibble. Whether Ms. Heynen's statement about Dyer that "it could be" her assailant is now called a formal identification by the state's appellate

lawyers does not really matter. The state concedes Ms. Heynen said exactly the same thing -- "it could be him" -- when she later picked Mr. Miles out of a photograph lineup. (RB 52, 54. *See also* 3 RT 643.) And at trial, the prosecution relied on Ms. Heynen's subsequent identifications of Mr. Miles to support its theory that he committed the January 21, 1992 crime against her. Because Ms. Heynen's initial identification of Dyer was *identical* to her initial identification of Miles, the state's conceded destruction of the Dyer lineup cannot simply be brushed aside by saying that Ms. Heynen's identification of Dyer was not more definitive. Skilled counsel could very well have used this information to undercut Ms. Heynen's subsequent identification of Mr. Miles.

Finally, just as it did with the composite sketches shown to Ms. Yenerall, the state argues that the sketches shown to Heynen were "available" to the defense. (RB 95, n.33.) As the defense noted below, and as Judge McCarville recognized, although various composite sketches were apparently available, since police could not recall which sketch had been shown to Ms. Heynen, whatever exculpatory value there was in the sketches was gone. (10 CT 2710; 11 CT 3003; Pre-trial RT 184.)

C. Because The State Destroyed Evidence Which The Prosecutor Himself Conceded Was Exculpatory, And Which The Trial Court Found Supported A Claim Of "Factual Innocence" Precisely Because It Rebutted The State's Eyewitness Identifications, The Trial Court Erred In Admitting Evidence Of The Eyewitness Identifications.

Turning to Mr. Miles's legal claim, the state accurately notes that the trial court found no malicious conduct in the state's destruction of what the prosecutor conceded was "exculpatory evidence." (RB 90, 92.) Relying on the non-capital cases of *Arizona v. Youngblood* (1988) 488 U.S. 51 and *California v. Trombetta* (1984) 467 U.S. 479, the state argues at some length that absent such a finding, the trial court's refusal to exclude the eyewitness testimony here after the state lost impeaching evidence did not violate the Due Process Clause of the Fourteenth Amendment. (RB 92-97.)

As a matter of Due Process, the state may be entirely correct. The problem with the state state's argument is far more basic. Mr. Miles did not raise a *Trombetta/ Youngblood* Due Process claim in his opening brief, and he does not raise one here. Indeed, the state itself recognizes that in his opening brief, Mr. Miles did *not* present this claim as a *Trombetta/Youngblood* claim. (RB 97.) Instead, Mr. Miles's claim is far narrower, and is based not on the Fourteenth Amendment, but on the entirely separate reliability requirements of the Eighth Amendment.

The distinction is critical. The Supreme Court has repeatedly recognized that death is a unique punishment, qualitatively different from all others. (*See, e.g., Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Thus, the Court has held there is 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 [guilt]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 [penalty].)

Procedures which risk undercutting this heightened need for reliability violate the Eighth Amendment. (*See, e.g., Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118-119 (O'Connor, J., concurring); *Lockett v. Ohio, supra,* 438 U.S. 586; *Gardner v. Florida, supra,* 430 U.S. at p. 362.) And particularly relevant here, a procedure may violate the reliability requirements of the Eighth Amendment *even when that very same procedure does not violate the Due Process Clause*. (*See, e.g., Beck v. Alabama, supra,* 447 U.S. at pp. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though due process may not]. *See Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the Due Process Clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."]. *Compare Furman v. Georgia* (1972) 408 U.S. 238 [standardless capital sentencing violates the

Eighth Amendment] *with McGautha v. California* (1971) 402 U.S. 183 [standardless capital sentencing does not violate Due Process].)

The question presented in this case is not the relatively simple question of admissibility presented in non-capital cases like *Trombetta* and *Youngblood.* As the state argues, the *Trombetta/Youngblood* Due Process question largely revolves around a finding of bad faith on the part of police.

Instead, the Eighth Amendment question presented here hinges on application of the entirely distinct enhanced reliability requirements of the Eighth Amendment. It has nothing at all to do with a finding of bad faith. Instead, under the Supreme Court's Eighth Amendment cases, where state action prevents a defendant from confronting aggravating evidence against him, the Eighth Amendment does not permit a resulting death sentence to stand -- even where there has been no finding of malicious intent on the state's part. (*Gardner v. Florida* (1977) 430 U.S. 349.)

In his opening brief, Mr. Miles explained why *Gardner* controlled this case. In *Gardner*, defendant was sentenced to death at least in part based on information which defense counsel did not have a fair chance to confront because it had not been provided to him by the state. (430 U.S. at p. 351.) Ultimately, the Court held that a sentencer's

reliance on evidence which had not been properly confronted did not meet the reliability standards of the Eighth Amendment. (430 U.S. at p. 362. *Id.* at p. 364 [White, J., concurring].) In this case, just like *Gardner*, the state's failure to disclose evidence to the defense prevented defense counsel from properly confronting evidence which the state relied on to obtain a death sentence. As in *Gardner*, this process "fails to meet the 'need for reliability in the determination that death is the appropriate punishment'" which the Eighth Amendment requires. (*Gardner v. Florida, supra*, 430 U.S. at p. 364.)

The state argues "[t]his case is nothing like *Gardner.*" (RB 98.) The state accurately notes that in *Gardner*, because the information had not been disclosed to the defense, the defense had no opportunity to confront the evidence at all. (RB 98.) In this case, the state argues, Mr. Miles at least had an opportunity to confront the state's case, since he could have cross-examined the state's witnesses. (RB 98.) Mr. Miles noted this precise aspect of *Gardner* in his opening brief. (AOB 236.)

This is a distinction without a difference which misses the essential vice which *Gardner* was really addressing. (AOB 236.) In both *Gardner* and this case defense counsel's ability to confront the state's aggravating evidence was undercut by the same state action: a failure to disclose evidence by the prosecutor. In *Gardner*, the state failed to disclose the aggravating evidence itself. In this case, the state failed to disclose

evidence which could be used to impeach the aggravating evidence. In both situations, defendant's ability to confront the aggravating evidence -- and the reliability of the resulting death sentence -- was compromised by the the state's failure to disclose evidence.

The state's argument, therefore, is simple. When a defense lawyer is prevented from rebutting the state's case in aggravation because the state has destroyed the evidence on which such rebuttal would be based, *Gardner* and the reliability concerns of the Eighth Amendment are not implicated. Under the state's view, these reliability concerns are only implicated when a defense lawyer is prevented from rebutting the state's case in aggravation because he is unaware of it and is surprised. The state never explains why the Eighth Amendment's concern with reliability should be so disparately applied.

Nothing in logic, common sense, the Eighth Amendment -- or the state's brief -- supports such a narrow reading of *Gardner*. The Eighth Amendment principle of reliability has not been confined to cases of surprise; to the contrary, it broadly applies where trial courts refuse to admit mitigating evidence, refuse to fully consider mitigating evidence which has been introduced, give instructions which impair a jury's ability to consider mitigating evidence or permit improper prosecutorial argument. (*See, e.g.*, *Lockett v. Ohio, supra*, 438 U.S. 586; *Eddings v. Oklahoma, supra*, 455 U.S. 104; *Penry*

v. Lynaugh (1989) 492 U.S. 302; *Caldwell v. Mississippi, supra*, 472 U.S. 320.) The state action which prevented proper confrontation in this case -- a failure to provide evidence to the defense -- was the same state action which prevented proper confrontation in *Gardner*. Equally important, the vice identified in *Gardner* is the same in both cases -- there is a genuine risk that death was imposed because defense counsel was unable to confront aggravating evidence on which the sentencer may have relied. That is exactly what animated the decision in *Gardner* and is exactly the problem here.[18]

In making its contrary argument, the state cites *People v. Rodrigues* (1994) 8 Cal.4th 1060 and argues that "this Court has previously rejected an argument nearly identical to Miles's." (RB 98.) The state is wrong.

In *Rodrigues*, defendant was convicted of capital murder. At his penalty phase, the state sought to introduce evidence of a 12-year old rape charge against defendant which had been dismissed. During the investigation of the rape case, the victim had identified

---

[18] In his opening brief. Mr. Miles noted that his case presented an even stronger case for finding a prejudicial Eighth Amendment violation than *Gardner* itself. After all, in that case the Court reversed because of the absence of proper confrontation even though there was nothing in the sentencer's findings which "indicate[d] that there was anything of special importance in the undisclosed portion [of the pre-sentence report]." (430 U.S. at p. 353.) Here, the record shows that in his penalty phase closing argument, the prosecutor placed great reliance on the eyewitness identification testimony which could not be properly confronted. (20 RT 6779-6780, 6789, 6792-6793, 6794, 6795.) The state does not address this point at all. (RB 86-100.)

defendant from a photographic lineup as one of her attackers. She later repeated that identification at the preliminary hearing in the prior case. The rape case was eventually dismissed.

At the penalty phase of defendant's capital trial 12 years later, the state sought to introduce the rape victim's prior identification of defendant. The defense speculated that the prior identification in the rape case was tainted by an unduly suggestive photographic identification. (8 Cal.4th at p. 1162.) The defense argued that "without the without the lost photographs, the defense could not show how suggestive they may have been, or demonstrate how the photo lineup procedure may have impermissibly affected [the victim's] subsequent identifications of defendant . . . ." (8 Cal.4th at p. 1162.) Because the photographic identification had been lost, the defense "moved to exclude any evidence of the Jill M. incident." (8 Cal.4th at p. 1160.)

This Court rejected the argument. First, the Court correctly noted that nothing in the record supported the defendant's speculation that the photographic lineup was actually suggestive. (8 Cal.4th at p. 1162.) This was so since "it appears that the in-court identification [was] based on the personal observation of the defendant at the time of the alleged crime, rather than on the previous lineup" and "nothing in her testimony suggested that her photo identification contributed to her subsequent identifications at the

preliminary hearing or at the penalty phase itself." (*Id.* at pp. 1162-1163.) Second, the Court noted the availability of other evidence which the defense could use to challenge the suggestiveness of the identification including (1) the in-court testimony of the police captain who actually prepared the photographic lineup and "was able to remember many of the details of the photographic display," (2) the captain's testimony as to the identity of those people in the lineup and (3) the captain's notes reflecting not only the number of photographs in the lineup but the height and weight of each person in the lineup. (*Ibid.* and n. 63.) Under these circumstances, the Court concluded that the materials which were lost "did not significantly diminish his ability to challenge the evidence in question" and the trial court did not err in refusing to exclude all evidence of the prior incident. (8 Cal.4th at p. 1161.)

Rodrigues is distinguishable from this case in every important respect. First, as noted above, in *Rodrigues* the exculpatory value (if any) of the lost evidence was *entirely* speculative. But here, there is no genuine dispute as to the exculpatory value of the lost evidence here. The prosecutor here conceded -- and the state does not dispute -- that the lost evidence "needed to be presented as exculpatory evidence to the Grand Jury." (2 RT 430.) The trial court found "agree[d] with defense counsel and their characterization . . . of the importance of that evidence" and concluded that "the evidence that is gone to some extent is evidence of factual innocence, which is certainly important evidence, and is

gone . . . ." (Pre-trial RT 185.) Later, the trial court recognized that as to each of the identifications on which the state had lost evidence "there is some evidence which would at least create a[n] argument that the identification should be viewed with some caution or suspicion . . . ." (2 RT 513-514.) The nature of the lost evidence in this case is nothing at all like the nature of the lost evidence in *Rodrigues*.

Second, and again in stark contrast to *Rodrigues*, there was no replacement evidence in this case. As trial counsel in this case concluded, "[t]he ability to defend against these [uncharged] cases was significantly impaired by the resultant inability to produce this exculpatory evidence." (15 CT 4347.) Unlike *Rodrigues*, the lost evidence here could *not* be recreated in any way.

The state accurately notes that as to two of the lineups which were destroyed, the state offered to provide DMV photographs of the person who was identified. (RB 89.) Although never made explicit, the state may be suggesting that DMV pictures of the persons identified could somehow substitute for the actual lineups, just like the substitute evidence in *Rodrigues*. But as defense counsel pointed out, he himself could obtain the DMV pictures without the state's aid if he wanted to; DMV pictures did not solve the problem in any sense:

> "Obviously, any of these people that we're talking about, there is sufficient identification that we can get DMV photos of these people. The problem is that's not the photo used in the line-ups. They used booking photos that had been taken, presumably under different conditions, different lighting conditions, different times, perhaps with different facial features, like beards and mustaches, or whatever. Who knows?"
>
> "We don't know what the actual pictures these witnesses looked at looked like, and I'm sure the Court has enough experience to know that a booking phot of one person can look much different than a DMV photo of that same person taken at a different time." (2 RT 497-498.)

In short, *Rodrigues* does not aid the state's case here. The eyewitness evidence should not have been admitted.[19]

D. The Error Requires A New Penalty Phase.

Alternatively, the state argues that any error was harmless beyond a reasonable doubt. (RB 99.) In approaching the harmless error calculus, it is important to note that absent the eyewitness testimony as to these robberies which should not have been admitted under the Eighth Amendment, the prosecution was free to introduce any forensic

---

[19] It is worth noting that in *Rodrigues*, the defendant had moved to exclude not just *identification* evidence from the rape victim, but "*any* evidence of the [rape] incident." (8 Cal.4th at p. 1160, emphasis added.) The trial court denied the motion. Thus, the ruling which the Court was asked to review in *Rodrigues* was substantially broader than the ruling to which Mr. Miles is objecting here. Here, Mr. Miles is *not* seeking to exclude all evidence of the prior uncharged robberies. Instead, he is making a substantially narrower argument -- the only evidence that should have been excluded is the eyewitness testimony which the defense was unable to rebut because of the state's loss of evidence.

evidence, confessions, admissions or other circumstantial evidence supporting Mr. Miles's complicity in these robberies. As the state at least implicitly recognizes, however, the prosecution here presented no such testimony at all. Thus, the state properly concedes that on this record, had the trial court excluded the eyewitness testimony, "it would have effectively precluded the jury from hearing about the Yenerall, Heynen and Kendrick/Crawford robberies." (RB 99.)

The concession is of some importance. This Court has long noted that evidence of prior crimes "may have a particularly damaging impact on the jury's determination whether the defendant should be executed . . . ." (*People v. Polk* (1965) 63 Cal.2d 443, 450.) More than 40 years ago the Court went even further, recognizing that other crimes evidence may be the most important factor causing jurors to impose death:

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

Social science data supports this Court's conclusion. The study which this Court referenced in *McClellan* concluded after an extensive analysis that "[t]he aspect of the cases with the greatest impact on penalty was the presence or absence of a prior criminal record. . . . According to nearly all of the analytical techniques employed, the admission

of defendant's 'priors' into evidence at penalty is the most significant of all the variables analyzed in the study." (Note, A Study of the California Penalty Jury in First-Degree Murder Cases (June 1969) 21 Stan. L. Rev. 1297, 1326.) Other studies across the nation have consistently confirmed that among aggravating factors related to the defendant himself (as opposed to aggravating factors relating to the crime), jurors place extremely heavy reliance on other crimes evidence in imposing a death sentence. (*See, e.g.*, S. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1559 (1998); Baldus et al., *Comparative Review of Death Sentences: an Empirical Study of the Georgia Experience* (1983) 74 J. Crim. L. & Criminology 661, 686; Barnett, *Some Distribution Patterns for the Georgia Death Sentence* (1985) 18 U.C. Davis L. Rev. 1327, 1363; Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach* (1980) 33 Stan. L. Rev. 1, 26.)

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

This Court has also consistently noted that a prosecutor's reliance on evidence during closing argument is a strong indication of how important the evidence was to the jury. (*People v. Powell* (1967) 67 Cal.2d 32, 55-57; *People v. Cruz* (1964) 61 Cal.2d 861, 868.) The prosecutor in this case relied throughout his argument on evidence of uncharged crimes which -- assuming error -- the state largely concedes the jury would not have heard. (20 RT 6779-6780, 6789, 6792-6793, 6794, 6795.) The state observes, however, that the jury would still have had before it the circumstances of the crime itself as well as the state's other aggravating evidence. (RB 100.)

The observation is entirely accurate. But as noted above, it does not tell the whole story in connection with a prejudice inquiry. The substantial mitigating evidence must also be factored into the calculus -- proper harmless error review requires an analysis of the entire record, not just those portions of the record which the state selectively culls to support its position. (*See, e.g., Rose v. Clark, supra*, 478 U.S. at p. 583.) Proper harmless error review also requires consideration of the fact that all that is necessary for an error to require reversal is that one juror could reasonably reach a different result absent the error. (*See People v. Soojian, supra*, 190 Cal.App.4th at p. 521; *People v. Bowers, supra*, 87 Cal.App.4th at pp. 735-736.)

Here, absent the trial court's error the jury would not have heard evidence of a

series of prior uncharged crimes which the prosecution introduced in aggravation and which the prosecutor asked the jury to rely on in imposing death. The defense presented a substantial case in mitigation, including evidence of severe mental illness beginning when defendant was but a child and continuing into adulthood, substantial organic brain dysfunction including a large brain tumor removed after the crime which could have impacted defendant's thinking and behavior and a troubled upbringing and childhood. Based on the record as a whole, the state cannot prove that deleting substantial aggravation from death's side of the scale -- aggravation which the prosecutor urged the jury to rely on in deciding if Mr. Miles should live or die -- was harmless beyond a reasonable doubt and would have made no difference. A new penalty phase is required.

VIII. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE VICTIM IMPACT EVIDENCE RELATING TO AN UNRELATED JUNE 1992 NON-CAPITAL CRIME.

Penal Code section 190.3, subdivision (b) provides that at the penalty phase of a capital trial the state may introduce evidence showing:

> "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence."

In *People v. Boyde* (1988) 46 Cal.3d 212 this Court held that section 190.3, subdivision (b) did *not* authorize admission of victim impact testimony which related only to uncharged crimes. The Court could hardly have been more clear, holding that section 190.3, subdivision (b) did not authorize admission of "testimony by victims of other offenses about the impact that the event had on their lives." (46 Cal.3d at p. 249.)

In *People v. Benson* (1990) 52 Cal.3d 754, 797 the Court reached precisely the opposite conclusion, holding that section 190.3, subdivision (b) *permitted* introduction of such evidence, and that such admission did not violate the federal constitution. Like *Boyde*, the cases which follow *Benson* could not be more clear -- "at the penalty phase the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victim's of those acts." (*People v. Price* (1991) 1 Cal.4th 324, 479.)

Neither *Benson* nor *Price* discuss *Boyde*. In this case, relying on *Benson*, the trial court permitted the state to introduce victim impact testimony from Bridgit Emanuelson about the impact on her life of a June 16, 1992 rape committed by defendant. (18 RT 6065-6066.)

In his opening brief, Mr. Miles recognized this stark split of authority. (AOB 243.) He argued that *Boyde* was correct and that a new penalty phase was required for three reasons. First, he performed a detailed statutory construction argument which showed that, in fact, *Boyde* correctly held that section 190.3, subdivision (b) did not authorize admission of victim impact testimony as to uncharged crimes. (AOB 244-253.) Second, as state courts around the country have held, admission of such evidence is irrelevant to a defendant's moral blameworthiness for the current crime and therefore its admission violates Due Process and the Eighth Amendment. (AOB 253-257.) Finally, he contended that the state could not prove the error harmless here in light of the remaining aggravating and mitigating evidence. (AOB 257-258.)

In connection with the state-law component of this claim, respondent takes an unusual tack. First, the state ignores the statutory construction argument altogether. (RB 100-103.) The state does not discuss the principles of statutory construction or case law discussed in Mr. Miles's opening brief or even the language of section 190.3, subdivision

(b) on which it purports to rely. (RB 100-103.)

Instead, the state cites several cases just like *Benson* which hold this type of evidence admissible. (RB 100.) As Mr. Miles himself noted in his opening brief, the state is entirely correct that this Court has issued opinions rejecting his position. (AOB 243, 252, *citing People v. Benson, supra*, 52 Cal.3d 797 and *People v. Price* (1991) 1 Cal.4th 324, 479.) That is precisely why Mr. Miles asked the Court to revisit this area and resolve the split of authority between *Boyde* and *Benson.*

But according to the state, there is no issue to resolve because there is no split of authority after all. Under the state's view, *Boyde* did not hold that victim impact evidence as to other crimes was not authorized by section 190.3, subdivision (b). (RB 101.) Instead, the state argues *Boyde* simply held that section 190.3, subdivision (b) did not permit admission of "testimony by victims of other offenses about the impact that the event had on their lives." (RB 101.)

The state never explains the difference between these two formulations. In fact, there is none. The state offered testimony from Bridgit Emanuelson about a prior rape, as it was permitted to do pursuant to Penal Code section 190.3, subdivision (b). The state then went further and offered victim impact testimony from her as to how that act had

impacted her life. (18 RT 6065-6066.) Pursuant to *Boyde*, the testimony the state offered was *inadmissible* under section 190.3, subdivision (b) precisely because it constituted -- in the state's own words -- "testimony by victims of other offenses about the impact that the event had on their lives." (RB 101.) Pursuant to *Benson* and its progeny, however, this very same testimony was *admissible* under section 190.3, subdivision (b).

It is time to recognize candidly that one of these two lines of authority is wrong, plain and simple. And at least as an initial matter, the question is one of statutory construction -- did the electorate intend section 190.3, subdivision (b) to apply to victim impact testimony from victims of other crimes?

Now, it is always possible that state could present an argument on the statutory construction issue which is more persuasive then the argument Mr. Miles presented in some detail in his opening brief. Perhaps the state could cite statutory language, case law or principles of statutory construction that support its position. But here, as noted above, the state elected *not* to make any argument at all on the merits of the statutory construction argument. (RB 100-103. *See People v. Bouzas*, *supra*, 53 Cal.3d at p. 480 [the state's failure to respond to an appellant's argument in its principal brief constituted a concession of the point]; *People v. Isaac*, *supra*, 224 Cal.App.4th at p. 147 [same]; *People v. Werner*, *supra*, 207 Cal.App.4th at p. 1212 [same].)

In fact, as the state's approach suggests, there is no real statutory construction argument to be made in support of the state's position. The language used in section 190.3, subdivision (c) that has been specifically held to authorize admission of victim impact evidence under the California death penalty scheme was *not* used in section 190.2, subdivision (b). When drafters of legislation use very different language in similar statutes "the normal inference is that the [drafters] intended a difference in meaning." (*People v. Trevino* (2001) 26 Cal.4th 237, 242. *Accord People v. Drake* (1977) 19 Cal.3d 749, 755.) So it is here as well. As a matter of statutory construction, *Boyde* is entirely correct.

In connection with the Eighth Amendment component of the claim, the state maintains that this Court has already rejected the argument. (RB 101.) As Mr. Miles noted in his opening brief, the state is correct. (AOB 257.) Mr. Miles noted numerous authorities from around the country that had reached a different result. (AOB 255-256.)

The state suggests in passing that these cases are based on state law rather than the federal constitution. (RB 102.) As to some of the authorities, the state is plainly wrong. (*See, e.g., Cantu v. State* (Texas 1997) 939 S.W.2d 627, 637 ["*Payne* does not contemplate admission of such evidence as permissible under the Eighth Amendment"].) As to others, the state is plainly right. (*See also Andrews v. Commonwealth* (Va. 2010)

699 S.E.2d 237, 271-273; *Gilbert v. State* (Okla. Crim. App. 1997) 951 P.2d 98, 116-117.) In any event, the state correctly notes that none of these many out-of-state authorities are binding on the Court.

True. But the existence of so many other states which have held this evidence irrelevant and inadmissible to the capital sentencing decision should at least give the Court pause. The state has not identified a single other state that has reached the conclusion it advocates here. And this Court's own precedents show a stark split on the state-law aspect of the question. The Court should reconsider its federal constitutional holdings on this point.

Finally, the state argues that if any error occurred it was harmless. (RB 102.) Once again, the state's argument is that the aggravating evidence was overwhelming. (RB 102.) As discussed above, however, while a review of the aggravating evidence is certainly proper in any harmless error calculus, the state fundamentally errs in refusing to consider any of the mitigating evidence that was also presented. (*See, e.g., Rose v. Clark, supra*, 478 U.S. at p. 583; *People v. Galloway, supra*, 100 Cal.App.3d at p. 559.) Here, as also discussed above, although the circumstances of the crime were aggravating (as in all capital cases), there was mitigating mental health evidence not only showing serious illnesses, but showing that the onset of mental health problems occurred when defendant

was just a child, there was mitigating evidence of organic brain tumors, there was mitigating evidence of low IQ, and there was mitigating evidence about Mr. Miles's childhood and upbringing. (18 RT 6198-6218, 6227-6232, 6238-6256, 6371-6377,6390-6404, 6418, 6422-6428, 6464-6471; 19 RT 6582, 6585, 6588, 6591, 6599, 6603, 6606, 6613, 6620.) In addition, this case -- while undeniably aggravating -- was single homicide committed by a defendant with no prior homicides in his background. (*Compare In re Carpenter*, *supra*, 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bittaker*, *supra*, 48 Cal.3d 1046 [defendant murdered five teenage girls]; *People v. Bonin*, *supra*, 47 Cal.3d 808 [defendant murdered ten people]; *People v. Ray*, *supra*, 13 Cal.4th 313 [defendant had two prior murder convictions]; *People v. Nicolaus*, *supra*, 54 Cal.3d 551 [defendant had three prior murder convictions and had been on death row].)

Considering both the aggravating and the mitigative evidence, the state cannot establish there is no reasonable possibility that one juror would have returned a life sentence in the absence of this error. (*See People v. Soojian*, *supra*, 190 Cal.App.4th at p. 521.) Accordingly, a new penalty phase is required.

IX. THE TRIAL COURT VIOLATED STATE LAW IN ADMITTING POWERFUL VICTIM IMPACT TESTIMONY.

At the penalty phase, the state introduced victim impact testimony from three family members of the victim: her sister, her father and her mother. (17 RT 6021-6024; 18 RT 6102-6105, 6107-6110.) This evidence was introduced in aggravation as a "circumstance of the crime" within the meaning of section 190.3, subdivision (a).

In his opening brief, Mr. Miles contended that when section 190.3 was enacted by the electorate in 1978, the term "circumstances of the crime" as used in section 190.3, subdivision (a) was taken from the 1958 death penalty statute. (AOB 263.) Pursuant to case law interpreting the phrase as used in the 1958 statute, this Court had held that the phrase "circumstances of the crime" did *not* permit introduction of victim impact testimony or argument absent evidence that defendant intended that impact. (AOB 263-267, *citing People v. Love* (1960) 53 Cal2d 843 and *People v. Floyd* (1970) 1 Cal.3d 694.) Pursuant to accepted principles of statutory construction, when the electorate used this same phrase in the 1978 statute, the electorate is presumed to have intended the same meaning in section 190.3. (AOB 267.) Mr. Miles recognized that this Court had held victim impact testimony admissible in *People v. Edwards* (1991) 54 Cal.3d 787 (and subsequent cases), but contended that *Edwards* was not faced with, and therefore did not decide, the statutory construction argument raised here. (AOB 268-269.) On the record

of aggravation and mitigation presented here, the improper admission of this powerful aggravating evidence requires reversal. (AOB 270-271.)

The state disagrees. The state first cites numerous cases where the Court has held that "victim impact evidence is properly admitted as a "circumstance of the crime under section 190.3, factor (a)." (RB 103.) These citations are accurate and, at their root, all rely on this Court's decision in *Edwards* for this conclusion. If *Edwards* is correct then so too are these cases, and Mr. Miles's argument must be rejected. But *Edwards* was not correct.

At its core, the statutory construction argument Mr. Miles is making in this case is based on three simple premises:

(1) When a statute passed by the electorate uses language which has already been interpreted, there is a strong presumption that the electorate intended to incorporate the same meaning when it used the same language. (*See In re Jeanice D.* (1980) 28 Cal.3d 210, 216.)

(2) The phrase "circumstances of the crime" as used in the 1978 statute at issue here had its genesis in the identical phrase in the 1977 law, which -- in turn -- came from the 1958 death penalty law. (*See* Former Penal Code § 190.1, added by Stats.1957, c. 1968, p. 3509, § 2, amended by Stats.1959, c. 738, p. 2727, § 1 [providing that in determining penalty, the jury could consider "the circumstances surrounding the crime . . . ."].)

(3) Under the 1958 statute, victim impact evidence and argument was

> *not* admissible in California. (*See People v. Love* (1960) 53 Cal.2d 843, 856-857 and n.3 [victim impact evidence]; *People v. Floyd* (1970) 1 Cal.3d 694, 721-722 [victim impact argument].)

The state does not take issue with either of the first two propositions. (RB 103-105.) Instead, the state only takes issue with Mr. Miles's third proposition. The state argues that "*People v. Love* . . . does not help Miles" because it excluded penalty evidence which was unduly inflammatory. (RB 104.) And according to the state, "*People v. Floyd* . . . is so inapposite that Miles must have cited it by mistake" because it held that arguments as to retribution constituted misconduct. (RB 104 and n.35.)

The state's discussions of *Love* and *Floyd* are puzzling and bear little relationship to the actual facts of those cases. Mr. Miles will start with *Love*.

There, this Court applied the 1958 death penalty law which permitted the state to admit evidence of the "circumstance[s] surrounding the crime." The Court explicitly held that under the 1958 law, the harm caused to victims could *not* be admitted absent evidence showing that the defendant intended to inflict that harm. In *Love*, at defendant's penalty phase the state was permitted to introduce several types of evidence to show the impact of the crime on the victim before she died; to wit, that she was in extreme pain. (53 Cal.2d at pp. 854-855.) This included photographic evidence and evidence from a

tape recording the victim made at the hospital. (*Ibid.*) The jury imposed death. Writing for the Court, Justice Traynor reversed the penalty, concluding that this evidence was not admissible under the 1958 death penalty law precisely because "[p]roof of such pain is of questionable importance to the selection of penalty unless it was intentionally inflicted." (*Id.* at p. 856.) Significantly, Justice McComb dissented, arguing that this evidence was admissible as a "circumstance surrounding the crime" within the meaning of Penal Code section 190.1, subdivision 1. (*Id.* at p. 858-859.)

In other words, the precise point of contention between the dissent and the majority opinions in *Love* was whether victim impact evidence -- in that case, evidence showing how the crime impacted the actual victim herself -- was admissible as a "circumstance surrounding the crime." Justice Traynor's majority opinion held that it was *not* admissible. When this same phrase was used in the 1978 death penalty law, principles of statutory construction which the state does not dispute required that it be given the same meaning there. Pursuant to *Love*, absent evidence showing that particular harm was intended by the defendant, "it is of questionable importance to the selection of penalty" and is not admissible as a "circumstance of the crime."

People v. Floyd, supra, 1 Cal.3d 694 confirmed this view and extended the analysis to prosecutorial argument about victim impact evidence. There, in penalty phase

closing arguments the prosecutor urged the jury to consider the effect of the victim's murder on the victim's wife. (*Id.* at p. 721.) The portion of the prosecutor's argument quoted in the Court's opinion presents a classic example of a victim impact argument:

> "Don't forget about . . . Mrs. Hartzel, his wife, you think a day will pass the rest of her life when she won't be reminded of the horror of what happened to her husband and suffer very much for it?" (1 Cal.3d at p. 721.)

Later the prosecutor again focused the jury's attention on the impact of the crime on the victim's wife, urging the jury to consider "Mrs. Hartzell. A great, great enormous loss. Sometimes its easy to forget about the victim and his loved ones." (*Ibid.*) The jury imposed death. (*Id.* at p. 702.) On appeal, this Court held that just as in *Love*, because there was no evidence that defendant intended this impact to Mrs. Hartzell, the victim impact argument was improper. (*Id.* at p. 722.)

Taken together, *Love* and *Floyd* establish that at the time the 1978 law was passed, the phrase "circumstance of the crime" had an established meaning that *precluded* admission of evidence or prosecutorial argument on victim impact evidence absent a showing that defendant intended that particular harm. In ruling that victim impact evidence and argument were admissible as a "circumstance of the crime" under section 190.3,subdivision (a), *Edwards* and its progeny never faced this argument.

It is worth noting here that for all its rhetorical ardor in disputing this contention, the state -- who was of course counsel in *Edwards* -- does not dispute that *Edwards* never addressed this statutory construction argument. With good reason. The briefing in *Edwards* shows beyond question that the argument Mr. Miles is making here -- based on principles of statutory construction, the language of the 1958 law, and this Court's cases interpreting that language -- was never raised. (*See People v. Edwards*, S004755, Appellant's Opening Brief at 1–438; *People v. Edwards*, S004755, Appellant's Supplemental Brief at 8–10; *People v. Edwards*, S004755, Appellant's Supplemental Closing Brief at 20–23; *People v. Edwards*, S004755, Respondent's Brief at 1–202; *People v. Edwards,* S004755, Respondent's Supplemental Brief at 2–7; *People v. Edwards*, S004755, Respondent's Supplemental Reply Brief at 3-4.) And as this Court has routinely held, cases are not authority for propositions not presented or considered. (*See, e.g., People v. Evans* (2008) 44 Cal.4th 590, 599.)

The fact of the matter is that Mr. Miles's argument was neither presented nor addressed in *Edwards.* That argument is based on three essential propositions: the state does not dispute the first two of these propositions and then badly misapprehends the third. Admission of the victim impact evidence was not authorized by section 190.3.

To be sure, as noted above, the state correctly observes that there is a great deal of

water under the bridge. Since *Edwards* first faced this issue in 1991, this Court has held victim impact evidence and argument proper in many cases. Mr. Miles certainly recognizes that the principle of stare decisis counsels in favor of retaining the *Edwards* rule.

But as this Court has noted on many occasions, "[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction." (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212–1213. *Accord People v. Mendoza* (2000) 23 Cal.4th 896, 924; *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924.) Stare decisis compels less deference to precedent in those areas where correction of an incorrect precedent through the Legislature is not practical. (*See, e.g., Board of Supervisors v. Local Agency Formation Co.* (1992) 3 Cal.4th 903, 921. *Compare People v. Latimer, supra*, 5 Cal.4th at p. 1213 [stare decisis compels the most deference when "the legislative power is implicated and [the Legislature] remains free to alter what [the Court] ha[s] done."].)

Here, although *Edwards* involved interpretation of a statute, it was a statute passed by the electorate, not the Legislature. Given the practical limitations of getting a corrective initiative on the ballot, and pursuant to the above authorities, stare decisis is of less importance in connection with the Court's initial interpretation of section 190.3,

subdivision (a). Admission of the victim impact evidence in this case was improper.

Alternatively, the state argues that any error was harmless in light of the nature of the crime and the remaining aggravating evidence. (RB 105.) As discussed above, however, the state's harmless error analysis tells only half the story. While consideration of the crime and the aggravation is important in any harmless error analysis, so too is consideration of the mitigating evidence presented. As discussed above, in light of the record as a whole -- considering both the aggravation and the mitigation -- the state cannot establish that there is no reasonable possibility the compelling victim impact evidence affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) Reversal of the penalty phase is required.

CONCLUSION

For all these reasons, and for the reasons set forth in Mr. Miles's opening brief, the conviction, competency finding, and penalty verdict must all be reversed.[20]

Dated: 12/15/14

Respectfully submitted,

Cliff Gardner
Attorney for Appellant

[20] Mr. Miles considers the remaining arguments and sub-arguments raised in his opening brief to be fully joined by the briefs currently on file with the Court. Accordingly no further discussion of those issues is required here. Mr. Miles intends no concession, abandonment or waiver as to any of these points.

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 34,201 words in the brief.

Dated: 12/15/14

Cliff Gardner

CERTIFICATE OF SERVICE

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

On December 17, 2014, I served the within

APPELLANT'S REPLY BRIEF

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

California Appellate Project
101 2nd Street
San Francisco, CA 94105

Office of the Attorney General
Kevin R. Vienna, Deputy Attorney General
P.O. Box 85266
San Diego, CA

Johnny Duane Miles
H-8-153
San Quentin State Prison
San Quentin, CA 94974

Hon. James Edwards
Superior Court
401 North Arrowhead Ave
San Bernardino, CA 92415

Office of the District Attorney
316 North Mountain View Ave
San Bernardino, CA 92415

I declare under penalty of perjury that the foregoing is true. Executed on December 17, 2014 in Berkeley, California.

Declarant