SUPREME COURT COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

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

Honorable Lantz Lewis, Judge

CLIFF GARDNER
(State Bar No. 93782)
RUDOLPH J. ALEJO
(State Bar No. 284302)
1448 San Pablo Avenue
Berkeley, CA 94702
Tel: (510) 524-1093
Fax: (510) 527-5812
Casetris@aol.com

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

ARGUMENT

I. BECAUSE MR. RICES IS BLACK, AND THE JURY WAS DECIDING WHETHER HE WOULD LIVE OR DIE, THE TRIAL COURT ERRED IN REFUSING TO STRIKE JURORS WHO CONCEDED THEY BELIEVED BLACKS WERE MORE VIOLENT THAN WHITES.

A. Introduction.

Defendant Jean Pierre Rices is black. (6 CT 1337.) Because he pled guilty, the only question the jury in this case would be asked to answer was whether he should live or die.

In answer to question 53 on the juror questionnaire, prospective juror T.T. admitted she "believe[d] black and mexican[s] are more likely to be violent." (6 CT 6237.) She forthrightly told defense counsel during voir dire that he would have an "uphill battle" to convince her to impose life without parole rather than death. (7 RT 1167, 1172.)

Similarly, prospective juror L.M. explained her view that "Hispanic [and] African-Americans" were more violent (19 CT 4479.) Before hearing any evidence in the case, L.M. advised defense counsel that she leaning towards imposing death. (7 RT 1167,

1189.)

Defense counsel challenged both jurors for cause. (7 RT 1232, 1233.) The trial court denied both challenges. (7 RT 1234, 1235.) Eventually, both T.T. and L.M. were called into the jury box. (8 RT 1276, 1277.) Defense counsel was forced to exercise peremptory challenges as to each. (8 RT 1276, 1277.) When counsel used up all 20 of his peremptory challenges, he sought additional challenges, both in writing and orally. (8 RT 1273-1281; 4 CT 931.)

In seeking additional challenges, counsel specifically argued the trial court's refusal to strike T.T. and L.M. for cause was incorrect. (4 CT 937-938.) As counsel explained, prospective juror T.T. had admitted "'I believe blacks and Mexicans are more likely to be violent.'" (4 CT 937-938.) And counsel noted that prospective juror L.M. wrote in her questionnaire that "she believes Hispanic and African Americans involved in gangs are more violent . . . ." (4 CT 938.) The trial court denied counsel's motion. (8 RT 1281.)

In Argument I of his opening brief, Mr. Rices argued that a new penalty phase was required. There were two distinct components of this argument. First, citing *Adams v. Texas* (1980) 448 U.S. 38 and California Code of Civil Procedure 225, subdivision

(b)(1)(C), Mr. Rices contended the trial court erred in refusing to strike jurors T.T. and L.M. for cause. (Appellant's Opening Brief ("AOB") 19-28.) Second, citing a long series of this court's cases, Mr. Rices contended that the trial court's error was preserved for review because counsel did all that existing law at the time of trial required him to do to preserve this error for review -- he used peremptory challenges on T.T. and L.M., exhausted his peremptory challenges and requested more. (AOB 29-33.)[1]

The state does not dispute that Mr. Rices is black. (Respondent's Brief ("RB") 11-19.) The state does not dispute that because he pled guilty, the only decision for the jury was whether he should live or die. (RB 11-19.) The state does not dispute that in her jury questionnaire prospective juror T.T. explained that she "believe[d] black and mexican[s] are more likely to be violent" and that defense counsel would have an "uphill battle" to convince her to impose life without parole rather than death. (RB 13.) Finally, the state does not dispute that in her jury questionnaire prospective juror L.M. explained her view that "certain races were more violent," specifying that races it was "Hispanic[s] [and] African-Americans" that were more violent. (RB 12.)

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[1] *See People v. Whalen* (2013) 56 Cal.4th 1, *People v. Jones* (2012) 54 Cal.4th 1, 45, *People v. Mills* (2010) 48 Cal.4th 158, *People v. Bonilla* (2007) 41 Cal.4th 313, *People v. Cunningham* (2001) 25 Cal.4th 926, *People v. Ochoa* (1998) 19 Cal.4th 353, *People v. Morris* (1991) 53 Cal.3d 152, and *People v. Bittaker* (1989) 48 Cal.3d 1046.

Nevertheless, for three reasons the state argues that the trial court's refusal to discharge T.T. and L.M. does not require a new penalty phase. First, the state argues the issue is not properly preserved for review because trial counsel did not express dissatisfaction with the jury as seated. (RB 15-16.) Alternatively, the state argues the trial court properly refused to discharge either T.T. or L.M. from sitting in judgment on this case. (RB 16-18.) Finally, relying primarily on a case decided five years *after* trial, the state argues that a new penalty phase is not required because defense counsel did not challenge for cause any of the jurors who actually sat on the case. (RB 18-19.)

Mr. Rices will address each of the state's arguments in turn. Because none have merit, a new penalty phase is required.

B. Trial Counsel Did All That The Law Required Him To Do At The Time Of Trial To Preserve This Issue.

The parties agree on the applicable legal principle. When a trial court denies a for-cause challenge to a prospective juror made by the defense, in order to challenge that ruling on appeal defense counsel must (1) use a peremptory challenge to remove the juror, (2) exhaust his peremptory challenges and (3) express dissatisfaction with the seated jury. (*People v. Whalen*, *supra*, 56 Cal.4th 1, 42; *People v. Jones*, *supra*, 54 Cal.4th 1, 45; *People v. Mills*, *supra*, 48 Cal.4th 158, 186; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 339;

People v. Cunningham, supra, 25 Cal.4th 926, 976; *People v. Ochoa, supra*, 19 Cal.4th 353, 444; *People v. Morris, supra*, 53 Cal.3d 152, 184; *People v. Bittaker, supra*, 48 Cal.3d 1046, 1087-1088.)

The state concedes that "appellant used peremptory challenges to remove the jurors in question." (RB 15.) The state concedes that defense counsel "exhausted all his peremptory challenges." (RB 15.) The state argues, however, that defense counsel "did not express dissatisfaction with the jury ultimately selected." (RB 15.)

The state recognizes that after the court's rulings defense counsel filed a written motion asking for additional peremptory challenges. (4 CT 931.) The state correctly notes, however, that defense counsel made this motion for additional peremptory challenges *before* the jury was actually constituted. (RB 15.) The legal argument at least implicit in this factual observation is that defense counsel could not really have been expressing dissatisfaction with the actual jury selected since that jury had not even been selected yet.

This argument makes some sense. And had defense counsel not renewed the motion later, the state might have a point. (*Compare People v. Bonin* (1988) 46 Cal.3d 659, 679 [denial of defense motion for additional peremptory challenges not preserved for

appeal where "defendant made his motion for additional peremptory challenges before he had exhausted the 26 peremptory challenges allotted to the defense" and defendant "never renewed the motion" afterwards].)

But whatever interesting legal issue this might present in another case, it presents no such issue here. The fact of the matter is that defense counsel explicitly renewed this very same motion *after* the jury was actually selected. (8 RT 1281.) Indeed, the record could not be much clearer on this point. Immediately after the jury was selected, the following exchange occurred between defense counsel Chambers and the trial judge:

> MR. CHAMBERS: . . . Your honor, I would renew my request for additional peremptory challenges based on the motion I filed this morning. I know the court has already ruled on the motion, but I am renewing it at this time.
>
> THE COURT: Thank you Mr. Chambers. And I have considered the arguments raised in the moving papers, the arguments that were presented, and that motion is again denied. (8 RT 1281.)

Without explanation the state suggests that defense counsel's decision to renew the motion for additional challenges after the jury was selected "did not express dissatisfaction with the jury as constituted because it referenced a motion that, again, was filed before a single juror had been seated for final selection." (RB 15.) With all due respect, this is simply a non-sequitur.

If defense counsel had genuinely been satisfied "with the jury as constituted" after the jury was selected, there would have been no reason at all to renew the motion for additional peremptory challenges. In the real world setting of trial, the only reason a lawyer moves for additional peremptory challenges after a jury has been seated is because the lawyer is dissatisfied with the jury and wants additional challenges to challenge some of the seated jurors.

Although it is not entirely clear, the state may be suggesting that the act of seeking additional peremptory challenges after the jury is seated is not sufficient to express dissatisfaction with the jury. If this is the state's suggestion, it is worth noting that the state does not cite a single case that has ever advanced such a thesis.

In fact, the law has long been to the contrary. (*See, e.g., People v. Caldwell* (1980) 102 Cal.App.3d 461, 473 [trial court denies three challenges for cause, defendant uses peremptory challenges to dismiss jurors, defense exhausts challenges and "moved for additional peremptory challenges;" held, issue properly preserved for review]; *Darcy v. Moore* (1942) 49 CalApp.2d 694, 701 [trial court denies challenges for cause, defendant uses peremptory challenges to dismiss jurors, defense exhausts challenges; held, "[s]ince petitioner requested and was denied additional peremptory challenges, he is entitled to urge on appeal the point of the alleged erroneous disallowance of his challenge for

cause."]; *compare People v. Terry* (1994) 30 Cal.App.4th 97, 104 ["failure to seek an additional peremptory challenge . . . will be deemed waiver of a claim of prejudice from the erroneous denial of a challenge for cause."]; *People v. Shambatuyev* (1996) 50 Cal.App.4th 267, 272 [defendant arguing that his trial lawyer properly preserved an objection to the trial court's denial of a for-cause challenge was not entitled to augment the record on appeal to include a transcript of voir dire where the defendant did "not indicate that the voir dire transcript he seeks will demonstrate . . . a motion for an additional peremptory challenge."].) In light of this case law, counsel's decision to seek additional peremptory challenges properly preserved this issue for review.[2]

C. The Trial Court Erred In Refusing To Discharge Prospective Jurors T.T. And L.M.

Alternatively the state argues that the trial court properly refused to discharge T.T. and L.M. for cause. The argument need not long detain the Court.

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[2] It is worth noting that this Court has repeatedly noted the *absence* of a motion for additional peremptory challenges in finding that trial counsel had *not* preserved the issue for appeal. (*See People v. Whalen, supra*, 56 Cal.4th 1, 42; *People v. Ramirez* (2006) 39 Cal.4th 398, 448 [trial court denied for-cause challenge to alternate juror, defendant exhausted peremptory challenges to remove this juror but "defendant did not request additional peremptory challenges" as to the alternates; held, claim not preserved since defendant "fail[ed] to express dissatisfaction with the jury."].)

The state concedes the trial court was required to discharge for cause any juror whose views would "prevent or substantially impair" the performance of his duties as a juror. (RB 16.) Here, defendant was black, the only question the jury would be asked to decide was whether he should live or die, and prospective juror L.M. opined that "Hispanic [and] African-Americans" were more violent than other people. (19 CT 4479.) The state concedes L.M. was not asked even a single question about her views as to black people at during jury voir dire, but nevertheless argues that the trial court's decision not to strike her is entitled to deference. (RB 16-17.) The state notes that in her questionnaire L.M. said she "had a lot of social contact with people of other races and ethnicities . . . nor had she ever had a bad experience with an African-American individual." (RB 17.) The state cites this as reassuring evidence that L.M. "did not harbor any bias." (RB 17.)

The state makes a similar argument as to prospective juror T.T. Thus, the state concedes T.T. admitted her view that "black & mexican [sic] are more likely to be violent." (RB 17.) As it did with L.M., the state argues she "was unbiased," pointing out that she too "never had a negative experience with an African-American person." (RB 17.)

In arguing that the Court should find that the for-cause challenges were properly denied, the state urges the Court to defer to the trial court's decision because the trial

judge saw and heard these jurors. (RB 16.) The state notes that deference is generally appropriate when a juror has made conflicting statements or given equivocal statements. (RB 16.)

But the question of whether deference should be provided in this case is not quite so neat. As to L.M., for example, the state concedes that during voir dire "she was not questioned about" her belief that black people are more violent. (RB 17.) In fact, L.M. was asked only one question during the voir dire:

> BY MR. CHAMBERS:
>
> Q: Juror No. 37, I looked at the last page of the questionnaire. Do you want to read it? "I'm very in favor of the death penalty if charged guilty in murder." Is there a reasonable possibility that you could vote for life in prison?
>
> A: Yeah. It depends on the circumstance but I think I'd lean more towards the death penalty. I'd lean more towards the death penalty.

That was it. There was not a single question about her view that blacks were more violent. No inquiry was made in this area at all. So there were no conflicting statements, or equivocal answers, which the trial court could evaluate by "seeing and hearing" this juror testify. Applying deference in this situation -- when the entire reason for the rule of deference does not apply -- makes little sense. Because the trial judge's ruling was not

made on the basis of the one-question voir dire -- which he saw and heard -- but was instead based entirely on his evaluation of the jury questionnaire, deference is simply inappropriate here. (*Compare People v. Riccardi* (2012) 54 Cal.4th 758, 779 ["In reviewing dismissals for cause based upon only written answers, we apply a de novo standard of review."].)

The same is true with respect to T.T. During voir dire, T.T. said she was leaning toward the death penalty, "at this point I would say the death penalty," but it was "not definite" and she would look at the evidence and listen to both sides. (7 RT 1172.) Later she repeated that she would consider both sides. (7 RT 1212.) As with L.M., however, no inquiry at all was made about T.T.'s view that blacks were more violent. Here too there were no conflicting statements, or equivocal answers, which the trial court could evaluate by "seeing and hearing" this juror testify.

Fortunately, there is no need to dwell on the question of whether a full measure of deference is appropriate given the actual record in this case. This is because, as this Court has noted time and again, "although appellate courts should generally defer to trial courts in factual or discretionary matters, deference is not abdication." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1291. *Accord People v. Lucas* (2014) 60 Cal.4th 153, 277; *People v. Batts* (2003) 30 Cal.4th 660, 703; *In re Jones* (1996) 13 Cal.4th 552, 561.)

Here, even deferring to the trial court, the decisions as to L.M. and T.T. cannot be upheld. The state was seeking to sentence Mr. Rices, a black man, to death. One of the state's arguments for seeking death was that Mr. Rices would be dangerous in the future. (19 RT 2752-2753.) The trial court refused to discharge two jurors who admitted their views that blacks were more violent than whites. At no point during the voir dire was either juror questioned about these views, at no point did either juror agree to put aside this view in deciding the case and at no point did the trial court ever find that these jurors would indeed set aside this view.

As noted, the state offers the reassuring observation that both prospective jurors had experiences and contact with people of other races, and neither juror had ever had a bad experience with an African American. (RB 17.) But this does little to advance the state's cause. If anything, it suggests an even more ingrained bias. After all, if neither T.T. nor L.M. had ever personally had an adverse experience with a black person, their belief that blacks are more violent is necessarily attributable to an ingrained prejudice rather than a life experience. That certainly does not suggest that either juror should have been permitted to sit in judgment, deciding whether Mr. Rices should live or die.

The state cites *People v. Jackson* (1996) 13 Cal.4th 1164 and suggests that it is "instructive." (RB 18.) Mr. Rices agrees, but not in the way the state argues.

During the voir dire in *Jackson* one juror said he had been "raised with racial prejudice" but had "grown out of it." (13 Cal.4th at 1199.) He expressed his belief -- based on media accounts -- "that Blacks were more likely to have committed a crime than Whites" but he then agreed he would "judge each case individually." (*Ibid.*) The trial court denied defense counsel's for cause challenge to this juror. Given that there had been voir dire on the actual question of the juror's racial views, the prospective juror had given equivocal answers, and had promised to set aside any improper views, this Court deferred to the trial court and ruled there had been no abuse of discretion in denying the challenge.

Jackson is distinguishable in every respect. Here, as noted above, neither juror T.T. nor L.M. were asked about their view as to whether blacks were more violent than whites. Thus, neither of them gave any equivocal answers on the subject -- the only information in the record on this subject are their unequivocal answers on the jury questionnaire that blacks are indeed more violent than whites. Nor was either juror asked whether they could set aside their views that blacks were more violent and decide this case individually. The fact that both L.M. and T.T. agreed to hear both sides of the case says nothing at all about whether they would set aside their ingrained view that blacks

were more violent. *Jackson* does not justify the trial court's ruling here.[3]

D. In Light Of The Law Which Existed At The Time Of Trial, A New Penalty Phase Is Required.

The state's final argument is that even if the trial court erred, and even if that error was preserved for review, reversal of the penalty phase is not required because the trial record is insufficient to show prejudice. (RB 18-19.) The state argues that to show prejudice the trial record must show (1) defense counsel made an unsuccessful "motion in the trial court" to challenge a sitting juror for cause and (2) "a juror who should have been removed for cause sat on the jury that ultimately decides the case." (RB 19.) The state correctly notes that in *People v. Black* (2014) 58 Cal.4th 912 this Court held that these two requirements were indeed necessary to establish prejudice.

The state's position requires this Court to answer two questions. The first is a

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[3] It is also worth noting that the juror's particular bias in *Jackson* -- "that Blacks were more likely to have committed a crime than Whites" -- had little to do with the state or defense theories presented in *Jackson* at either the guilt or penalty phase. The defense there conceded Jackson was involved in a crime, contending only that he had withdrawn from participation before the murder was committed. (13 Cal.4th at p. 1192.) In contrast, because Mr. Rices pled guilty in this case the only question was whether he should live or die, and the prosecutor urged death in part based on future dangerousness. In this situation there is a far greater likelihood that the bias expressed by prospective jurors T.T. and L.M. -- a belief that blacks were more *dangerous* -- rendered them "substantially impair[ed]" in their ability to resolve the only question that would be presented to them.

question the Court has never actually addressed: can the standard set forth in *Black* in 2014 -- requiring trial counsel to have made a "motion in the trial court" challenging a sitting juror for cause -- be fairly and constitutionally applied to a case tried in 2009? If the answer is no, the Court must then decide whether prejudice has been shown under the standard that existed when the case was actually tried in 2009.

As more fully discussed below, *Black* cannot fairly be applied to this case. At the time of trial the law was quite clear as to what defense counsel had to do to set the record for a showing of prejudice in this situation. The law did *not* require counsel to file a "motion in the trial court" to challenge a sitting juror for cause, nor did it require the record to show "a juror who should have been removed for cause sat on the jury that ultimately decides the case." Applying these subsequently-created requirements to this case, requirements of which trial counsel here had no notice, would violate due process and the right to effective counsel. And as also discussed below, application of the rule in effect at the time of trial -- of which counsel was aware -- requires a new penalty phase.

1. Because trial counsel established a sufficient record for a showing of prejudice under the law as it existed in 2009, it would be unfair to retroactively apply a higher standard of prejudice created five years after trial.

As noted, trial in this case was in 2009. At the time the law was clear about the

record a trial lawyer needed to establish in order to ensure reversal where the trial court had erroneously denied a for-cause challenge. In a series of early cases -- some more than a century old -- this and other California courts had held that the erroneous denial of a for-cause challenge required reversal whenever the defendant used all available peremptory challenges and was "obliged afterward to accept an objectionable juror, without power to use a peremptory challenge upon him." (*People v. Helm* (1907) 152 Cal. 532, 535. *Accord Darcy v. Moore, supra,* 49 Cal.App.2d 694, 700 ["in order to constitute legal basis for assignment of prejudicial error" the defendant must show "that he has not only exhausted all of his peremptory challenges, but that he has in some appropriate manner manifested his dissatisfaction with the jury as completed."].) That was all the trial record had to show in order to obtain relief.

In 1989 this Court reiterated the same conclusion. (*See People v. Bittaker*, *supra*, 48 Cal.3d 1046.) There defendant was charged with capital murder. During voir dire the trial court denied five for-cause challenges made by the defense. Defense counsel later used peremptory challenges to remove these five prospective jurors. On appeal defendant argued that the trial court deprived him of his right to an impartial jury because it required him to use peremptory challenges to remove the five prospective jurors it should have removed for cause. Echoing the rationale it used in *Helm*, the Court noted that if defendant could show that "his right to an impartial jury was affected because he was

deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal." (48 Cal.3d at p. 1088.) No further showing of prejudice was required. As lower courts have properly concluded, under *Bittaker* "if the defendant can show that he was required to use his peremptory challenges to remove jurors as to whom the trial court erroneously denied a challenge for cause, and that he exhausted his peremptory challenges and thus was unable to excuse one or more jurors who sat on his case, his right to an impartial jury necessarily was affected and he is entitled to reversal." (*People v. Baldwin* (2010) 189 Cal.App.4th 991, 999–1000.)

Several years after *Bittaker*, however, and without discussing *Bittaker* (or *Helm*) at all, the Court reached a very different result. In *People v. Yeoman* (2003) 31 Cal.4th 93 the Court announced a standard of prejudice which imposed a substantially higher burden on defendants. Like *Bittaker*, the defendant in *Yeoman* had been charged with capital murder. Like *Bittaker*, during voir dire the trial court denied several for-cause challenges made by the defense, defense counsel later used peremptory challenges to remove these prospective jurors, he exhausted all his peremptory challenges and expressed dissatisfaction with the jury. And like *Bittaker*, defendant contended on appeal that the trial court erred in denying his for-cause challenges. This Court rejected the claim, noting that to show prejudice defendant would have to show that a juror sat on his jury who should have been discharged for cause. (31 Cal.4th at p. 114.) As the state admits,

Yeoman went further and held that a defendant could not show prejudice where trial counsel had not "challenge[d] for cause any sitting juror." (*Ibid. See* RB 19.) Thus, as the state correctly concludes, in order to show prejudice under *Yeoman* defense counsel must have "made a motion in the trial court" to dismiss a sitting juror for cause. (RB 19.)

At this point in time -- 2003 -- the matter stood as follows. Under *Bittaker*, a defendant showed prejudice simply by showing that the trial record proved "he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case." (48 Cal.3d at p. 1088.) There was no need to show that a juror sat who should actually have been discharged for cause, and there no requirement that trial counsel unsuccessfully challenge for cause a juror who actually sat in the case. But under the Court's more recent precedent in *Yeoman*, to show prejudice a defendant would not only have to show that a juror sat who should have been discharged for cause, but he had to show that defense counsel actually had challenged for cause a sitting juror. (31 Cal.4th at p. 114.)

Had this case been tried prior to 2005, the state would have a good argument that defense counsel was on notice that the higher *Yeoman* standard was properly applicable. But two years after *Yeoman*, the Court unanimously announced a *third* standard -- a hybrid approach that combined both *Yeoman* and *Bittaker*. In *People v. Blair* (2005) 36

Cal.4th 686 the Court held that to prove prejudice in this situation the defendant could meet *either* the *Bittaker* standard *or* the *Yeoman* standard:

> To establish that the erroneous inclusion of a juror violated a defendant's right to a fair and impartial jury, the defendant must show *either* that a biased juror actually sat on the jury that imposed the death sentence, *or* that the defendant was deprived of a peremptory challenge that he or she would have used to excuse a juror who in the end participated in deciding the case. (36 Cal.4th at p. 742, emphasis added.)

In the years after *Blair* was decided in 2005 -- and well before the beginning of trial here in May of 2009 -- this Court reiterated the hybrid approach of *Blair* on several occasions. (*See, e.g., People v. Lewis* (2008) 43 Cal.4th 415, 495; *People v. Hoyos* (2007) 41 Cal.4th 872, 905 n.18.) This hybrid rule was the rule in place when the 2009 trial occurred in this case.

Five years *after* trial in this case, the Court addressed the conflict between *Yeoman* and *Bittaker*. In *People v. Black, supra*, 58 Cal.4th 912 the Court noted the conflict between these two approaches and concluded that "*Yeoman* sets forth the correct standard for a defendant to demonstrate prejudice after properly preserving a claim that the defense used peremptory challenges to cure a trial court's erroneous denial of one or more for-cause challenges." (58 Cal.4th at p. 920.) Thus, it is *now* quite clear that in trials after the *Black* decision, trial counsel is on notice of what he or she must do to create the

strongest possible record for reversal after the erroneous denial of a for-cause challenge -- the record must affirmatively meet the *Yeoman* standard and show that (1) trial counsel moved to discharge a sitting juror for cause and (2) a juror actually sat on the jury who should have been discharged for cause.

But it is equally clear that this was *not* the rule prior to *Black*. In the years prior to *Black*, when trial in this case actually occurred, the *Blair* rule was in effect. Under *Blair*, trial counsel was on notice that to ensure a reversal after the erroneous denial of a for-cause challenge the defendant could meet *either* the *Bittaker* standard or the more rigorous *Yeoman* standard. Under *Blair*, there was no need for defense counsel to meet the *Yeoman* requirements of (1) challenging a sitting juror for cause and (2) showing that a juror who should have been discharged for cause actually sat on the case.

In this situation the *Black* standard cannot fairly (or constitutionally) be applied to this case. In a closely related context, where the Court changes the rules for preserving an issue on appeal, federal and state principles of due process and fundamental fairness prevent retroactive application of the new rule. (*See e.g.*, *People v. Collins* (1986) 42 Cal.3d 378, 388.) "To deny defendants their right to appeal on [an] issue because [they followed existing law] . . . would be to change the rules after the contest was over." (*Ibid.*)

As Judge Alarcon explained, "we refuse to impose subsequently-created requirements . . . on a defendant who did all that was necessary to comply with the law applicable at the time of his trial. By doing so, we avoid the brutal absurdity of commanding a man today to do something yesterday." (*United States v. Givens* (9th Cir. 1985) 767 F.2d 574, 579.) Thus, a decision changing the rules for preserving an issue on appeal will only be applied to "trials beginning after [the new] decision is final." (*People v. Collins, supra*, 42 Cal.3d 378, 388. *Accord People v. Welch* (1993) 5 Cal.4th 228, 238 [court holds that defense lawyers must challenge probation conditions in trial court in order to preserve the issue for appeal, but makes ruling prospective only]; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 716 [court holds that challenges to juvenile court's fitness finding must be raised in a pretrial writ, but makes ruling prospective only because "the reported cases provide conflicting directions as to the proper manner in which and time at which a challenge to a certification order should be asserted."].)

The same rule should be applied here. The state correctly notes that defense counsel here did not file "a motion in the trial court" (RB 19) to "challenge for cause any sitting juror" as *Yeoman* and *Black* required. (31 Cal.4th at p. 114.) But as the time of trial, when *Blair* was the law of the land, defense counsel could not possibly have known this was a requirement of the prejudice calculus.

As the Court is no doubt aware, one of the most important roles of any trial lawyer is to ensure the record is adequate to preserve claims on appeal. Counsel's role is not only to preserve the record as to the existence of error, but to do what he or she can to preserve the record in connection with prejudice as well. Retroactively changing the rules on how prejudice must be shown for a particular error -- when (as here) the showing of prejudice is one that is largely within the control of defense counsel -- is no more fair than retroactively changing the rules on how to preserve error in the first place. In short, it would violate due process and the right to counsel to apply the 2014 standard of prejudice to the 2009 trial in this case. Instead, the standard of prejudice which can and should fairly be applied to this case is the standard trial counsel could reasonably have assumed was controlling when he tried this case (and created his record) in 2009 -- the standard set forth in *Blair*. It is to application of that standard that Mr. Rices now turns.

2. Applying the standard of prejudice extant in 2009, a new penalty phase is required here because defense counsel was erroneously deprived of numerous peremptory challenges he would have used to excuse jurors who participated in deciding the case.

As noted above, under the *Blair* standard which applied to this 2009 trial, the erroneous refusal to grant a for-case challenge required reversal whenever the trial record showed "that the defendant was deprived of a peremptory challenge that he or she would have used to excuse a juror who in the end participated in deciding the case. (36 Cal.4th

at p. 742.) In his opening brief Mr. Rices addressed this standard directly, contending that the entire reason defense counsel sought additional challenges was that there were number of jurors he would have wanted to excuse with additional challenges. (AOB 30-32.)

As also noted above, the state argues that prejudice has not been shown under the *Black* standard. (RB 18-19.) But the state does not dispute that under the prior standard, reversal is required. (RB 11-19.) For good reason.

Seated juror 4 had been the victim of several violent crimes, believed the punishment imposed in those cases was not harsh enough, stated she would give more weight to the testimony of police officers than other witnesses and "favor the side that had law enforcement officers as witnesses," said she would not fully consider mitigating evidence of a bad childhood, admitted that her opinion of Mr. Rices was that "he sounds obviously violent and without regard for human life" and offered her view that the death penalty was used too seldom. (7 CT 1509, 1511, 1512, 1518; 6 RT 917.) Seated juror 10 was strongly in favor of the death penalty; his view was that if a defendant took an innocent life, he should get death. (8 CT 1652.) Seated juror 6 said he would give more weight to the testimony of police and believed that death was proper whenever a defendant killed "willfully." (7 CT 1555, 1564.)

These were plainly jurors whom defense counsel would have discharged if he had additional peremptory challenges. After all, the aggravation in this case primarily involved testimony from numerous law enforcement officers. One theory of aggravation was that defendant would be dangerousness in the future. There was no dispute that the killing in this case was willful and involved innocent victims. And the mitigation depended largely on evidence of defendant's severe childhood and difficult upbringing. In such a case, no defense lawyer with remaining peremptory challenges would seat jurors who (1) admitted they would favor law enforcement testimony, (2) believed defendant was "without regard for human life," (3) believed death was proper if the killing was willful or involved innocent victims and (4) would refuse to fully consider childhood evidence as mitigation. A new penalty phase is required.

II. BECAUSE MR. RICES'S CHILDHOOD AND UPBRINGING WERE THE CENTRAL THEORIES OF MITIGATION, THE TRIAL COURT ERRED IN REFUSING TO STRIKE JURORS WHO EXPLICITLY ADMITTED THEY WOULD NOT CONSIDER CHILDHOOD EVENTS IN MITIGATION.

As the state recognizes in its brief, "the defense presented evidence in mitigation, mostly focusing on appellant's childhood." (RB 7.) In light of what would be the defense focus on Mr. Rices's childhood question 90 of the jury questionnaire asked jurors if they would be "willing to weigh and consider the defendant's childhood and upbringing as factors in reaching your decision" as to whether Mr. Rices would live or die.

In response to this question, prospective juror V.B. checked the "No" box and explained that "everyone has to be responsible for their actions." (10 CT 2114.) Prospective juror T.T. also stated in her questionnaire that she would refuse to consider childhood and upbringing as mitigating evidence. She noted that although "childhood upbringing has a lot to do with it everyone has the choice to make positive changes in their life. A lot of people have horrible childhoods and become wonderful adults. Childhood upbringing should not be an excuse for bad choices in life." (25 CT 6243, 6245.)

Defense counsel challenged both jurors for cause. (7 RT 1145, 1231-1232.) He renewed his challenges at the end of voir dire, explaining that V.B. was "unwilling to

fairly assess mitigating evidence" and T.T. "demonstrates an inability to fairly consider mitigation evidence." (4 CT 937-938.) The trial court refused to reconsider its rulings. (8 RT 1253.)

In Argument II of his opening brief, Mr. Rices contended that a new penalty phase was required for two reasons. First, Mr. Rices contended that the trial court's refusal to discharge both V.B. and T.T. was error. (AOB 34-38.) Second, the trial court's error was preserved for review because counsel used peremptory challenges on V.B. and T.T., exhausted his peremptory challenges and requested more. (AOB 38-40.)

In its brief, the state concedes that prospective jurors V.B. and T.T. both indicated they would *not* "be willing to weigh and consider the defendant's childhood and upbringing as factors in reaching your decision." (RB 20.) Nevertheless, for many of the same reasons discussed above in Argument I, the state argues that the trial court's refusal to discharge V.B. and T.T. does not require a new penalty phase. First, the state repeats its argument that the issue was not properly preserved for review because defense counsel did not express dissatisfaction with the "jury ultimately selected." (RB 23.) But as discussed in detail above, this factual predicate is simply false. While it is true that trial counsel moved for additional peremptory challenges before the jury was selected, the fact of the matter is that he explicitly renewed that motion *after* the jury was selected, and that

renewed motion was denied. (8 RT 1281.) And the case law has long held that a request for additional peremptory challenges is a sufficient expression of dissatisfaction with the jury to preserve this issue for review. (*See, e.g., People v. Caldwell, supra,* 102 Cal.App.3d 461, 473; *Darcy v. Moore, supra,* 49 Cal.App.2d 694, 701.)

Alternatively, the state argues the trial court properly refused to discharge either V.B. or T.T. from sitting in judgment on this case. (RB 23-26.) The state repeats its position that deference to the trial judge is warranted here, and notes that both jurors said they would consider both punishments and listen to all the evidence, both aggravating and mitigating. (RB 25.) The state adds that the court had told the jurors they must weigh "aggravating and mitigating circumstances," defined mitigation and told the jurors that this included "sympathy or compassion for the defendant or anything you consider a mitigating factor." (RB 25-26.)

Here too however the question of deference is not quite so clear as the state would suggest. As to V.B., the state concedes that "[d]uring voir dire, neither lawyer followed up substantially with V.B." (RB 20.) The concession is something of an understatement. (7 RT 1090, 1131.) The voir dire showed only that V.B. believed in an "eye for an eye" and he could choose either punishment. (7 RT 1090, 1131.) There is not a single question about his view that he would not consider childhood evidence as mitigating

evidence. There are no conflicting statements about whether childhood evidence can be considered mitigation. There is no equivocation as to whether childhood evidence can be considered mitigation. There is simply nothing to defer to here.

The record is similar with respect to T.T. The state recognizes that the actual voir dire of T.T. did not involve any questions at all about her refusal to consider childhood evidence as mitigation. (RB 21-22.) Instead, as discussed above, her short voir dire indicated only that she was leaning towards death but would listen to the evidence presented. (7 RT 1172, 1212.) Again there are neither conflicting nor equivocal statements about whether childhood evidence is mitigating.

Onca again, however, there is no need to dwell on the question of whether a full measure of deference is appropriate given the actual record in this case. As noted above, "deference is not abdication." (*People v. Johnson*, *supra*, 47 Cal.3d 1194, 1291.) And here too, even deferring to the trial court, the decisions as to V.B. and T.T. cannot be upheld. The state was seeking a death sentence. As the state forthrightly concedes in its brief, the mitigation evidence focused "mostly . . . on appellant's childhood." (RB 7.) The trial court refused to discharge two jurors who admitted their views that childhood evidence was not mitigating and they would not consider it.

The state correctly notes that the court made certain comments to the jury during voir dire. As noted, the state relies on the fact that the court told jurors they must weigh "aggravating and mitigating circumstances," it defined mitigation and told jurors that this included "sympathy or compassion for the defendant or anything you consider a mitigating factor." (RB 25-26.) Noticeably absent from the trial court's comments, however, is any statement -- or even suggestion -- that evidence of a defendant's childhood and upbringing is in fact mitigating evidence. When a prospective juror has declared a specific view that childhood evidence is *not* mitigating in the first place, broadly telling that juror he must weigh aggravating and mitigating evidence does nothing to correct the misunderstanding.

In urging a contrary result, the state cites *People v. Riggs* (2008) 44 Cal.4th 248. (RB 24-25.) There, defendant was charged with capital murder. In her questionnaire a prospective juror said that she did not see the relevance of evidence regarding "someone's past." (44 Cal.4th at p. 286.) During voir dire this subject was covered in some detail and the juror agreed she would follow the court's instructions on aggravation and mitigation. (*People v. Riggs*, S043187, Reporter's Transcript 1117-1118.) The trial court denied defendant's for-cause challenge to this juror ruling that "I believe her when she does so express she can follow the court's instructions and apply them promptly and is a qualified juror for this panel." (*Id.* at 1130-1131.) On appeal the Court held that the

juror's initial statement about her reluctance to recognize the relevance of childhood mitigation was "properly understood as explaining her then-existing view of the relative weight of one particular type of mitigating evidence." (44 Cal.4th at p. 287.) On this record the Court deferred to the trial court's view that the "prospective juror can conform his views to the requirements of the law . . . ." (44 Cal.4th at p. 288.)

Riggs is very different from this case. Here, the subject of T.T. and V.B.'s refusal to consider childhood evidence as mitigating was *not* covered extensively in voir dire. In fact, as noted above, it was not covered at all. Here, the court did *not* receive an assurance from either juror that they would follow the court's instructions and consider this evidence as mitigation. And here, the court's comments did *not* in any way inform the jurors that childhood evidence was in fact mitigating. The fact that both V.B. and T.T. generally agreed to hear both sides of the case says nothing at all about whether they would set aside their views that they would not consider childhood evidence as mitigation. *Riggs* does not justify the trial court's ruling here.

Finally, the state once again relies on this Court's 2014 decision in *People v. Black, supra*, 58 Cal.4th 912 and repeats its argument that Mr. Rices cannot show prejudice because (1) his trial lawyer "challenged none of the jurors for cause" that sat on his jury and (2) the record does not show "that an incompetent juror was forced upon

him." (RB 26.) For the same reasons as discussed above, however, application of the *Black* test here would violate due process and the right to counsel. And as discussed above and in Mr. Rices's opening brief, application of the standard of prejudice in place when this case was actually tried requires a new penalty phase.

III. THE TRIAL COURT ERRED IN PRECLUDING DEFENSE COUNSEL FROM FULLY VOIR DIRING JURORS TO SEE IF LIFE WAS AN OPTION THEY WOULD CONSIDER.

The jury questionnaire asked a series of question about the jurors' views in connection with each area of mitigating evidence that would be presented: drugs and alcohol, domestic violence and childhood and upbringing. (*See* 7 CT 1537-1538, 1543.) During voir dire, the defense sought to gather similar information about an important area of aggravating evidence: prior convictions. (6 RT 893.) The trial court refused to permit any such questioning. (6 RT 893-896.)

Defense counsel later narrowed and renewed his motion, seeking permission to voir dire to learn if jurors could still consider life where a defendant had a prior attempted murder conviction. (7 RT 1057-1058.) The court denied this motion as well. (7 RT 1059.) When the matter was discussed a third time, the court made quite clear that defense counsel was not permitted even to "give the jury hints as to what they are going to be hearing about." (7 RT 1101.)

In Argument III of his opening brief, Mr. Rices contended that the trial court's limitation on defense counsel's ability to voir dire the jury was improper, violating Mr. Rices's rights to an impartial jury, a fair trial and the effective assistance of counsel.

(AOB 41-52.) There were two parts to this argument. First, the trial court's ruling was improper because the area about which defense counsel wanted to ask prospective jurors -- involving other crimes -- was an area which has long been recognized as critical to the sentencing decision. (AOB 48-51.) Second, the state could not prove the error harmless. (AOB 51-52.)

The state first argues there was no error. The state's position is that "the trial court did not abuse it's (sic) discretion by not permitting appellant to obtain a commitment from prospective jurors about which punishment they would chose (sic) if confronted with certain facts." (RB 37.)

Mr. Rices agrees. If that was what the trial court did -- prevent counsel from "obtain[ing] a commitment" from jurors on what punishment they would impose -- Mr. Rices would have no issue with the court's ruling. But that is *not* what the trial court did, and it is not even very close.

At no point during the voir dire was defense counsel seeking "to obtain a commitment from prospective jurors about which punishment they would chose (sic) if confronted with certain facts." As the state observes, that would be plainly improper and the trial court would be fully entitled to preclude such an inquiry. Instead, as defense

counsel made clear, he was simply seeking to determine whether the type of aggravation the state intended to present "will prohibit them [the jurors] from giving [defendant] life, or they will mandatorily go to death." (6 RT 893.)

Significantly, the state does not dispute that this is *exactly* what prosecutors are permitted to do. When there is important mitigating evidence which will be presented during the penalty phase, prosecutors are fully entitled to asks jurors about that mitigating evidence to learn whether the jurors can still consider death as an option notwithstanding such mitigating evidence. (*People v. Taylor* (2010) 48 Cal.4th 574, 636-637; *People v. Ochoa* (2001) 26 Cal.4th 398, 428-431; *People v. Noguera* (1992) 4 Cal.4th 599, 645-647.) In each of these cases the prosecutors were not seeking to "obtain a commitment from prospective jurors about which punishment they would chose (sic) if confronted with certain facts," but instead they sought to ensure that jurors would still consider both punishments even when presented with certain types of powerful mitigation.

Here, as the actual record shows, defense counsel was trying to do the same. As he made clear, he was simply trying to do what the prosecutors in *Taylor*, *Ochoa* and *Noguera* were permitted to do -- find out if jurors could still consider both punishments in light of evidence the other side was going to present.

The state does not discuss, or even cite, *Taylor*, *Ochoa* or *Noguera*. (RB 27-38.) The state does not distinguish any of these cases. (RB 27-38.) The state does not suggest that the aggravating evidence about which defense counsel here sought to question the jurors -- involving commission of serious other crimes evidence -- was not the type of aggravating evidence that might cause a juror to invariably vote for death. (RB 27-38.) Instead, the state simply argues that the trial court did not abuse its discretion "when it did not permit counsel to ask questions that would require jurors to commit to a certain punishment if confronted by certain facts." (RB 36.) But as noted above, this is *not* what defense counsel was seeking to do, and it is *not* what the court actually did.

Alternatively, the state argues that reversal is not required because "appellant has not established prejudice." (RB 37.) Mr. Rices has anticipated this argument in his opening brief. (AOB 51-52.) Suffice it to say here that the state's suggestion that Mr. Rices must affirmatively establish prejudice ignores the federal constitutional nature of the error. (*See People v. Cash* (2002) 28 Cal.4th 703, 722; *see also Gamache v. California* (2010) 562 U.S. 1083, 1084-1085 (statement of Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ.) [noting that such burden shifting violates *Chapman*].) As such, the state must prove the error harmless beyond a reasonable doubt. For the very reasons set forth in the opening brief, the state will be unable to carry its burden here. (AOB 51-52.) A new penalty phase is required.

IV. THE TRIAL COURT'S REFUSAL TO CHANGE VENUE REQUIRES A NEW PENALTY PHASE.

Ten months before trial defense counsel moved to change venue. (2 CT 192.) Counsel attached to his motion 94 local media accounts of the crimes. (2 CT 217-348.) The crimes were described as "execution-style" murders 55 times,[4] "brutal" and "cold-blooded," as well as "evil," "horrible," and "horrific."[5] Media claims included that Mr. Rices was an "animal," "coward[]," "dangerous," and "a danger to the community" who "[had] no conscience." (2 CT 220, 270, 275, 278, 279.)

Counsel's motion also attached 10 media references to evidence that Mr. Rices had "bragged" about the crime to others -- evidence the trial court specifically ruled inadmissible. (4 RT 665-666; 2 CT 250 [three times], 252, 293, 323, 324, 325, 326, 327.) Still other media articles on which the motion was based referenced evidence which was never introduced at trial regarding the witness protection program. (2 CT 251, 293, 325, 327, 332.)

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[4] 2 CT 219, 221 [twice], 252, 254 [twice], 255, 258, 267, 269, 274, 275, 282, 285, 287, 288, 290, 292, 295, 305, 306, 310 [twice], 312 [three times], 313, 314, 316 [twice], 319 [twice], 322 [twice], 324, 325, 327, 328 [twice], 330 [twice], 332, 334 [twice], 335 [twice], 336 [twice], 337, 340, 341, 343, 345 [twice], 348.

[5] 2 CT 275 ["brutal"], 288 ["cold-blooded"], 303 ["cold blooded," "evil," "brutal," "cold-blooded"], 310 ["brutal"], 312 ["brutal"], 323 ["cold blood," "brutal"], 328 ["cold-blooded"], 330 ["horrific," "horrific," "horrible," "cold-blooded," "horrible"], 334 ["brutal"], 348 ["brutal"].

The venue motion was also supported by a survey of potential jurors throughout San Diego County. (2 CT 193-194.) The survey was broken up into three geographic areas: (1) East County, (2) North County, and (3) Central/South County. (*Ibid.*) The survey showed that 70 percent of potential jurors in East County had been exposed to pretrial publicity, 28 percent of whom believed Mr. Rices was guilty. (4 CT 194.)

The numbers were substantially better in North and Central/South County. In North County, only 46 percent of potential jurors had heard of the case and only 16 percent believed Mr. Rices was guilty. (*Ibid.*) Similarly, in Central/South County, only 49 percent of potential jurors had been exposed to pretrial publicity and 24 percent of whom believed Mr. Rices was guilty. (*Ibid.*)

Accordingly, the defense moved to change venue or -- in the alternative -- to transfer the case to North or Central County, where far fewer potential jurors knew of the case. (2 CT 213-215.) The trial court denied the motion to change venue based on its understanding that jurors would be coming not just from East County (of which 70% had been exposed to the publicity), but from North and Central/South as well. (4 RT 630-631, 644.) In fact, however, of the 242 prospective jurors that appeared for jury service, 239 -- or 98.8% -- were from East County. (AOB, Appendix A.)

In Argument VI of his opening brief Mr. Rices contended that the trial court's failure to grant the change of venue motion violated both his state and federal constitutional rights. (AOB 92-103.) More specifically, he contended that because the record demonstrated that the community was saturated with prejudicial publicity about the crime, his right to a fair trial was violated and reversal was required without a showing of prejudice. (AOB 92-103.)

The state disagrees, arguing (1) the record did not show the community was saturated with prejudicial publicity and (2) in any event, there was no prejudice. (RB 55-60, 60-62.) The state's prejudice argument is based on the premise that of the jurors who actually sat on the case five had not heard of the case and all indicated there was no reason they could not sit. (RB 61.)

The parties' disagreement about the existence of error can be evaluated based on the current briefing. However, the state's argument as to prejudice deserves further comment. The state's suggestion that prejudice must be shown here confuses the actual legal claim being made.

The Supreme Court has recognized that there are two distinct problems which can be caused by adverse publicity. First, the publicity can cause the community where

the trial is being held to become saturated with prejudicial and inflammatory publicity about the crime. (*See, e.g., Rideau v. Louisiana* (1963) 373 U.S. at pp. 726-727. *Accord Murphy v. Florida* (1975) 421 U.S. 794, 798-799; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 352-355, 363; *Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1361.) In this situation, a defendant need *not* demonstrate actual prejudice. (*Sheppard v. Maxwell, supra*, 384 U.S. 333, 352; *Rideau v. Louisiana, supra*, 373 U.S. at pp. 726-727; *Harris v. Pulley, supra*, 885 F.2d at p. 1361.)

Short of saturating an entire community, however, publicity about a case can also infect an individual jury venire. In this situation, defendant must show actual prejudice by showing that the jury venire has demonstrated a level of partiality that is too high to tolerate. (*See, e.g., Murphy v. Florida, supra*, 421 U.S. at p. 803; *Irvin v. Dowd* (1961) 366 U.S. 717, 723; *Harris v. Pulley, supra*, 885 F.2d at p. 1363.)

Here, Mr. Rices is making a straightforward saturation claim. There was extensive media coverage, the coverage included descriptions of highly prejudicial evidence that the trial court ruled inadmissible, it included descriptions of evidence that simply did not exist and it included outraged statements from community leaders and politicians. (AOB 99-102.) The descriptions of the crime were anything but objective, and the repeated characterizations of defendant as "brutal," an "animal," "cold-blooded," "evil" "horrible"

all made it reasonably likely that Mr. Rices could not get a fair trial. Because the community was saturated with this publicity, there was no need to prove prejudice. A new penalty phase is required.

The state's reliance on the answers of voir dire of the seated jurors does not change this. As the state notes, some jurors said they had not heard of the crime despite the publicity and -- in some fashion or another -- each of the 12 jurors said there was no reason they could not sit in the case. (RB 61-62.) But even aside from the fact that this is a saturation claim which does not require a showing of prejudice, the precise legal relevance of these declarations by the jury is difficult to understand in light of the case law. (*See Irvin v. Dowd*, *supra*, 366 U.S. at p. 728 [reversing for prejudicial pre-trial publicity even though all 12 seated jurors said they would be impartial]; *People v. Williams*, *supra*, 48 Cal.3d at p. 1129 [same]; *People v. Tidwell* (1970) 3 Cal.3d 62, 73 [same].) These cases establish that where the community has indeed been saturated with prejudicial pretrial publicity, declarations of fairness and rectitude from the 12 jurors selected to try the case are given little weight in the calculus:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. (*Irvin v. Dowd*, *supra*, 366 U.S. at p. 728.)

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

A. Introduction.

San Diego county reached a flat fee agreement with trial counsel. (33 Sealed CT 7749-7755.) Under the terms of that agreement, counsel was to receive $40,000 "at the commencement of pre-trial motions hearing" and $40,000 "after the jury is impaneled." (33 Sealed CT 7754.)

In April 2008 -- long before either the "pre-trial motions hearing" or the jury being impaneled -- Mr. Rices advised trial counsel that he was having mental health problems in jail; he was hearing voices telling him to "kill people" in jail and "slice people's throats open." (3C RT 417.) He knew he had a problem and was seeking help. (3C RT 417.) Mr. Rices felt that he could not tell jail personnel about his problem because they would use it against him so he told defense counsel. (3C RT 416, 417, 420.) Several months later Mr. Rices attacked Officer James Clements in the county jail. (15 RT 2320-2324.)

The state brought separate charges based on this August 2008 attack, charging Mr. Rices with attempted premeditated murder, along with a deadly weapon use allegation, an

allegation that he inflicted great bodily injury and a prior strike allegation. (*See* 3 RT 492-495.) Later the state amended its notice of aggravating evidence in the capital case to add "[e]vidence of the attack on Sheriff's personnel with a razor shank on August 8, 2008." (3 CT 681.)

At the penalty phase the state called Officer Clements to testify about the August 2008 attack. (15 RT 2311.) In rebuttal, defense counsel suggested the attack was motivated by the fact that officer Clements might have dropped a meal of Mr. Rices's while serving food and argued that Officer Clements's actions were "unacceptable." (15 RT 2327-2328; 19 RT 2765.)

In Argument VII of his opening brief, Mr. Rices contended a new penalty phase is required for four reasons. First, through no fault of his own defense counsel was laboring under a conflict of interest. The flat fee agreement gave counsel a substantial financial interest in remaining as counsel on the case. But because Mr. Rices had sought help from counsel for his mental problems in April, counsel was in a unique position to serve as a mitigation witness and provide (1) mitigating factor (k) evidence regarding Mr. Rices's plea for psychiatric assistance in county jail and (2) evidence which could help explain the attack on Officer Clements. Because serving as a mitigation witness would have required counsel to terminate his work on the case, the fee agreement required counsel to

make the critical tactical decision as to what mitigating evidence to present while laboring under a conflict of interest. And because the record shows the conflict caused an adverse effect on counsel's performance, reversal of the penalty phase is required. (AOB 112-121.) Second, Mr. Rices contended that the conflict involved decisions made in connection with the presentation of mitigating evidence at capital sentencing. Thus, separate and apart from whether the Sixth Amendment right to counsel required a new penalty phase, reversal is nevertheless required by the special reliability requirements of the Eighth Amendment. (AOB 121-123.) Third, even if the record was insufficient to establish a prejudicial conflict under the state or federal constitutions, remand was required because the trial court was aware of the facts on which the conflict was based but made no inquiry at all into the conflict. (AOB 123-125.) Finally, Mr. Rices contended a new penalty phase is required because state law required trial counsel to withdraw from representing Mr. Rices because he knew or should have known he "ought to be called as a witness." (AOB 125-130.)

The state disagrees on all four counts. The state first argues there was no conflict for three distinct reasons: (1) defense counsel could not testify about what defendant told him because that would be hearsay (RB 66), (2) defense counsel could testify and remain counsel in the case (RB 67) and (3) there were other witnesses who could have testified to the same facts. (RB 68-69.) In any event, even if there was a conflict, the state argues

that a new penalty phase is not required because Mr. Rices has not show the outcome of trial would be different. (RB 70.) Second, the state argues that since there was no conflict, there was no violation of the reliability requirements of the Eighth Amendment. (RB 72.) Third, the state argues the trial court was under no obligation to conduct a hearing into the conflict because "the trial court did not know, nor reasonably should have known, about the possibility of any conflict." (RB 71.) Finally, although the state does not separately discuss the state-law component of Mr. Rices's argument -- his argument that state law required counsel to withdraw (AOB 125-130) -- this state-law argument appears to be joined by the state's position that although the rules of ethics require an attorney to withdraw from representation when he knows he ought to be a witness, "there is no categorical mandate" requiring such withdrawal. (RB 67.)

Mr. Rices will address each of the state's arguments. Because they are without merit, a new penalty phase is required.

B. Counsel Made Critical Decisions About The Penalty Phase While Under A Conflict Of Interest.

1. There was an actual conflict of interest.

There are three points not in dispute. First, the state does not dispute that the

prosecution advised defense counsel it would be using as penalty phase aggravation Mr. Rices's August 2008 attack on Officer Clements in county jail. (3 CT 681.) Of course, under established law defense counsel was required to "discover all reasonably available . . . evidence to rebut" this aggravating evidence. (*Wiggins v. Smith* (2003) 539 U.S. 510, 524.)

Second, the state does not dispute that several months before the August 2008 attack -- and long before pre-trial motions were heard -- Mr. Rices called defense counsel from county jail and asked for help. (RB 64.) Mr. Rices felt he could not tell jail personnel about his mental state because they would testify against him. (3C RT 417.) But he admitted to his lawyer that he was hearing voices telling him to "kill[] people" in jail and "slice" them. (3C RT 417.)

Finally, the state does not dispute that under the terms of the flat fee agreement the County had reached with defense counsel, counsel would receive $40,000 at the beginning of the pretrial motions hearing and an identical payment at the beginning of trial. (RB 63.) Thus, defense counsel was required to decide what penalty phase witnesses to present -- and specifically what evidence to present to rebut the incident of August 2008 -- knowing that if he became a witness to Mr. Rices's statements, he would forfeit $80,000.

As noted above, the state argues that this presented no conflict of interest for three reasons. First, the state argues that defense counsel could not in fact testify about what defendant told him because that would be hearsay. Since he could not testify, there was no decision to be made and thus no conflict. (RB 66.)

The state is wrong. Of course counsel could have testified to defendant's statements about his own state of mind. Evidence Code section 1250 covers this precise issue:

> Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.

Pursuant to § 1250, Mr. Rices's statement to counsel about his "existing state of mind" -- including his "statement of . . . mental feeling" -- was simply not hearsay.

To its credit, the state recognizes the potential applicability of section 1250 but

argues in a single sentence that the evidence was not admissible pursuant to section 1250 because it was untrustworthy within the meaning of section 1252. (RB 66-67.) Section 1252 provides generally that "[e]vidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

Section 1252 has no application here. Mr. Rices's request for help in April of 2008 had nothing to do with the crimes committed in March of 2006. He was talking about his then-current mental state (in 2008), not trying to create evidence relevant to the 2006 crime. Nor was he trying to create evidence in connection with the August 2008 incident the state was using in aggravation -- after all, that incident was still a full four months away from even occurring. Moreover, if Mr. Rices had somehow been trying to concoct evidence for his defense it seems unlikely he would have expressed such reluctance to provide that information to Deputy Rodriguez at the jail. (3C RT 416-417.) In the final analysis, the record shows Mr. Rices's statements to counsel had nothing to do with presenting his case, but simply showed he was seeking mental health resources for a problem he was experiencing in custody. Contrary to the state's suggestion, given the timing of the statements there was nothing untrustworthy about them -- they did not relate to or mitigate the 2006 incident and the 2008 incident had not yet even occurred.

Citing this Court's decision in *People v. Earp* (1999) 20 Cal.4th 826, the state argues in the alternative that there was no conflict because there really was no decision to be made. In the state's view, even if defense counsel knew he could and should be a witness, there was no conflict because counsel could both testify and serve as a defense mitigation witness. (RB 67.)

It is difficult to square the state's legal thesis with the actual law. California Rule of Professional Conduct 5-210 requires quite clearly that an attorney must withdraw from representation when he knows he should be a witness:

> A member shall not act as an advocate before a jury which will hear testimony from the member unless:
>
> (A) The testimony relates to an uncontested matter; or
>
> (B) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (C) The member has the informed, written consent of the client.

To be sure, as the state's reliance on *Earp* suggests, there is a sound exception to this rule. Rule 5-210 does not prevent defense counsel from testifying -- and staying on a defendant's case -- where that testimony is required to impeach a state witness who has attributed misconduct to the defense lawyer himself. The facts of *Earp* -- which the state

does not discuss -- present a good example.

In *Earp*, defendant was charged with capital murder. During trial, the state introduced testimony from an investigating officer that defense counsel had tried to bribe the officer with cash. (20 Cal.4th at p. 877.) Relying on the ethical rule, the trial court refused to permit counsel to testify to rebut the charge. (20 Cal.4th at p. 879.) This Court held the trial court had erred, concluding that "a trial court may not deny the defendant the right to present impeaching evidence through the testimony of his counsel, notwithstanding the provisions relating to testimony by counsel in the Rules of Professional Conduct." (*Ibid.*) The *Earp* exception makes sense. Indeed, any other rule would raise the specter of gamesmanship in permitting the state to force defense counsel off a case by presenting certain evidence requiring counsel to testify.

But *Earp* has no application here. Because the trial court in *Earp* did not in fact permit defense counsel to testify, no issue was raised in that case as to whether -- assuming counsel did testify -- he could properly remain as counsel. That is undoubtedly why -- six years *after* the decision in *Earp* -- the Court stated the rule as follows:

> An attorney must withdraw from representation, absent the client's informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client's cause. An attorney should "resolve any doubt in favor of preserving the integrity of his testimony and

against his continued participation as trial counsel." (*People v. Dunkle* (2005) 36 Cal.4th 861, 915.)

Equally important, nothing in the record suggests the prosecutor here knew of Mr. Rices's April 2008 conversation with defense counsel when the August 2008 incident was added to the state's Notice of Aggravation. Thus, the specter of gamesmanship on the state's behalf is certainly not present here.

In short, Mr. Rices quite agrees that the Rules of Professional Conduct do not permit a "trial court [to] deny the defendant the right to present impeaching evidence through the testimony of his counsel . . . ." (*People v. Earp*, *supra*, 20 Cal.4th 826, 879.) But the question here is not whether the trial court denied Mr. Rices a right to present impeaching evidence. Instead, the question is whether -- outside the narrow context of the *Earp* exception -- the Rules of Professional Conduct generally preclude defense counsel from serving as both a witness and counsel. Because that is exactly what the rules do -- and because defense counsel here was undoubtedly aware that this was the tenor of the rule -- there was a stark conflict in this case. Defense counsel could either testify as a penalty phase mitigation witness or continue as counsel. He could not reasonably have believed he could do both. Thus there was an actual conflict.

Finally, the state argues that there was no conflict because defense counsel "was

not the only source of the information concerning appellant's mental state and attempts to seek help in custody." (RB 68.) The state argues that defendant had spoken to Deputy Rodriguez at the jail about his mental health issues, he had been seen in the psychiatric unit of the jail and he spoke with one defense doctor. (RB 68.) Citing *People v. Dunkle*, *supra*, 36 Cal.4th 861, the state suggests there is no conflict here because defense counsel could have elicited the same information given to him by Mr. Rices from any of these other witnesses. (RB 68, 69-70. *See People v. Dunkle*, *supra*, 36 Cal.4th 861, 915-916 [defense counsel had no duty to withdraw and testify as to his observations of defendant where counsel was able to call an expert who "recounted at length his observations of defendant.".].)

The record will not support the state's argument. Mr. Rices will start with the state's suggestion that Mr. Rices first told jail deputy Rodriguez that he was "hearing voices." (RB 68.) As the state admits, however, Mr. Rices "did not feel that he could be completely forthright" with Deputy Rodriguez. (RB 64.) In fact, Mr. Rices was clear that he did not tell Deputy Rodriguez the thoughts he was having:

> [Deputy Rodriguez] asked me further, what was going on. I told Rodriguez, I couldn't tell him. I couldn't tell him what the voices in my head was because it was inappropriate for me to tell him. (3C RT 416-417.)

And Mr. Rices went further, explaining exactly why he felt he could not tell Deputy Rodriguez what the voices actually were saying. Because the voices were telling Mr. Rices to kill people, he felt if he told that to Deputy Rodriguez, it would be used against him at trial:

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

In short, the state's suggestion that defense counsel could have introduced the same mitigating evidence from Deputy Rodriguez is unsupported by the record. Mr. Rices had told defense counsel he "knew something was wrong;" he was hearing voices which were telling him to kill people, and "slice people's throats open," and he asked defense counsel to get him help. This information was simply not conveyed to Deputy Rodriguez.

The state adds that Mr. Rices was going to be seen in the jail psychiatric unit and so "another witness was privy to appellant's mental condition." (RB 68, citing 3C RT 420.) But even assuming Mr. Rices was actually seen by the jail psychiatric unit, given his hesitance to speak with jail personnel about the specifics of his problem nothing in the record suggests he dealt with the jail psychiatric unit any differently than he dealt with

Deputy Rodriguez.[6]

Here, defense counsel had a tactical choice to make. If he listed himself as a mitigation witness -- to testify to Mr. Rices's attempts to seek help for his mental issues and to mitigate the state's explanation for the August 8 attack -- he would forego $80,000, since he could no longer represent Mr. Rices. And after defense counsel elected not to testify, he instead presented a very different explanation for the August 8 incident, arguing that Mr. Rices stabbed the officer because the officer "unacceptably" dropped a food tray. This record suggests not only that because of the conflict "some effect on counsel's handling of particular aspects of the trial [was] likely," (*Lockhart v. Terhune* (2001) 250 F.3d 1223, 1231) but that there was "a specific and seemingly valid or genuine alternative strategy or tactic . . . available to defense counsel, but it was inherently in conflict with his duties to . . . his own personal interests." (*United States v. Bowie* (1990) 892 F.2d 1494, 1500.) Defense counsel was laboring under an actual conflict of interest.

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[6] The state accurately notes that defense counsel said a defense doctor had conveyed the same information to counsel that Mr. Rices conveyed to the court. (RB 68.) Even assuming that this was a reference to the information about voices telling him to kill, the observation misses the point. The point is that even in this situation, defense counsel had a tactical decision to make as to which witness to call -- a basic part of every trial lawyer's obligation. Mr. Rices was entitled to have that decision made by a lawyer who was not under a conflict of interest.

2. Because there was an actual conflict of interest, prejudice is presumed.

The state also argues that even if there was an actual conflict of interest between defense counsel and Mr. Rices, a new penalty phase is not required. The state cites *People v. Doolin* (2009) 45 Cal.4th 390 for the proposition that in a conflict case -- just as in a case alleging ineffective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668, 694 -- a presumption of prejudice does not arise and, instead, Mr. Rices must show that "the outcome would have been more favorable to appellant . . . absent the conflict." (RB 70.)

The state's characterization of the holding in *Doolin* is accurate. The problem with the state's position is more basic. In *Doolin*, the defendant alleged that a flat fee agreement between the county and defense counsel created a conflict of interest. The Court recognized that under federal law, prejudice was presumed in any conflict arising out of defense counsel's "active[] represent[ation of] conflicting interests" -- as where a defense lawyer concurrently represents two defendants charged with the same crime. (45 Cal.4th at p. 418.) But a divided court in *Doolin* went on to limit this presumption of prejudice to conflict cases involving such "active[] represent[ation of] conflicting interests." (45 Cal.4th at pp. 418-420.) As to other conflicts -- including a conflict caused by a county's flat fee agreement -- the majority held that prejudice would *not* be

presumed from an actual conflict. Instead, defendant in that situation was required to meet the prejudice standard announced in *Strickland v. Washington*, *supra*. (45 Cal.4th at pp. 420-421.) As discussed below, however, *Doolin* cannot be squared with case law from the United States Supreme Court.

At its heart, the issue here is simple. It is true, of course, that where a defendant alleges his lawyer was ineffective, the defendant must not only establish that counsel's performance was deficient, he must establish that absent counsel's errors, there is a reasonable likelihood of a different result. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 694.) Under the majority opinion in *Doolin*, this same prejudice requirement applies to conflict situation even where it is the state that has created a disabling conflict of interest between defendant and his lawyer.

In reaching this result, however, the *Doolin* majority ignored the language of *Strickland* itself. As noted in another context in Mr. Rices's opening brief, in *Strickland* the Court held that the allocation of the burden of proof in connection with prejudice arising from a claim of ineffective assistance of counsel depended on whether the right to counsel had been impaired by state conduct, or simply by an ineffective lawyer:

> [A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant

> affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. (466 U.S. at p. 692.)

Strickland specifically distinguished claims where counsel performed inadequately from those in which the lawyer's effectiveness was compromised because of state action, noting that in cases involving "state interference with counsel's assistance" the defendant did *not* have a burden to prove prejudice, but prejudice was "presumed" "because the prosecution is directly responsible [for these errors and as a result they were] easy for the government to prevent." (466 U.S. at p. 692.) *Strickland*'s focus on the source of the error in allocating the burden of proof was consistent with long established Supreme Court case law holding that where the state itself created an impediment to counsel's

representation in a criminal case, prejudice was presumed and the defendant did not have to prove prejudice.[7]

The fact of the matter is that the *Doolin* majority took its prejudice standard directly from *Strickland*. But not only did *Strickland* not involve a state-created conflict at all, *Strickland* held it was fair to impose the burden of proving prejudice on defendants only because "[t]he government [was] not responsible for" the errors involved. (466 U.S. at p. 692.) And *Strickland* went on to note that where the state was in fact responsible,

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[7] *Compare Bell v. Cone* (2002) 535 U.S. 685, 696-699 [where defense counsel decides not to present closing argument on a defendant's behalf, a defendant seeking to prove counsel ineffective must establish prejudice under *Strickland*] *with Herring v. New York* (1975) 422 U.S. 853 [where defense counsel is barred by the trial court from presenting closing argument, prejudice is presumed]; *Compare Strickland v. Washington, supra*, 466 U.S. 668, 699-700 [where defense counsel fails to call certain witnesses, a defendant must prove prejudice under *Strickland*] *with Washington v. Texas* (1967) 388 U.S. 14 [where defense counsel is precluded from calling certain witnesses by a state statute, prejudice is presumed]; *Compare Higgins v. Renico* (6th Cir. 2006) 470 F.3d 624, 634-635 [where defense counsel fails to cross-examine certain witnesses, a defendant must prove prejudice under *Strickland*] *with Davis v. Alaska* (1974) 415 U.S. 308 [where defense counsel is precluded from cross-examining a state witness by a state statute, prejudice is presumed].)

As Mr. Rices observed in his opening brief, the Court's position in *Strickland* was also consistent with the position advocated by the State of California in *Strickland* itself. There, California argued it was fair to impose the burden of proving prejudice on defendants "because neither the prosecution nor the court is responsible for the alleged defects in the proceedings." (AOB 186-187 *citing Strickland v. Washington*, 82-1554, Brief of Solicitor General (Joined by California) at p. 28; 466 U.S. at p. 670.) It was proper to place the burden on the defendant because "there is no suggestion that the prosecution was responsible in any way" (*id.* at p. 41) and it would be unfair to impose a burden on the state where it was not responsible for counsel's error. (*Id.* at p. 44.)

the defendant would *not* have a burden to prove prejudice. (*Ibid.*) Moreover, in a long series of other cases, none of which are discussed in the *Doolin* majority, the Supreme Court has held time and again that where it is the state that has affirmatively created an impediment to the effective assistance of counsel, prejudice is presumed and the state may *not* shift the burden of proving prejudice to the defendant.

To support its reliance on the *Strickland* standard of prejudice for conflicts cases, the *Doolin* majority also relied on the Supreme Court's decision in *Mickens v. Taylor* (2002) 535 U.S. 162. (45 Cal.4th at pp. 417-418, 421.) But *Mickens* provides no support at all for application of the *Strickland* standard.

Mickens involved a conflict caused by successive representation -- the lawyer representing the defendant in a murder case had previously represented the victim. (535 U.S. at p. 164.) The trial court failed to inquire into the conflict. The question addressed in *Mickens* was whether the trial court's failure to inquire into the conflict excused the defendant from having to prove that a conflict existed by showing adverse affect. (535 U.S. at pp. 165, 174.) *The Supreme Court explicitly noted that the case did not involve the question of whether defendant also had to prove Strickland prejudice.* (535 U.S. at p. 174.) Nothing in *Mickens* addresses, or even purports to decide, the question of whether a defendant must prove prejudice when it is the state that has created the conflict of

interest in the first instance. This may explain why the dissent in *Doolin* focused on precisely this point:

> Because it was the government's fee agreement that made this possible, I would apply the standard of presumed prejudice . . . . (45 Cal.4th at p. 464, Kennard, J., dissenting].)[8]

In short, the United States Supreme Court has never required a showing of prejudice in connection with a state-created conflict. The Court has never departed from its reasoning in *Strickland*, nor has it departed from the plain teachings of *Bell v. Cone*, *Herring v. New York*, *Geders v. United States*, *Washington v. Texas*, *Davis v. Alaska*, *Brooks v. Tennessee* and *Ferguson v. Georgia*. With all due respect, *Mickens* will not support the weight placed on it by the majority in *Doolin*; the fact of the matter is that the Court has never countenanced forcing defendants to prove prejudice when it is the state that is responsible for creating a fundamental impediment to the right to counsel.

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[8] In dictum *Mickens* went on to criticize three appellate cases that had not required a showing of prejudice where there was a financial conflict between counsel and the defendant. (535 U.S. at p. 174.) Significantly, however, none of the three "financial interest" cases criticized in *Mickens* involved a state-created conflict; all three involved a financial conflict created entirely by the defense lawyers themselves. (535 U.S. at p. 174.) Thus, whatever force this dictum has in connection with allocating the burden of proving prejudice on financial conflicts generally, it has no force at all in connection with allocating the burden of proof in connection with a financial conflict for which the state is entirely responsible.

This may be why federal and state courts around the country have reached a result directly contrary to the *Doolin* majority, *refusing* to limit the presumption of prejudice to conflicts where counsel is "actively represented conflicting interests." As the Seventh Circuit Court of Appeals has noted, "we have routinely applied [a presumption of prejudice] to conflict of interest cases which are not multiple representation cases." (*Spreitzer v. Peters* (7th Cir. 1997) 114 F.3d 1435, 1451, n.7. *Accord Edwards v. Lewis* (Ga. 2008) 658 S.E.2d 116, 120-121 [applying presumption of prejudice even though conflict did not involve multiple representation]; *State v. Regan* (Wash.App. 2008) 177 P.3d 783 [same].) Courts around the country have rejected the position that the presumption of prejudice does not apply simply because a conflict is caused by counsel's personal financial interest rather than multiple representation. (*See, e.g., United States v. Alvarez* (10th Cir. 1998) 137 F.3d 1249, 1252; *Brown v. State* (Fla. 2004) 894 So.2d 137, 157-158; *State v. Cheatham* (Kan. 2013) 292 P.3d 318, 341.) As these cases show, the presumption of prejudice applies to conflicts that are created by the state.

Here, of course, there is no dispute that the conflict is entirely state-created. The county devised the flat fee system at issue in this case. As the Supreme Court noted in *Strickland*, in this situation prejudice should be presumed because "[t]he government is . . . responsible for, and hence [was] able to prevent" the conflict. (466 U.S. at p. 692.) At the end of the day, the state's suggestion that the *Strickland* standard applies to this case

is simply contrary to federal law.[9]

C. The Case Must Be Remanded Because The Trial Court Failed To Conduct Any Inquiry At All.

When a trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to inquire into the matter and act on the information it receives. (*Wood v. Georgia* (1981) 450 U.S. 261, 272.) In his opening brief, Mr. Rices contended that a remand was proper because the trial court failed to hold any hearing into the potential conflict. (AOB 123-125.) The state disagrees, arguing that "at the time appellant made his *Marsden* motion" -- April 29, 2008 -- the trial court was under no obligation to conduct a hearing into the conflict because "the trial court did not know, nor reasonably should have known, about the possibility of any conflict." (RB 71.)

Mr. Rices fully agrees with this position. After all, as the state correctly notes, at the time of his *Marsden* hearing in April of 2008, the August 2008 attack had not yet happened. As such, he state had not indicated it would be using that attack in

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[9] Mr. Rices contended the conflict also violated his Eighth Amendment right to a reliable penalty phase. (AOB 121-123.) As noted above, the state argues there is no Eighth Amendment violation because there was no conflict. (RB 72.) For all the reasons discussed above, however, there was indeed an actual conflict in this case.

aggravation. Thus, on the date of the *Marsden* motion the trial court had no obligation to conduct a hearing because (1) the trial court not have any notice of the conflict and (2) the conflict had not yet even arisen.

But by the time of the penalty phase trial in May of 2009, the trial court knew considerably more than it did in April of 2008. Thus, the state does not dispute that by the time of trial the court was aware (1) Mr. Rices told defense counsel in April of 2008 that he heard voices telling him to kill people in jail, (2) the state had indicated it would be relying on the 2008 jail attack as evidence in aggravation at the penalty phase and (3) the prosecutor in his opening statement told jurors that the August 2008 attack was part and parcel of the penalty phase. (9 RT 1337-1338.)

For reasons that are not entirely clear, the state's entire analysis of what the trial court knew freezes on April 29, 2008 -- the date of the *Marsden* hearing. (RB 71-72.) Significantly, however, the state does not dispute that by the time trial began, the trial court knew or reasonably should have known of the potential conflict. In this situation, even if the record itself does not establish an actual conflict which requires reversal, at a minimum the trial court was required to conduct an adequate inquiry. (*Wood v. Georgia*, *supra*, 450 U.S. 261, 272-273.) The failure to do so requires a remand.

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

In his opening brief Mr. Rices contended that a new penalty phase was required because trial counsel violated state law -- specifically Rule of Professional Conduct 5-210 -- in failing to move to withdraw from representation because counsel knew or should have known he "ought to be called as a witness." (AOB 125-130.)

Although the state does not separately respond to this argument, the state's position appears to be twofold: (1) although the rules of ethics do indeed require an attorney to withdraw from representation when he knows he ought to be a witness "there is no categorical mandate" requiring such withdrawal (RB 67) and (2) defense counsel did not know he should have been a witness because (a) Mr. Rices's statements were hearsay and (b) there were others who could have testified to the same facts. (RB 66-68).

Mr. Rices has addressed each of these arguments above in connection with the state's argument that no actual conflict existed. He incorporates those arguments here by reference. Suffice it to say here that (1) rule 5-210 applied in full force to this case and (2) on the facts of this case, defense counsel should certainly have known he should be a witness for the defense. After all, the only decision for the jury was whether it should give life or death, the prosecutor was relying on future dangerousness to prison staff in

asking for a death verdict, and defense counsel's testimony could have given a very different view of the August 2008 attack. A new penalty phase is required under state law as well.

VI. THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING AFTER LEARNING THAT THE "INDEPENDENT" LAWYER IT HAD APPOINTED TO ADVISE MR. RICES ON TRIAL COUNSEL'S COMPETENCY WAS NOT INDEPENDENT AT ALL.

The case against Mr. Rices was not initially charged as a capital case. The trial court appointed private counsel through the Private Conflicts Counsel Panel ("PCC"). (2 RT 3, 45-47.) Several months later, when the state elected to seek death, PCC advised the court that in its view, defense counsel was not qualified to handle a capital case. (3A RT 329-330.) Defense counsel disagreed, contending he was qualified. (3A RT 332-334.)

PCC advised the court that Mr. Chambers was qualified to serve as second chair in a capital case. (3A RT 330.) PCC was prepared to recommend that a qualified first chair counsel be appointed and Mr Chambers serve as second chair. (3A RT 330.) Mr. Chambers indicated he would not serve as second chair. (3A RT 330.) PCC asked the court to appoint independent counsel to advise Mr. Rices:

> [T]his is a lot for Mr. Rices to absorb at this point in time; the ramifications, waivers, and etcetera, and it might be wise to appoint an independent attorney, someone who is neither on the death penalty screening committee or involved in the case at this point in time to counsel Mr. Rices about what his options are and what all of this means. (3A RT 331-332.)

Ultimately the trial court decided to appoint "an independent counsel" to advise

Mr. Rices, appointing Don Levine. (3A RT 349, 352.) The court explained to Mr. Rices that it was appointing independent counsel so Mr. Rices could "get advised of your rights." (3A RT 346.)

The parties reconvened after Mr. Levine had met with Mr. Rices. The prosecutor noted that she did not "know what [Mr. Levine's] role is in this case" but had "just learned that it looks like he's going to be advising or speaking with Mr. Rices in some capacity." (3 RT 356.) She advised the court that Mr. Levine was representing a witness who had "come forward to provide testimony against Mr. Rices." (3 RT 357.)

The trial court made no inquiry of Mr. Levine. For his part, Mr. Rices asked the court on three separate occasions why the court had appointed a lawyer who was "represent[ing] a confidential informant or cooperating witness" and who was "cooperating against me.' (3B RT 362.) Mr. Rices then declined the trial court's offer for yet another lawyer and agreed to keep defense counsel. (3B RT 363.) At no point did either Mr. Levine, or defense counsel, comment on the prosecutor's observation that Mr. Levine was representing a witness who had "come forward to provide testimony against Mr. Rices." (3 RT 357.)

Throughout this entire exchange, both defense counsel and Mr. Levine remained

entirely silent on the issue. Although the trial court was plainly aware of the potential conflict of interest, the court made no inquiry of anyone into the subject.

In Argument VIII of his opening brief, Mr. Rices contended a remand was required. Because the prosecutor herself had raised the conflict issue prior to the hearing, Mr. Rices raised it three times during the hearing and the court itself recognized the possibility of a conflict, the court was required at least to make an inquiry. (AOB 131-141, 144-146.) Although Mr. Rices declined the court's offer of a new attorney to advise him, that did not constitute a waiver of his right to conflict free counsel because he was never advised of the dangers of proceeding with conflicted counsel. (AOB 141-144.)

The state disagrees. The state first argues that "[t]he court was aware of the conflict and reasonably chose not to inquire further or engage in any action . . . ." (RB 73.) In the state's view, because Mr. Levine's role was "very limited" once the trial court learned that Mr. Levine had represented a cooperating witness in the case, it was entirely proper for the court to do nothing at all:

> Having learned that [Mr. Levine had represented a cooperating witness] the court reasonably sought to do nothing in light of the fact that Mr. Levine's input was very limited and had no bearing on any of appellant's constitutional rights. (RB 77.)

Alternatively the state argues that (1) Mr. Rices waived his right to appointment of conflict free counsel and (2) in any event, a remand for a hearing is not required absent a showing of prejudice. (RB 77-79.) The state's positions should be rejected.

The state's argument that the trial court reasonably decided to do nothing is starkly at odds with the case law. As noted above, the state concedes that the trial court "was aware of the conflict." (RB 73.) The concession was warranted; the prosecutor told the court that Mr. Levine had represented a cooperating witness in the case, Mr. Rices raised the issue three times, and the trial court itself admitted it raised a potential conflict. (3 RT 356-357; 3B RT 362-363.)

The law in this situation is quite clear: when a trial court is aware of a potential conflict of interest on the part of defense counsel, it is required to inquire into the matter. (*Wood v. Georgia*, *supra*, 450 U.S. 261, 272.) Failure to do so requires a remand for a proper hearing. (*Id.* at pp. 272-274.) The inquiry must be sufficient to determine whether to replace counsel. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 484.)

The state argues that the trial court was free to ignore these rules -- and "reasonably [seek] to do nothing" -- because Mr. Levine's role as the independent counsel was "very limited and had no bearing on any of appellant's constitutional rights." It is

hard to reconcile the state's characterization with what actually happened below. After all, trial courts are not generally in the habit of going to the extreme of appointing independent counsel to advise defendants on matters that are utterly inconsequential. And that was certainly not the case here.

Mr. Rices was charged with capital murder. PCC was offering to appoint a first and second chair as counsel. Mr. Chambers was only qualified as second chair. So Mr. Rices would be getting advice from independent counsel on the options available to him as far as who would represent him in these capital proceedings. Contrary to the state's suggestion, the trial court's appointment of Mr. Levine to advise Mr. Rices in connection with issues relating to counsel's qualifications to handle a capital case had a direct bearing on Mr. Rices's constitutional rights, specifically his Sixth Amendment right to effective and qualified counsel.

The state notes that guidelines pertaining to the qualifications of appointed counsel in a capital case do not necessarily equate with constitutional standards for effective assistance of counsel, and argues that "[a]ll that is constitutionally required is the admission to the state bar." (RB 77.) Although this latter observation is plainly incorrect as a gauge of the constitutional right to effective counsel, the Court need not linger over the state's claim. The fact of the matter is that it seems very unlikely the trial court here

went to the trouble of appointing Mr. Levine as independent counsel to advise Mr. Rices whether Mr. Chambers was "admi[tted] to the state bar." Instead, as the trial court itself noted, it appointed Mr. Levine "to get [Mr. Rices] advised of [his] rights." (3A RT 346.) These "rights" -- which the state now suggests were unimportant -- involved Mr. Rices's right to two lawyers who possessed the qualifications required of counsel in a capital case. In light of the fundamental importance of these rights, and contrary to the state's position, the trial court was not free to learn about the conflict and then -- in the state's own words -- "reasonably [seek] to do nothing." (RB 77.)

Alternatively, the state argues that Mr. Rices waived his right to advice from conflict-free counsel. (RB 77-78.) The state accurately notes that the trial court offered to appoint a new lawyer other than Mr. Levine and Mr. Rices refused. (RB 78; *see* 3B RT 362, 363.) The state argues this refusal constitutes a waiver of the right to conflict-free counsel. It does nothing of the sort.

Mr. Rices anticipated this argument in his opening brief. (AOB 141-144.) To its credit, the state concedes that the standard for waiver of conflict free counsel requires the record to show the defendant (1) has discussed the potential drawbacks involving conflicted representation with either the conflicted attorney or outside counsel, (2) has been made aware of the dangers of proceeding with conflicted counsel, (3) has been made

aware of his right to conflict free counsel and (4) indicates he voluntarily waives his right to conflict free representation. (RB 78.) In what may fairly be characterized as another understatement, the state also concedes that the record here does *not* meet this standard:

> Admittedly, appellant's refusal to consult with a different lawyer did not precisely follow within this framework. (RB 78.)

But the state argues that this standard "should be relaxed" in this case. (RB 78.) In the state's view, although *none* of the four requirements for a waiver has been shown, Mr. Rices's bare statement that he did not want a new lawyer to represent him is enough because he "was aware of the potential conflict." (RB 78.) This Court has already rejected this very argument. (*People v. Bonin* (1989) 47 Cal.3d 808, 841.) The fact that a defendant may be aware of a potential conflict does not mean he or she is aware of the potential drawbacks of proceeding with conflicted counsel, has discussed those drawbacks with counsel or is aware that there is a right to conflict free counsel. There was no waiver in this case.

Finally, the state argues that although the trial court held no hearing at all to inquire into the conflict, no remand is required absent a showing of prejudice. (RB 78.) The state is wrong. (*Wood v. Georgia, supra*, 450 U.S. 261, 272-274.)

The state urges a departure from *Woods*, citing this Court's decisions in *People v. Nguyen* (2015) 61 Cal.4th 1015 and *People v. Cromwell* (2005) 37 Cal.4th 50. In both of those cases, however, the trial courts *did* hold hearings to look into whether a conflict existed. (*Cromwell*, 37 Cal.4th at p. 74; *Nguyen*, 61 Cal.4th at p. 1069.) In both cases the Court held that because the trial court had held a conflicts inquiry already, *Woods* did not require an automatic remand for a second inquiry absent a showing of prejudice. (*Cromwell*, 37 Cal.4th at p. 78; *Nguyen*, 61 Cal.4th at p. 1072.)

But here, there was no inquiry at all. In this situation *Woods* controls. A remand is required,

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

Until April 2008, there was an excellent relationship between Mr. Rice and defense counsel. In December 2007 when offered a chance to have new counsel, Mr. Rices declined because he and Mr. Chambers had "built a relationship . . . it's an understanding, mutual respect here, and I trust him, and my family trusts him . . . ." (3A RT 341.) Weeks after that, when Mr. Rices had another chance to dismiss counsel, he again asked to keep Mr. Chambers. (3B RT 363.) In light of this history, it stands to reason that for Mr. Rices to move to discharge a lawyer who he had grown to trust, and who his family had also grown to trust, something must have happened to undercut that trust.

In April 2008 Mr. Rices brought a *Mardsen* motion to replace Mr. Chambers as counsel, explaining that he no longer trusted Mr. Chambers. (3 RT 411, 420.) Mr. Rices told the court what had happened -- Mr. Rices had told Mr. Chambers about the voices in his head which were telling him to kill people in the jail and asked Mr. Chambers if he could contact the jail and "tell the watch commander that I needed to see the psych . . . ." (3C RT 420.) Mr. Rices was clear:

> I agreed -- I agreed for him to tell the watch commander that I needed to see the psych, but I didn't agree for him to disclose information of why I needed to see the psych. (3C RT 417-418.)

Mr. Chambers confirmed Mr. Rices's testimony. According to Mr. Chambers he and Mr. Rices had agreed that counsel would urge the jail staff to move up the meeting with jail mental health personnel:

> Between Mr. Rices and myself, it was decided since he had already requested to see the mental health provider doctor at the detention facility, that I would contact the staff there and attempt to move that meeting up. (3C RT 420.)

But when he spoke with jail personnel, Mr. Chambers did not just ask to move the meeting up, he told the watch commander that Mr. Rices "had the potential of acting out." (3C RT 420.) Mr. Rices made clear that this was "not what we agreed to." (3C RT 420.) Although he was a layman, Mr. Rices believed that in telling the jail staff "why I needed to see the psych," Mr. Chambers had violated the attorney-client privilege and therefore he (Mr. Rices) no longer trusted him. (3C RT 416, 418, 422.) The trial court denied the *Marsden* motion. (3C RT 422.)

In Argument IX of his opening brief Mr. Rices contended this was error. Under the rules of ethics, Mr. Chambers was fully entitled to breach his duty of confidentiality

and reveal the reason why he wanted the mental health meeting moved up. But as the Rules of Professional Conduct recognize, in that situation "the relationship between member and client will have deteriorated to as to make the member's representation of the client impossible." (Rule 3-100, Comment 11, Rules of Professional Conduct.) Mr. Rices's explanation that he no longer trusted counsel because counsel had revealed client communications to the jail was nothing more than an expression of the common sense principle set forth in Rule 3-100. Because the record "clearly shows" that the relationship between the defendant and counsel had deteriorated to such an extent that continued representation was untenable, new counsel should have been appointed. (*See People v. Michaels* (2002) 28 Cal.4th 486, 523.)

The state disagrees. According to the state, Mr. Rices was wrong to think Mr. Chambers breached the duty of confidentiality. In fact, the state argues that (1) Mr. Chambers did *not* breach the duty at all, but simply told jail officials that Mr. Rices "had the potential of acting out" and (2) this was not a breach of the duty of confidentiality because Mr. Chambers and Mr. Rices had actually agreed that this is what Mr. Chambers would say to the jail staff. (RB 83.) The state argues that the trial court "implicitly" found that Mr. Rices's version of events -- in which he asked counsel simply to get the meeting moved to an earlier date -- was not credible and that Mr. Rices actually agreed to have counsel tell jail staff that Mr. Rices had "the potential of acting out." (RB 83 and

n.12.)

First things first. In ruling on the *Marsden* motion the trial court made no such credibility finding. (3C RT 421-422.) Instead, the court simply found that based on the "work Mr. Chambers has performed on your behalf" there were no "grounds for granting your request to relieve" him as counsel. (3C RT 421.) The court did not purport to resolve the disagreement between Mr. Chambers's version of events (in which he and Mr. Rices agreed he would tell jail officials that Mr. Rices had "the potential of acting out") and Mr. Rices's version of events (in which they agreed counsel would simply ask jail official to move up the meeting but would not convey the reasons). (3C RT 421-422.)

Although the court did not resolve the dispute in what the parties actually agreed, it is worth noting that the history between Mr. Rices and Mr. Chambers does not remotely support the state's notion that Mr. Rices was not credible. After all, as noted above, in December 2007 Mr. Rices refused new counsel precisely because he and his family trusted Mr. Chambers. (3A RT 341.) And shortly after that Mr. Rices again asked to keep Mr. Chambers as counsel. (3B RT 363.) Given this history showing Mr. Rices's complete trust in Mr. Chambers, it stands to reason that in Mr. Rices's view something significant happened to cause him to seek to discharge Mr. Chambers in April 2008. The state completely ignores this history altogether.

This does not mean, of course, that Mr. Rices's recollection of exactly what the two agreed to tell jail officials was correct. But it does not matter whether Mr. Rices was correct or Mr. Chambers was correct. What matters for purposes of the *Marsden* inquiry is whether the relationship between client and lawyer has deteriorated to such an extent that representation must be terminated. (*See People v. Taylor* (2010) 48 Cal.4th 574, 599 [trial court granted *Marsden* motion because "the attorney-client relationship had deteriorated."]; *People v. Roldan* (2005) 35 Cal.4th 646, 681 ["A criminal defendant is entitled to raise his or her dissatisfaction with counsel at any point in the trial when it becomes clear that the defendant's right to effective legal representation has been compromised by a deteriorating attorney-client relationship."].) And Rule 3-100 makes clear that a client's belief that counsel has breached the duty of confidentiality indicates that the attorney-client relationship is beyond repair. The *Marsden* motion should have been granted.

The state briefly argues that any error in failing to grant the *Marsden* motion was harmless. (RB 85.) The state is confusing two different types of *Marsden* error.

When an indigent defendant seeks to replace appointed counsel, the trial court must hold a hearing to inquire into the reasons for defendant's request. (*People v. Marsden* (1970) 2 Cal.3d 118, 125-126.) A trial court commits *Marsden* error when it

fails to hold such a hearing. In this situation the error can be harmless where, for example, the trial court holds a proper hearing the next day or later in the trial. (*People v. Taylor* (2010) 48 Cal.4th 574, 602; *People v. Leonard* (2000) 78 Cal.App.4th 776, 787.)

But a trial court also violates *Marsden* when it holds a hearing but refuses to discharge a lawyer who should -- in fact -- be discharged. The state does not cite any case that has ever found such an error harmless. (RB 84-85.)

But that is the precise situation we have here. Mr. Rices was on trial for his life. It was essential that he have open communication with defense counsel in terms of exploring and presenting a full case in mitigation. Mr. Rices advised the trial court that because Mr. Chambers had revealed client communications to the state he no longer trusted him. As Rule of Professional Conduct 3-100 makes clear, that should have been enough to show that the attorney client relationship had deteriorated and new counsel was required. This is especially true here where Mr. Rices was on trial for his life and had to confide in counsel for purposes of preparing a penalty phase. In such a case communication between attorney and client is perhaps even more important. The *Marsden* error requires a new penalty phase.

VIII. DEFENSE COUNSEL'S FAILURE TO OBJECT WHEN MR. RICES'S JURY WAS CALLED BACK TO HEAR CO-DEFENDANT'S LAWYER PRESENT EVIDENCE IN AGGRAVATION DEPRIVED MR. RICES OF EFFECTIVE ASSISTANCE OF COUNSEL.

A. Introduction.

Mr. Rices has already described in some detail the unusual procedure which the trial court adopted here in light of the fact that (1) Mr. Rices was charged jointly with co-defendant Miller, (2) Mr. Rices pled guilty and would only be having a penalty phase and (3) the court granted separate juries for the two defendants. (AOB 152-153.) In a nutshell, the parties agreed that (1) the Rices jury would hear the state's guilt phase case against Miller and so learn the circumstances of the crime, (2) the Rices jury would *not* be present for the Miller defense evidence and (3) after Miller's trial was completed the Rices jury would return to hear aggravating and mitigating evidence. (*See* 4 RT 710-711; 5 RT 795, 1020.) There was one notable exception to this general approach however; the prosecutor stated without objection by defense counsel that the Rices jury would return if Miller testified in his own defense. (11 RT 1565.)

Pursuant to the general plan, the Rices jury heard evidence against both defendants from June 8, 2009 through June 10, 2009. (9 RT 1331 - 11 RT 1661-1663.) The Rices jury was recessed while the Miller jury alone began to hear the Miller defense case which

began the next day. (12 RT 1841.) On June 16, 2016 -- during the Miller defense case -- the Rices jury was called back into session to hear Miller's testimony in his own defense. (13 RT 1891.) On direct examination, Miller told both juries (1) he participated in the robbery/murder only because Mr. Rices threatened him with a gun, (2) he (Miller) was scared of Rices because of his "reputation" and "high status" as a gang member and (3) Rices had a "killer glaze in his eyes." (13 RT 1909-1921, 1939.) On cross-examination by the prosecutor, Miller told the Rices jury that Rices shot the victims after each victim begged for their lives. (13 RT 1958-1959.)

In Argument X of his opening brief, Mr. Rices contended that trial counsel's failure to object to the presence of the Rices jury during Miller's testimony fell below the requisite standard of care required by both federal and state law. (AOB 161-173.) Because this error resulted in the jury being presented with extremely prejudicial testimony about Mr. Rices's role in the crime, testimony the jury would not have heard absent counsel's error, confidence in the outcome of the penalty phase is undermined and a new penalty phase is required.

The state disagrees on both counts. First, the state argues that because "there was no reasonable basis upon which to [object]" that "any objection would have been invariably overruled." (RB 96.) Alternatively, the state grudgingly concedes that

"Miller's testimony arguably added an additional emotional component to the crime" (RB 97), but nevertheless argues there was no prejudice from Miller's testimony. (RB 96-98.)

Mr. Rices will take the state's arguments in turn. In fact, the Eighth Amendment basis for counsel's objection has been well established for nearly 40 years. And given the nature of the testimony Miller provided, the reliance on that testimony by the prosecutor in seeking death and the nature of the mitigating evidence presented, the error here cannot be found harmless.

B. Upon A Timely Objection The Rices Jury Would Not Have Heard Miller's Testimony.

As noted above, in his opening brief Mr. Rices contended that trial counsel's failure to object to the Rices jury being present during Miller's testimony fell below an objective standard of care. (AOB 161-173.) The state argues that counsel's performance was not substandard because there was no tenable basis for any objection and, as a result, any objection would have been overruled. (RB 91-96.)

Mr. Rices will start with a point of agreement. If in fact an objection would properly have been overruled, then the state is correct. As Mr. Rices has already recognized in his opening brief on this very point, there can be no ineffective assistance

of counsel for failing to bring a motion that is unsupported by the law. (AOB 162.)

The problem with the state's position is far more basic. As Mr. Rices explained in some detail in his opening brief, in light of state and federal law, an objection by trial counsel would have been granted. (AOB 162-173.) The fact of the matter is that because Miller was not a witness for the prosecution, the ethical, constitutional and statutory discovery obligations which constrain a prosecutor -- and ensure that the jury hears evidence properly tested by the adversary system -- did not apply to Miller's testimony. (AOB 163-165.) These obligations include such basic duties as disclosing exculpatory evidence,[10] disclosing impeaching evidence,[11] correcting false testimony from witnesses[12] and disclosing written and oral statements of all witnesses.[13] (AOB 163-164.)

In short, there would have been nothing novel about defense counsel's objection in this case. The introduction of evidence absent *any* of the pretrial mechanisms specifically designed to ensure reliable adversarial testing of evidence violates the enhanced reliability requirements of the Eighth Amendment which apply to capital cases.

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[10] *Brady v. Maryland* (1963) 373 U.S. 83.

[11] *United States v. Bagley* (1985) 473 U.S. 667, 674.

[12] *Napue v. Illinois* (1959) 360 U.S. 264.

[13] Penal Code section 1054.1

(*Compare Gardner v. Florida* (1977) 430 U.S. 349, 360-362 [consideration of aggravating evidence which defendant did not have an opportunity to confront violates the Eighth Amendment].)

To its credit, the state does not dispute any of this. The state concedes that "[d]iscovery obligations and ethical duties relate to the duty of the prosecutor and do not attach themselves to a particular piece of evidence." (RB 93.) The state concedes that "a codefendant has no discovery or ethical obligation to his codefendant with respect to his own statements." (RB 93.) And perhaps of most importance, the state concedes that the trial prosecutor relied on the fact that Miller was being called by the codefendant to avoid any disclosure of the 59-page "free talk" Miller had with police prior to trial. (3 CT 590-591; 4 CT 769; 12 RT 1817.)[14]

Nevertheless, in the state's view it was entirely proper for the Rices penalty phase jury to hear Miller's testimony even though none of the mechanisms usually relied on to ensure accuracy and reliability applied to this evidence. Significantly, however, the state does not cite any case -- from this or any other jurisdiction -- which has permitted the state in a capital case to ask a jury to sentence a defendant to die based on testimony from

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[14] The consequences of the failure to disclose this free talk are discussed more fully in Argument IX, *infra*.

a witness to which the *Brady*, *Bagley*, *Napue* and section 1054.1 obligations did not apply. (RB 90-96.) No such case exists. To the contrary, the High Court's Eighth Amendment jurisprudence points in precisely the opposite direction. Because death is a qualitatively different punishment from any other the Supreme Court not hesitated to strike down a wide variety of penalty phase procedures which had the effect of increasing the risk that the factfinder will make an unreliable determination. *(Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) Allowing a penalty phase jury to hear evidence to which the prophylactic *Brady*, *Bagley*, *Napue* and section 1054.1 obligations do not apply poses the identical risk. Had trial counsel made an Eighth Amendment objection to Miller's testimony it would have been sustained.

In arguing that there was no basis for an objection by defense counsel, the state ignores the Eighth Amendment implications of what happened in this case altogether. (RB 86-96.) The state does not cite even a single one of these Eighth Amendment cases. Although some of these cases are nearly 40 years old, the state suggests that any objection by defense counsel would have been "novel." (RB 96.)

Rather than address the Eighth Amendment case law on which this argument is

(and an objection by defense counsel would have been) based, and in the absence of any case permitting this kind of untested evidence in a capital penalty phase, the state relies on this Court's decision in *People v. Keenan* (1988) 46 Cal.3d 478. (RB 92.) *Keenan* does not aid the state's case.

Keenan involved a capital trial arising out of a robbery felony murder. At trial, defendant sought to sever his guilt phase trial from that of his codefendant Kelly. The trial court denied the motion and Kelly testified (1) defendant was the person who shot the victim and (2) he (Kelly) participated in the robbery because he was afraid of defendant, having seen him beat up a Mr. Stevenson only the day before. On appeal, defendant argued that his severance motion should have been granted. This Court held the fact that Kelly would testify against defendant at the guilt phase of trial was not enough to warrant severance under state law. In reaching this state-law ruling -- and in language the state quotes in its brief -- the Court concluded there was no reason the defendant should be able "to insulate himself, by the tactical device of severance, from the relevant and admissible testimony of his codefendant." (46 Cal.3d at p. 501, n.5.)

At first blush, the state's reliance on *Keenan* makes sense. After all, since it was the codefendant's lawyer who called Kelly to testify in that case -- as opposed to the prosecutor -- the *Brady*, *Bagley*, *Napue* and section 1054.1 obligations did not apply in

Keenan either. Because the Court expressed no concern with Kelly's testimony against the defendant in *Keenan*, the state's argument is that there should be no similar concern here.

But *Keenan* is fundamentally distinguishable from this case in three important ways. First, the issue in *Keenan* arose in the context of a guilt phase severance claim under state law. It did *not* involve a claim of reliability under the Eighth Amendment and it did *not* involve a capital penalty phase. (46 Cal.3d at pp. 499-503.) Second, nothing in *Keenan* suggests that evidence not subject to the *Brady*, *Bagley*, *Napue* and section 1054.1 protections be routinely admitted in capital penalty phases. To the contrary, *Keenan* took pains to note that every important aspect of Kelly's testimony had been confirmed by other independent witnesses. Thus, Kelly described events during the robbery/shooting and said that defendant did the shooting. (46 Cal.3d at pp. 493.) The Court noted not only that defense counsel for Keenan conceded the shooting but that the testimony of two eyewitnesses "confirmed" Kelly's testimony about what had happened. (46 Cal.3d at p. 493. *See also* 46 Cal.3d at p. 502.) Kelly said that he went along with the robbery because he was scared of defendant, having seen him beat up Mr. Stevenson the day before. (46 Cal.3d at pp. 493-494.) The Court noted that Stevenson himself testified and "confirmed the beating . . . ." (46 Cal.3d at p. 494.) Third, it was clear not only that Kelly had given his version of events to police prior to trial in an interrogation, but that a

copy of that interrogation had properly been given to defense counsel so he could prepare for trial. (46 Cal.3d at p. 499.)

Keenan is distinguishable from this case in every respect. First, the claim here is not that severance was improper under state law. In fact, the trial court here *granted* separate trials. Instead, the claim here is that because Miller's testimony was not subject to the *Brady*, *Bagley*, *Napue* and section 1054.1 protections designed to ensure the reliable testing of evidence in criminal trials, that testimony should not have been presented in Mr. Rices's capital penalty phase. Nothing in *Keenan* purported to decide this very different Eighth Amendment issue. And as the state itself properly notes, "cases are not authority for propositions not considered." (RB 94.)

Second, as noted above, in resolving the state-law issue in *Keenan* the Court was careful to note that the codefendant's testimony had been "confirmed" in every important respect by independent witnesses. Thus -- even though *Keenan* did not involve an issue of Eighth Amendment reliability at all -- the reliability concerns as the heart of the Eighth Amendment may very well have been satisfied. But the same cannot be said here. No other evidence -- much less independent eyewitnesses as in *Keenan* -- confirmed Miller's story of duress or his version of the actual killing.

Third, and again in contrast to *Keenan*, this was not a case where the codefendant's testimony was consistent with an earlier statement to police *which had been properly disclosed to the defense*. In that situation, of course, reliability of the ultimate testimony is enhanced because the defense therefore has time to investigate and prepare in the context of an adversary proceeding. But in this case, as the state has now conceded, although Miller spoke with police for several hours prior to trial, *that 59-page statement was kept secret from the defense and the defense was unable to prepare its case accordingly*.

In short, there was a firm and long established basis for an objection under the Eighth Amendment. The state cites no case which has ever permitted the state to seek death based on testimony from a witness to which the *Brady*, *Bagley*, *Napue* and section 1054.1 obligations did not apply. Had defense counsel raised an objection, the Rices jury would not have been presented with Miller's testimony.

The state correctly notes that claims of ineffective assistance of trial counsel are typically raised in habeas proceedings unless there "could be no satisfactory explanation" for counsel's conduct. (RB 90.) Pursuant to this general rule the state argues briefly that Mr. Rices's claim should "more appropriately" be raised in habeas proceedings because "[i]t is wholly conceivable that defense counsel may have wanted Miller's testimony

before the jury . . . ." (RB 90-91.)

Yet again, Mr. Rices anticipated this argument in his opening brief. (AOB 171-173.) As discussed in more detail there, defense counsel actually *did* object to the presence of the Rices jury at Miller's testimony, albeit after the damage had been done and when he realized exactly what was happening. (13 RT 1953.) Moreover, the record of this case shows that far from "want[ing] Miller's testimony before the jury," defense counsel did everything he could to keep Miller away from the Rices jury. Thus, defense counsel moved for severance, noting that based on what he knew at the time, Miller's testimony was harmful to Mr. Rices's case. (3 CT 481-485.) In short, the issue is properly before the Court precisely because there is "no satisfactory explanation" for counsel's failure to make a more timely objection to the presence of the Rices jury. (*See People v. Pope* (1979) 23 Cal.3d 412, 426.)

C. Because Miller's Testimony May Have Caused At Least One Juror To Vote For Death, A New Penalty Phase Is Required.

The state argues that in order to establish prejudice for a claim of ineffective assistance of counsel Mr. Rices must show that counsel's error actually "changed the outcome." (RB 98.) This is not the law.

In fact, in order to establish prejudice from an error by trial counsel all a defendant must show is that counsel's error "undermine[s] confidence in the outcome" of the trial. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Significantly, this "undermine confidence" test does *not* require defendants to show that a different result was certain absent counsel's error. Indeed, contrary to the state's suggestion this test does not even require defendant to show that "counsel's conduct more likely than not altered the outcome in the case." (466 U.S. at p. 693.) Instead, as both the United States and this Court have held, relief is required under this test where a single juror could reasonably have reached a different result absent counsel's error. (*See Wiggins v. Smith* (2003) 539 U.S. 510, 537; *People v. Centeno* (2014) 60 Cal.4th 659, 677.) Applying the correct standard here is relatively straightforward.

Because of counsel's error, the Rices jury heard Miller's testimony that Rices was a prominent gang member with a "reputation" and that Miller participated in the crime only because Rices threatened him and that Rices had a "killer glaze in his eyes. (13 RT 1899 1907-1921, 1939-1940, 1945.) Some members of the Miller jury obviously found this testimony credible because his jury was unable to reach a verdict.

The Rices jury also heard Miller's uncorroborated testimony that Rices shot the victims as they were begging for their lives. (13 RT 1958-1959.) Not surprisingly, in

closing argument the prosecutor focused repeatedly on this evidence. (19 RT 2747, 2748, 2780.) The prosecutor's comments in argument about this evidence are worth quoting:

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

In fact, the prosecutor told jurors that this aggravating evidence *alone* was sufficient reason to impose death.

> If there wasn't one shred of aggravating evidence beyond that, not one thing, you would be justified in saying, "For that conduct, Jean Pierre Rices, you deserve to die." (19 RT 2748.)

As this Court has long noted, a prosecutor's focus on certain evidence in closing argument demonstrates the importance of the evidence to the state's case "and so presumably [to] the jury." (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d

861, 868 [same]. *Accord United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1323 ["closing argument matters; statements from the prosecutor matter a great deal"].) More recently the Court has continued to look at the prosecutor's closing argument as a useful guide in assessing prejudice. (*People v. Grimes* ___ Cal.4th ___, 2016 WL 4434808 at * 13 [in finding the exclusion of defense evidence prejudicial the Court examined the prosecutor's closing argument in detail and concluded "[t]he excluded statements would have given the defense a substantial basis for countering the prosecutor's argument."]; *In re Sakarias* (2005) 35 Cal.4th 140, 166-167 [relying on prosecutor's closing argument in finding error prejudicial].)

Significantly, however, in its discussion of prejudice the state ignores the prosecutor's reliance on this evidence entirely except to say that "the prosecution relied very little on Miller's testimony during its closing argument." (RB 96-98.) As the above quotations show, however, the state's characterization is simply wrong.

To be sure, as noted above, the state does admit that "Miller's testimony arguably added an additional emotional component to the crime." (RB 97.) As the prosecutor's quoted argument above suggests, the state's characterization is far too modest. In the prosecutor's own words, Miller's testimony *alone* justified imposition of a death sentence. (19 RT 2748.)

In making its prejudice argument the state summarizes the other aggravating evidence presented. (RB 97.) This is entirely proper. But curiously absent from this prejudice calculus is any discussion of the mitigating evidence presented. (RB 96-98.)

This will not do. The state's approach to harmless error analysis -- focusing solely on evidence which supports the judgment of death -- confuses the test for assessing harmless error with the very different test for assessing sufficiency of the evidence. In assessing the sufficiency of the evidence, a reviewing court assesses the evidence in the light most favorable to the judgment, accepting all logical inferences the jury could draw in favor of the judgment. (*People v. Eliot* (2005) 37 Cal.4th 453, 466.) That is exactly what the state has done here, albeit in the context of harmless error.

But harmless error review is very different. Harmless error review requires the reviewing court to make a straightforward assessment of the consequences of an error based on an objective review of *all* the evidence presented, not simply evidence and inferences which support the verdict which the state is defending. Thus, the United States Supreme Court has long made clear that proper harmless error review requires "the whole record be reviewed in assessing the significance of the errors." (*Yates v. Evatt* (1991) 500 U.S. 391, 409. *Accord Rose v. Clark* (1986) 478 U.S. 570, 583; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *United States v. Hasting* (1983) 461 U.S. 499, 509.) This

Court too has recognized that proper harmless error review requires the reviewing court to consider the *entire* record, not just bits and pieces of evidence on which the state relies. (*See People v. Mil* (2012) 53 Cal.4th 400, 417-418; *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1013; *People v. Taylor* (1982) 31 Cal.3d 488, 499-500.)

The difference in these two standards is directly relevant to the state's arguments here. The state correctly notes that there was other aggravating evidence. (RB 97.) But this was not a case bereft of mitigation; to the contrary, the defense presented powerful evidence about defendant's childhood, including eyewitness testimony about his mother abandoning him outside a fast food restaurant when Mr. Rices was only five years old, the various foster care homes he was placed in and the lack of any therapy he received. (AOB 11-16.) On this record -- where the prosecutor himself told jurors that the Miller testimony alone was sufficient for death -- it cannot be said with the requisite level of confidence that absent Miller's devastating testimony "there is a reasonable probability that at least one juror would have struck a different balance" and voted for life. (*Wiggins v. Smith*, *supra*, 539 U.S. 510, 537.) A new penalty phase is required.

IX. THE TRIAL COURT ERRED IN FAILING TO PROVIDE THE DEFENSE WITH A COPY OF MILLER'S PRE-TRIAL "FREE TALK" WITH POLICE.

The facts on which this claim is based are entirely uncontradicted. Unbeknownst to defense counsel, prior to trial Miller had a several-hour-long "free talk" with police. Because Miller was a codefendant, Penal Code section 1054.1, subdivision (b) required the state to disclose this statement to the defense. Instead of disclosing Miller's statement, however, the state sought to keep it from the defense by calling him "John Doe 1" and filing a Penal Code section 1054.7 motion with the trial court to avoid disclosure. (3 CT 590-591.) At a subsequent in camera hearing from which defense counsel was excluded, the state justified this request, in part, by noting that "John Doe 1" "will not be called as a witness by the People." (4 CT 769.) On November 26, 2008 the trial court granted the state's motion. (4 CT 769.)

As discussed in Argument VIII above, the Rices jury was reconvened to hear Miller's testimony. On direct examination Miller testified that Rices was a prominent gang member and that he (Miller) participated in the crime only because he was scared of Rices. (13 RT 1909-1921, 1939.) On cross-examination by the prosecutor Miller testified that Rices shot the victims as they were pleading for their lives. (13 RT 1958-1959.)

In Argument XI of his opening brief, Mr. Rices contended that once it became clear that Miller was going to be a witness -- regardless of who called him -- the November 26, 2008 ruling had to be modified so that Miller's statements to police were provided to the defense. (AOB 176-184.) After all, the original order permitting suppression of the statements was based at least in part on the prosecutor's in camera statement that Miller would not be a state witness, and it was the prosecutor who introduced Miller's testimony as to the victims pleading for their lives. (4 CT 769; 13 RT 1958-1959.) Simply put, nothing in section 1054.7 authorized the state to (1) obtain statements from a witness prior to trial, (2) introduce inculpatory evidence through that witness yet (3) keep the witness's pre-trial statements to police a secret. Because the trial court's ruling interfered with defense counsel's ability to provide effective representation throughout trial -- in selecting a jury, making opening statements and preparing to confront Miller -- prejudice was presumed and a new penalty phase was required. (AOB 184-190.)

The state disagrees for three reasons. The state first argues that "direct appeal is not the proper vehicle for this claim." (RB 101.) In the state's view, habeas is the proper forum so the Court can explore what defense counsel would have done had he received the free talk. (RB 101.) Second, the state argues it was entirely proper for the court to permit Miller to testify while allowing the state to keep the free talk a secret from the

defense. (RB 102-105.) The state cites cases for the indisputable proposition that "there are a whole host of situations where the trial court is under no obligation to act without a request from the moving party." (RB 102.) Finally, the state argues that any error in keeping the free talk a secret was harmless. (RB 105-107.)

The state does not cite any authority for the proposition that discovery violations cannot be assessed on appeal because -- by their nature -- they require "speculation as to what counsel would have done had" he been provided with the free talk. (RB 101.) Of course, this is true as to *every* violation of *Brady* and every violation of discovery statutes -- where material is improperly withheld from the defense (whether it is inculpatory or exculpatory), reviewing courts assess prejudice by looking to see what could have been done with the suppressed material. (*People v. Johnson* (2006) 142 cal.App.4th 776, 786; *People v. Shaparnis* (1983) 147 Cal.App.3d 190, 196.) As the state's failure to cite any case law suggests, no court anywhere has suggested that these claims must be litigated in habeas proceedings because they necessarily require "speculation as to what counsel would have done."

Turning to the merits, the state argues that although it was the trial court that permitted the prosecution to suppress the free talk (partially on the assurance that Miller would not be a witness), the trial court had no responsibility at all, and was not required,

to issue a new ruling requiring disclosure of the free talk once it became clear Miller would be a witness. (RB 102-103.) According to the state, "there are a whole host of situations where the trial court is under no obligation to act without a request from the moving party." (RB 102.)

This latter proposition is entirely true. But what this has to do with this issue is hard to fathom. To the extent the state is suggesting Mr. Chambers -- the "moving party" -- was required to ask the court to order the free talk disclosed, the assertion makes no sense at all. Mr. Chambers had no idea either that the free talk had (1) occurred or (2) been kept a secret from him. And this was no accident; as noted above when the state moved to prevent disclosure of the free talk it did not use Mr. Miller's name, but used "John Doe 1." (3 CT 590-591.) Moreover the subsequent hearing at which the prosecution promised the trial court it would not call Miller as a witness was in camera, and defense counsel was not present. (4 CT 769.) So there was certainly no way in this case for the trial court to ever get "a request from the moving party." (RB 102.)

In light of these stark facts what the state is really arguing is (1) absent a request from the moving party the court did not have to order disclosure of the free talk and (2) the moving party could make no such request since he did not know about the free talk in the first place. Joseph Heller himself could not devise a better Catch-22.

The state spills a great deal of ink distinguishing cases where courts have found that rulings of a trial court interfered with a defendant's right to effective assistance of counsel. (RB 103-105.) The state argues that these cases are different because the trial courts there "*actively interfered* with counsel's representation." (RB 103, emphasis in original). The state argues that here the interference was not "overt" but involved the "court merely iss[uing] an order." (RB 103.)

The distinction is a bit ephemeral. The trial court in *Geders v. United States* (1976) 425 U.S. 80 issued an order that defense counsel not confer with his client. The trial court in *Herring v. United States* (1975) 422 U.S. 853 issued an order preventing defense counsel from making a closing argument in a court trial. The trial court in *Brooks v. Tennessee* (1972) 406 U.S. 605 issued an order that defendant testify first or not at all. In each case the trial court issued an order which ultimately interfered with how defense counsel conducted the defense. Here, the trial court issued an order permitting the state to keep the free talk a secret. Just as in those cases, the order directly interfered with how counsel could conduct the defense.

The state argues there was no court-induced violation of Mr. Rices's right to effective counsel because there was no showing that "counsel's ability to prepare the defense was impaired." (RB 105.) With respect, this shows a basic misapprehension

about the defense function.

Had defense counsel seen the free talk he would have known that Miller's version of events was now very different from what he originally told police. Counsel would have known that Miller did not come up with his new version of events until he (Miller) was a "potential cooperating witness." (40A SCT 8886.) According to police, the entire purpose of the free talk was to see if Miller could provide the state with sufficient evidence to justify a "benefit or plea bargain" in his own case. (40A SCT 8886.)

In terms of assessing whether defense counsel's "ability to prepare the defense was impaired," it is important to recall that prior to trial Miller spoke with police during an interview which *was* provided to defense counsel during the discovery process. (*See* 37 CT 8389-8582.) In this interview, Miller admitted his culpability in the crime -- the idea to rob the store was his, he did other robberies with defendant, he knew they were going to do a robbery that night, he stole cigarettes in the robbery and he bragged about the murders to others. (37 CT 8390-8391, 8405-8406, 8412, 8416-8417, 8423, 8426-8427, 8437, 8449-8456, 8477-8482, 8495-8500, 8521, 8537, 8541-8542, 8564, 8566-8567.) In terms of preparing the defense -- that is, selecting a jury, making an opening statement, preparing to confront the state's case and making objections to testimony -- defense counsel would obviously base his tactical decisions on the information which had been

provided to him.

It turns out, however, that defense counsel's understanding of Miller's position -- based on the police interview he had been given -- was 180 degrees off the mark. In the free talk kept hidden from defense counsel, Miller says the idea to rob the store came from Rices, he (Miller) was uncomfortable with the idea, he had never committed a robbery with Rices before, he did not learn of the robbery until they parked across the street from the store that night, he did not steal his favorite cigarettes that night, he told Rices not to kill anyone and he did not brag about the murder to other people. (40A SCT 8902, 8925-8927, 8933-8934, 8936.)

There are many answers to what competent defense counsel would have done had he known about the free talk. But contrary to the state's implicit assertion, he would certain not simply have done nothing at all. At a minimum, he would have moved to prevent Miller from testifying at the penalty phase based on the Eighth Amendment grounds detailed above. Failing that, he would have prepared to cross-examine the new story Miller provided during the free talk. His voir dire and jury selection would certainly have taken account of any ruling on whether Miller would testify. So too would his penalty phase opening statement. And he would certainly have been prepared to cross-examine Miller in connection with the new allegations. The state's suggestion that

"counsel's ability to prepare the defense" was not impaired when the court permitted the state to keep the free talk secret must be rejected. At a minimum, the right to counsel means counsel must be entitled to make decisions about preparing for trial, selecting a jury, making an opening statement and making objections without being affirmatively misled as to what the state's evidence is.

Finally, the state argues that any error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (RB 105-106.) In fact, however, as Mr. Rices explained in some detail his opening brief, when the actions of a trial court cause counsel to be ineffective, prejudice is presumed. (AOB 184-190.)

The state disagrees with this conclusion, but largely ignores the substantial body of case law on which the argument is based, arguing that "[i]t would be inappropriate to presume prejudice in this case." (RB 105-106.) But as Mr. Rices explained in his opening brief, in an unbroken line of cases from *Strickland* in 1986 to *Bell v. Cone* (2002) 535 U.S. 685, the Supreme Court and lower federal courts have repeatedly held that where counsel's ineffectiveness is *not* the result of counsel's own conduct, but it caused by state action, prejudice should be presumed. (AOB 184-190.) Because that is exactly

the situation here, a new penalty phase is required.[15]

[15] As Mr. Rices contended in Argument VIII of this brief, *supra*, even under the *Strickland* prejudice standard, counsel's failure to object to the Rices jury hearing Miller's testimony was prejudicial and requires reversal. For many of the same reasons here, even if prejudice is not presumed and *Chapman* applied, reversal is required given the nature of Miller's testimony and the prosecutor's reliance on it in asking the jury to impose death.

X. MR. RICES WAS DENIED HIS RIGHTS TO COUNSEL AND PRESENCE AT ALL CRITICAL STAGES OF THE PROCEEDINGS WHEN THE COURT RESPONDED EX PARTE TO A QUESTION FROM THE JURY.

As discussed in some detail above in Arguments VIII and IX, the Rices jury (along with the Miller jury) heard Miller's testimony in his own defense and the state's cross-examination of that testimony. (13 RT 1891, 1950.) When Miller's testimony referenced matters which the Rices jury alone was not entitled to consider -- such as Miller's view that Rices was a gang member -- the trial court had no hesitation in instructing the Rices jury it must disregard that evidence. (13 RT 1940.)

As also noted above, Miller told both juries that Rices forced him to commit the robbery at gunpoint, Rices was the mastermind controlling the robbery and he (Miller) was "scared for his life" because if he had tried to walk away, Rices would have killed him. (13 RT 1907-1919,1928, 1947.) If found credible by the Miller jury, this duress evidence could be relied on to acquit of the robbery (and the related felony murder). (*People v. Anderson* (2003) 28 Cal.4th 767, 784.) And apparently this duress evidence *was* found credible by at least some of the Miller jury, since despite Miller's admissions to being fully involved in the crime, his jury hung. (17 RT 2473-2497.) More important here, and as the prosecutor and trial court both candidly recognized, if the duress evidence was found credible by the Rices jury it could be relied on in aggravation to impose death.

(13 RT 1946.)

On cross-examination of Miller in front of both juries, the prosecution offered Exhibits 65 and 65A -- a letter written to Rices by Miller. (13 RT 1981.) The evidence was offered to convince the jury that Miller's claim of duress was not credible. (13 RT 1981-1982.) For obvious reasons, defense counsel raised no objection since he too wanted the jury to find that Miller was not credible. (13 RT 1981.) Accordingly, and in sharp contrast to the trial court's instruction as to Miller's testimony that Rices was a gang member, the court did *not* instruct the jury to disregard this particular evidence.

The parties discussed exhibits after the state rested. The stated moved into evidence "all of the exhibits that have been referred to and marked." (16 RT 2393.) Defense counsel objected to Exhibits 67 through 89. (16 RT 2394.) The court stated that with the exception of Exhibit 88, the objections were overruled. (16 RT 2394.) The court admitted "the balance of the People's exhibits that may have been offered in front of both juries." (16 RT 2394.) On its face, this ruling would include Exhibits 65 and 65A since both had been "offered in front of both juries" and defense counsel had no objection to either.

During deliberations, the Rices jury asked to see Exhibits 65 and 65A. The trial

court did not advise either defense counsel or the prosecutor of the jury's question. Instead, the court told jurors these exhibits had not been introduced into evidence at Mr. Rices's trial. (*People v. Rices*, Order of January 27, 2014 Settling Record at pp. 3-4, emphasis added.)

In Argument XII of his opening brief Mr. Rices contended the trial court violated his federal and state rights to counsel at all critical stages of trial when it fashioned an answer to the jury's question without notifying or consulting counsel. (AOB 200-204.) Given the aggravating nature of the duress evidence which Exhibits 65 and 65A could have rebutted (Miller's duress claim) -- and the fact that the Miller jury found the duress evidence credible -- a new penalty phase was required even if the error did not require per se reversal. (AOB 204-211.) Mr. Rices separately contended that his federal and state rights to presence were also violated. (AOB 212-213.)

The state concedes that the trial court violated Mr. Rices's right to counsel, and to be present, at all critical stages when it answered the jury's question without notifying counsel or having him present. (RB 110-111.) For three reasons, however, the state argues that these violations were harmless. (RB 111-116.) First, the state argues that the error is not subject to the per se reversal standard of *United States v. Cronic* (1984) 466 U.S. 648. (RB 111-113.) Second, applying the *Chapman* test to the error, the state

argues the error was harmless because "the exhibit had not been received into evidence in the Rices case, thus the court's answer to the jury was not incorrect." (RB 114.) Alternatively, assuming the exhibits would have been provided to the jury had counsel been consulted, the state argues any error was harmless because the letter was not "particularly helpful to the prosecution or the defense" and there was "substantial aggravation." (RB 115.)

Because the state has conceded error, Mr. Rices will proceed directly to prejudice. As discussed in some detail in the opening brief, the trial court's decision to fashion a response to the jury's question without notifying counsel completely deprived Mr. Rices of counsel at a critical stage of the proceedings. As such, no showing of prejudice is required and a new penalty phase is required. (AOB 204-208.) Because reversal is required even under a *Chapman* analysis, however, there is no need to resolve whether the per se rule of prejudice applies here.

The state's initial argument is that counsel's presence would not have mattered since Exhibits 65 and 65A were not admitted in the Rices trial. (RB 114.) As a factual matter, however, this assertion is wrong.

For its part, the state concedes that in the various discussions about admitting

exhibits the trial court never explicitly ruled Exhibits 65 or 65A *inadmissible.* (RB 108-109.) Mr Rices will likewise concede that in these discussions the trial court never explicitly ruled Exhibits 65 and 65A *admissible.*

But the record shows a bit more than this. It shows that both juries were present when the prosecutor introduced the letter in court and cross-examined Miller about the letter. (13 RT 1981-1982.) It shows that defense counsel for Mr. Rices did not object when the prosecutor offered and questioned about the letter. (13 RT 1981-1392.) And it shows that although the court never explicitly mentioned Exhibits 65 and 65A when it ruled on the exhibits, the court specifically ruled admissible "the balance of People's exhibits *that may have been offered in front of both juries.*" (16 RT 2394, emphasis added.) Because there is no dispute that Exhibits 65 and 65A were "offered in front of both juries," the state's current suggestion that the letter had been ruled inadmissible as to the Rices jury simply finds no support in the record.

But even if there was some ambiguity, the state's harmless error argument would have to be rejected. In fact, the state's argument misses the essential harm from the absence of counsel in the first place.

Even if the state was correct that Exhibits 65 and 65A were somehow not covered

by the court's admission of all exhibits "offered in front of both juries," had defense counsel been notified of the jury's question he could certainly have moved for admission of the letter. After all, the Rices jury was present for the cross-examination involving the letter, the cross-examination involved a matter which both the prosecutor and trial court had recognized was aggravating as to Rices, and defense counsel had not objected to its use and introduction into evidence. As a result, the state would have been hard pressed to argue for exclusion. The vice of answering the jury's question in the absence of counsel is that it prevented counsel from making any argument for admission, an argument the defense would likely have won given the record.

Perhaps recognizing this, the state argues in the alternative that even if the letter was (or should have been) admitted, any error is harmless beyond a reasonable doubt. (RB 114-115.) As noted, the state argues the letter was not "particularly helpful to the prosecution or the defense" and its absence was harmless in light of the "substantial aggravation." (RB 115.)

The characterization of the letter by the state's current appellate lawyers is very different from the characterization of the letter by the state prosecutor at Miller's trial. During closing arguments in Miller's trial the prosecutor returned to the duress issue at the very conclusion of his closing argument. Quoting directly from the very letter which

the state's appellate lawyers now characterize as not "particularly helpful to the prosecution," the prosecutor not only told jurors it compelled rejection of Miller's duress defense, but he went further and told jurors the letter actually proved Miller was trying to perpetrate a fraud:

> Mr. Rices and Mr. Miller are like brothers. They are best of friends. This letter written, as I recall, in December of '07 is from Mr. Miller to Mr. Rices, and it says "I love you, boy, and this struggle only gets better until pencil meets paper again, your protégé."
>
> Mr. Miller and Mr. Rices perpetrated a robbery and murders at the Granada liquor store, and any theory that it was done under some sort of threat is perpetration of fraud on you. (27 Aug. RT 3871.)

The state's current lawyers never explain the tension between (1) the view of the trial prosecutor that the letter so powerfully rebutted Miller's duress claim that it actually showed Miller was trying to "perpetrate a fraud" and (2) the view of the state's appellate lawyers that the letter was not "particularly helpful to the prosecution." (*Compare New Hampshire v. Maine* (2001) 532 U.S. 742, 749-750 [noting the necessity of the judicial estoppel doctrine to protect "the integrity of the judicial process . . . [by] prohibiting parties from deliberately changing positions according to the exigencies of the moment."].) Contrary to the view of the state's current lawyers, and just as the trial prosecutor recognized, evidence of the letter was mitigating precisely because it powerfully rebutted Miller's claim of duress.

The state once again notes the "substantial aggravation" in its harmless error argument. (RB 115.) As discussed above, however, while this observation is entirely fair a proper harmless error inquiry does not simply consider the aggravating evidence but "the whole record must be reviewed in assessing the significance of the errors." (*Yates v. Evatt, supra*, 500 U.S. 391, 409. *Accord Rose v. Clark, supra*, 478 U.S. at p. 583.) This includes the significant mitigating evidence presented here about Mr. Rices's childhood and upbringing. The state once again improperly excises any reference to mitigation from its harmless error calculus. (RB 115-116.) And in making a harmless error assessment, it is important to consider that (1) the prosecutor himself recognized Miller's claim of duress was aggravating evidence against Mr. Rices (13 RT 1946), (2) the prosecutor recognized Miller's letter directly rebutted this aggravating evidence (27 Aug. RT 3871), and (3) the very first exhibit the Rices jury asked to see once it began deliberations was the Miller's letter.

At the end of the day, establishing that the improper exclusion of defense evidence from a capital penalty phase is harmless is a heavy burden. It is supposed to be. While it is impossible to determine from a cold record how credible Miller's claim of duress was, the fact of the matter is that some number of the Miller jurors who heard this testimony found it credible: as noted above, the Miller jury was hung despite Miller's explicit admission that he was involved. (17 RT 2473-2497.) If even a single one of the Rices

jurors similarly found Miller's claim of duress credible, and considered it as an aggravating factor against Mr. Rices *just as the prosecutor and trial court both recognized it was*, exclusion of the Miller letter cannot be found harmless. (*See People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [hung jury is a more favorable verdict for purposes of assessing prejudice]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736 [same]; *People v. Brown* (1988) 46 Cal.3d 432, 471 n.1 [Broussard, J., concurring].) On this record the state cannot carry its heavy burden of proving the error harmless beyond a reasonable doubt.[16]

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[16] As discussed above, the state concedes that the trial court's decision to answer the jury question in secret also violated Mr. Rices's right to presence, but argues that the error is harmless beyond a reasonable doubt. (RB 111.) For the same reasons as discussed above, however, the error may not be found harmless.

XI. MR. RICES'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE PROSECUTOR ASKED THE JURY TO IMPOSE DEATH BY RELYING ON PRIOR FELONY CONVICTIONS AND CRIMINAL CONDUCT COMMITTED WHEN MR. RICES WAS A CHILD.

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 one prior felony conviction which Mr. Rices suffered as a child and two incidents of prior criminal conduct Mr. Rices committed as a child. (15 RT 2197-2201, 2202-2205, 2208-2213, 2214-2229, 2307.)

In Argument XIII of his opening brief, Mr. Rices contended that admission of this evidence required a new penalty phase for three reasons. First, the rule permitting the use of juvenile convictions and conduct 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 219-224.) 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

224-226.) Finally, on the facts of this case, the state will be unable to prove that admission of this juvenile conduct at the penalty phase was harmless. (AOB 230.)

The state disagrees, accurately citing four cases which reject the argument that *Roper* itself precludes consideration of juvenile convictions in penalty phase aggravation. (RB 118 *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.) As Mr. Rices conceded in his opening brief, although none of these cases considered the impact of either *Graham* or *Miller*, the rationale on which they reject his position is certainly broad enough to include those cases as well. As well-expressed in *People v. Bramit*, *supra*, 46 Cal.4th at p. 1239, the Court's position has been that reliance on *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. U.S. 551, 562–567. . . . Defendant's challenge here is to the admissibility of evidence, not the imposition of punishment." This is the precise portion of *Bramit* on which the state relies. (RB 118.)

This distinction of *Roper* articulated 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. Because the Eighth Amendment analysis of *Hall* cannot be distinguished, *Bramit* no longer controls and the Court should reexamine the impact of the principles animating *Roper*, *Graham* and *Miller*.

Alternatively, the state argues that any error was harmless beyond a reasonable doubt. (RB 118-119.) The state's main thesis is that the aggravating evidence of the circumstances of the crime and other criminal history as an adult renders consideration of the juvenile conduct and conviction harmless. (RB 119.)

The state's focus on the remaining aggravating evidence is, of course, one legitimate part of the harmless error calculus. But as discussed in more detail in numerous arguments above, and 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, supra*, 478 U.S. at p. 583; *People v. Galloway* (1979) 100 Cal.App.3d 551, 559.)

Here, as Mr. Rices 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. 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, as discussed in some detail in the opening brief, the defense presented substantial evidence about defendant's troubled childhood, background and upbringing. (AOB 11-16.)

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 a conviction suffered and conduct committed when Mr. Rices was a juvenile requires a new penalty phase.[17]

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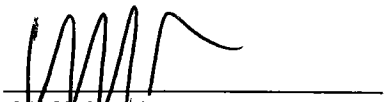
[17] The state briefly argues that counsel's failure to object to admission of this evidence forfeits the claim. (RB 117.) But as the state notes, this Court has long rejected the argument that the Eighth Amendment bars consideration of juvenile adjudications. (RB 117.) And it is well established that the requirement of an objection is excused when an objection would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Pursuant to this general rule, when a lower court is bound by Supreme Court authority to decide an issue in a certain way, counsel does not forfeit an issue by failing to make a futile objection which the lower court cannot sustain. (*People v. Birks* (1998) 19 Cal.4th 108, 117, n.6; *People v. Turner* (1990) 50 Cal.3d 668, 703-704.) Put another way, "the law does not require idle acts." (*People v. Medina* (1995) 11 Cal.4th 694, 739.)

CONCLUSION

For all these reasons, and for the reasons set forth in the opening brief, the case should be reversed for a new penalty phase.[18]

DATED: September 20, 2016

Respectfully submitted,



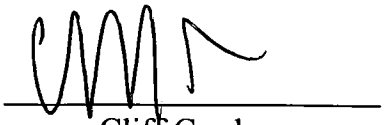
Cliff Gardner
Attorney for Appellant
Jean Pierre Rices

[18] Mr. Rices considers the remaining issues raised in his opening brief to be fully joined by the current briefing on file with the Court. Accordingly no further discussion of those issues is necessary here.

CERTIFICATE OF COMPLIANCE

I certify that the accompanying non-redacted brief is double spaced, that a 13-point proportional font was used, and that there are 28740 words in the brief.

Dated: September 20, 2016



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 September 21, 2016, 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, Suite 600
San Francisco, California 94105

Office of the Attorney General
P.O. Box 85266
San Diego, California 92186-5266

Jean Pierre Rices
P-98772
San Quentin State Prison
San Quentin, California 94974

Hon. Lantz Lewis
San Diego Superior Court
250 E. Main Street
El Cajon, California 92020

Office of the District Attorney
250 E. Main Street
El Cajon, California 92020

I declare under penalty of perjury that the foregoing is true.

Executed on September 21, 2016, in Berkeley, California.

Declarant