IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. CHARLES EDWARD MOORE, Appellant.	S075726 Superior Court (Los Angeles) A0185568

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Los Angeles County

Honorable James Pierce, Judge

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The jury was instructed it could convict Mr. Moore of murder in two distinct ways:

> (1) If the state proved an unlawful killing in the course of a robbery or burglary (7 RT 1628);
>
> (2) If the state proved that (a) Mr. Moore had been in possession of recently stolen property and (b) there was "corroborating evidence" which "need only be slight, and need not by itself be sufficient to warrant an inference of guilt." (8 CT 2038; 6 RT 1580, 1618.)

In his supplemental brief, Mr. Moore contended that providing the jury with this latter "possession of stolen property" theory of culpability required reversal. More specifically, Mr. Moore cited this Court's decisions in *People v. Coffman* (2004) 34 Cal.4th 1 and *People v. Prieto* (2003) 30 Cal.4th 226 and contended that the trial court's provision of a stolen property theory of murder was error. (Appellant's Supplemental Opening Brief ("ASOB") 12.) Because the jury rendered a general verdict of guilt, this error required reversal for three separate reasons: it gave the jury a theory of murder that did not exist under state law, it constituted an improper evidentiary presumption as to the proper elements of murder, and it improperly lightened the state's burden of proof. (ASOB 13-14, 14-19, 20-22.) In either case, reversal was required.

Respondent disagrees for three reasons. First, respondent asks this Court to overrule *People v. Smithey* (1999) 20 Cal.4th 936 and hold that the argument was waived by Mr. Moore's failure to object. (Supplemental Respondent's Brief ("SRB") 1-2.) Second, respondent asks this Court to overrule *Prieto* and *Coffman* and find there was no error in the first instance. (SRB 2-3.) Finally, respondent argues that any error was harmless. (SRB 4-9.) Respondent's arguments are meritless; reversal is required.

A. Because The Provision Of CALJIC 2.15 Affected Mr. Moore's Substantial Rights, Review Is Proper.

Mr. Moore has contended that the trial court's provision of CALJIC 2.15 was improper. (ASOB 12-22.) Respondent first argues that the Mr. Moore waived this instructional issue because he did not object at trial. (SRB 1-2.)

The argument need not long detain the Court. In fact, this Court has consistently rejected this precise argument in this precise context. (*People v. Gamache* (2010) 48 Cal.4th 347, 375, n.13; *People v. Smithey*, *supra*, 20 Cal.4th at p. 976, n.7.) So have other courts. (*See, e.g.*, *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173.) In light of the explicit language of Penal Code section 1259, it is hard to fault all these courts for reaching such a consistent conclusion:

> "The appellate court may . . . review any instruction given . . . even though no objection was made there to in the lower court, if the substantial rights of the defendant were affected thereby."

Here, Mr. Moore's claim is that provision of CALJIC 2.15 affected his substantial rights to proof beyond a reasonable doubt and undermined the presumption of innocence. Pursuant to section 1259, and the case law, review is proper.

B. Telling The Jury It Could Convict Of Murder If It Found Possession Of Stolen Property And Slight Corroboration Was Error.

This Court has repeatedly held that it is improper to instruct a jury it may convict a defendant of murder if it finds (1) he possessed stolen property and (2) there was "slight corroborating evidence." (*See, e.g., People v. Gamache, supra*, 48 Cal.4th at p. 375; *People v. Coffman, supra*, 34 Cal.4th at p. 101; *People v. Prieto, supra*, 30 Cal.4th at pp. 248-249.) Respondent argues all these cases are wrong; according to respondent, where a defendant is charged with a theft-based felony murder, the standard of proof beyond a reasonable doubt is satisfied by proof of nothing more than that (1) the defendant possessed stolen property and (2) there was slight corroborating evidence. (SRB 3-4.)

This argument too should not long detain the Court. Possession of stolen property, along with "slight corroborating evidence" does not constitute proof beyond a reasonable doubt of murder. As one court has correctly concluded, "[p]roof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed a murder to obtain the property." (*People v. Barker, supra*, 91 Cal.App.4th at p. 1176.) Error has occurred.

C. Giving The Jury A Possession-Of-Stolen-Property Theory Of First Degree Murder Was Not Harmless.

Mr. Moore contended the trial court's provision of CALJIC 2.15 required reversal for three separate reasons. First, citing *Suniga v. Bunnell* (9th Cir. 1994) 998 F.2d 664, Mr. Moore contended CALJIC 2.15 violated due process because it gave the jury a theory of murder that did not exist under state law. (ASOB 13-24.) Second, it constituted an improper evidentiary presumption as to the proper elements of murder. (ASOB 14-19.) Third, citing a series of cases from the Fifth Circuit Court of Appeals including *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254 and *United States v. Partin* (5th Cir. 1977) 552 F.2d 621, Mr. Moore contended that provision of CALJIC 2.15 improperly lightened the state's burden of proof. (ASOB 13-14, 14-19, 20-22.)

Although respondent disagrees generally, it makes no argument at all in connection with Mr. Moore's first argument -- that CALJIC 2.15 gave the jury a theory of culpability that does not exist under state law. (SRB 1-9.) The state does not cite or discuss *Suniga* specifically or the argument in general. (SRB 1-9)

To the state's credit, it does respond to the remaining arguments. Citing this Court's decision in *People v. Parson* (2008) 44 Cal.4th 332, the state argues that provision of CALJIC 2.15 did not constitute a permissive presumption as to the elements of murder. (SRB 7.) Citing this Court's decision in *Prieto*, the state argues that provision of CALJIC 2.15 did not lessen the state's burden of proof. (SRB 6-7.) And the state adds that any error is harmless because of the special circumstance findings. (SRB 8-9.)

As to the burden of proof issue, Mr. Moore has already anticipated the state's reliance on *Prieto*. (ASOB 23.) Accordingly, no further discussion of that issue is required. As explained in Mr. Moore's supplemental opening brief, the Court's conclusion in *Prieto* cannot be squared with *United States v. Cool* (1972) 409 U.S. 100 as well as *Partin* and *Hall*.

In connection with the permissive presumption issue, the state correctly notes that in *Parson*, this Court held that CALJIC 2.15 did not create an improper permissive presumption. (44 Cal.4th at p. 356.) But there is a basic difference between the issue in *Parson* and the issue here.

Parson involved the provision of CALJIC 2.15 in connection with theft offenses -- in that case, robbery and burglary. (44 Cal.4th at p. 355.) It was precisely for this reason that the Court held "the instruction did not create a permissive presumption that violated due process, because 'reason and common sense' justified the suggested conclusion that defendant's conscious possession and use of recently stolen property tended to show his guilt of robbery and burglary." (*Id.* at p. 355.)

This case, of course, does *not* involve an attack on CALJIC 2.15 in connection with theft offenses. This case involves provision of CALJIC 2.15 as a shortcut to conviction *not* of theft offenses, but of murder. Indeed, this is the crux of the problem with CALJIC 2.15 here. In contrast to *Parson*, neither "reason [nor] common sense justif[y] the suggested conclusion that defendant's conscious possession and use of recently stolen property tended to show his guilt of [murder]." (44 Cal.4th at p. 355.) To

the contrary, "[p]roof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed a murder to obtain the property." (*People v. Barker*, *supra*, 91 Cal.App.4th at p. 1176.) *Parson* is of no aid to the state here.[1]

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[1] Finally, the state relies on the special circumstance verdicts to render any error harmless. Respondent notes these verdicts show "the murders were committed in the course of a burglary and robbery" and argues, in turn, that these verdicts show the jury necessarily relied on "at least one correct" theory -- felony-murder. (SRB 9, *citing People v. Kelly* (1992) 1 Cal.4th 495, 531.)

It is true, of course, that the jury found both the robbery and burglary special circumstance allegations true. (8 CT 2013, 2015.) And it is also true that when a case is presented to the jury on alternate theories, and one of those theories is incorrect (as is the case here), a reviewing court may affirm the conviction only where the record necessarily shows the jury relied on a correct theory. (*People v. Kelley*, *supra*, 1 Cal.4th at p. 531.)

Nevertheless, the problem with respondent's position is basic. Although respondent directs the Court's attention to the special circumstance verdicts, it ignores completely the jury instructions which resulted in those verdicts. (SRB 8-9.) Those instructions show why the state's argument must be rejected; the jury here was instructed that to prove the special circumstance allegation, the state must prove that "the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery and/or burglary" and "the murder was committed in order to carry out or advance the commission of the crime of robbery and/or burglary . . . ." (8 CT 2068.)

In other words, the error at the heart of this case is in the trial court's alternate (and incorrect) definition of the crime of murder itself. The jury's special circumstance verdicts were marred by the identical error since -- under the court's instructions -- the jury may have relied on the court's incorrect definition of murder in finding the special circumstance allegation true. An instructional error may not be found harmless based on a separate verdict that is marred by the same instructional error.

II. THE TRIAL COURT'S PROVISION OF CALJIC NO. 2.11.5 UNDERCUT THE DEFENSE PRESENTED TO THE HOMICIDES CHARGED IN COUNTS ONE AND TWO.

Terry Avery was the state's main witness; she testified that Mr. Moore participated in the underlying felonies and personally killed Mr. Crumb. (6 RT 1325-1380.) The prosecutor herself recognized that the evidence against Mr. Moore was "primarily the testimony of Terry Avery." (7 RT 1651.)

But Avery had certain credibility problems. As Mr. Moore noted in closing argument, Avery was an accomplice in the offense as a matter of law who had not been prosecuted at all by authorities for her role in the offense. In order for the jury to fairly evaluate the defense theory as to Avery, the jury would have to determine exactly why she testified against Mr. Moore, and why she had not been prosecuted.

Prior to deliberations, however, the trial court gave the jury an instruction which directly interfered with its ability to make this critical determination, advising the jury that although there was evidence that persons other than Mr. Moore may have been involved in the crime, the jury was not to "discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether Lee Harris has been or will be prosecuted." (7 RT 1617.)

In his supplemental opening brief, Mr. Moore contended that provision of this instruction undercut his theory of defense that Avery was lying in order to obtain

immunity from prosecution. (ASOB 26-33.) Under the circumstances of this case, the error was prejudicial and requires reversal. (ASOB 33-34.)

Respondent disagrees for three reasons. First, respondent argues that the claim is waived by Mr. Moore's failure to object. (SRB 10.) Second, respondent argues that the instruction was properly given because (1) "Lee Harris . . . was repeatedly mentioned during trial" and (2) the jury was not likely to apply the instruction to Avery because she was not named in it. (SRB 11.) Third, respondent argues that any error was harmless because other instructions regarding witness credibility were given. (SRB 12-13.)

Respondent's waiver argument is easily addressed. Because the instruction given here undercut the central theory of defense in violation of Mr. Moore's substantial rights under the Fifth, Sixth and Eighth Amendments, no objection was necessary in order to raise this claim on appeal. (*See* Penal Code section 1259 ["Upon an appeal being taken by the defendant . . . . [t]he appellate court may also review any instruction given, refused

or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].)[2]

Turning to the merits, respondent argues that the instruction was properly given, and applied only to Lee Harris. (SRB 11-12.) First things first.

This Court has repeatedly held that "CALJIC 2.11.5 should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility." (*People v. Williams* (1997) 16 Cal.4th 153, 226. *Accord People v. Hardy* (1992) 2 Cal.4th 86, 190; *People v. Carrera* (1989) 49 Cal.3d 291, 312.) Respondent recognizes this (SRB 11), but argues it has no application here because the jury would have known to apply CALJIC 2.11.5 solely to Lee Harris. (SRB 11-12.)

As respondent notes, Mr. Moore has already anticipated and addressed this precise argument. (ASOB 29-30.) Mr. Moore has nothing to add on this issue; as noted in the

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[2] In aid of its implicit argument that section 1259 does not apply, respondent cites this Court's decision in *People v. Williams* (2010) 49 Cal.4th 405 for the proposition that failure to request a modification of CALJIC 2.11.5 forfeits an attack on the instruction on appeal. (SRB 10.) But *Williams* held no such thing.

In *Williams*, defense counsel not only did not object to provision of CALJIC 2.11.5, but stipulated to the instruction being given. (49 Cal.4th at p. 457.) Nevertheless, on appeal defendant contended the instruction should not have been given. Even on this record, the Court did *not* find the issue waived. (*Ibid.*) Instead, the Court (1) noted the general rule requiring an objection to preserve a claim on appeal, (2) noted that defense counsel had stipulated to the instruction and (3) cited this Court's decision in *Prieto* to the effect that "instructional error that affects the defendant's substantial rights may be reviewed on appeal despite the absence of an objection." (*Ibid.*) The Court then addressed the merits of the argument. (*Ibid.*)

supplemental brief, the state's argument requires the jury to apply the jury instruction in such a way as to render half of the instruction meaningless. (ASOB 29.)

Finally, respondent argues that any error was harmless, applying the lenient state-law standard of prejudice. (SRB 13.) As discussed in some detail in Mr. Moore's supplemental brief, because of the federal constitutional dimension to this error, the proper standard of prejudice to be applied is the *Chapman* standard, requiring the state to prove the error harmless beyond a reasonable doubt. (ASOB 33.) For the reasons set forth in that brief, the improper provision of CALJIC 2.11.5 is not harmless in this case.

III. THE TRIAL PROSECUTOR VIOLATED BOTH DUE PROCESS AND THE EIGHTH AMENDMENT IN TAKING FUNDAMENTALLY INCONSISTENT POSITIONS IN THE PENALTY PHASES OF HARRIS AND MOORE.

The state tried Lee Harris twice for the murders in this case. At the 1980 trial, the prosecutor's theory was straightforward: Harris planned the murders and was the mastermind, controlling both Avery and Moore, and therefore deserved to die. According to the prosecutor Harris ordered Terry Avery to get the knife and stab Mrs. Crumb, he controlled the actions of Mr. Moore, he "directed" Avery's acts, and the idea to kill came entirely and solely from Harris. (RTH 1980 at 1638, 1647, 1657, 1659, 1697.) Harris deserved death because he "directed the murders of Hettie and Robert Crumb by word, deed and conduct," "was the moving force in ultimately deciding to exterminate these innocent people" and was "the man in control of Charles Moore . . . ." (RTH 1980 at 2076-2077.) This jury convicted and imposed death and Mr. Harris appealed to this Court. (*See People v. Harris* (1984) 36 Cal.3d 36.)

Mr. Moore's first trial began in March of 1984, when the *Harris* case was still on appeal in this Court. The jury convicted and imposed death, and Mr. Moore appealed to this Court as well. (*See People v. Moore* (1987) 47 Cal.3d 63.)

In April of 1984, this Court reversed Mr. Harris's conviction and remanded the matter for a second trial. The second Lee Harris trial occurred in 1985, the year after Mr. Moore's trial. The prosecutor's theory as to Mr. Harris had not changed. The plan to kill was "Mr. Harris's plan," and Harris was "in control" of Moore. (RTH 1985 at 3605-3606, 3614.) In no uncertain terms, the "idea of the actual killing and how to do each of

the . . . killings was this defendant Lee Edward Harris' contribution to this series of executions" and he (Harris) took control of "ordering Mr. Moore around." (RTH 1985 at 3838, 3844.)

In 1987, this Court affirmed Mr. Moore's conviction and sentence. The federal courts eventually granted relief, and Mr. Moore's second trial began in 1998.

But at Mr. Moore's trial, the prosecutor told a very different story than was told in the 1980 or 1985 Harris trials. In Mr. Moore's case, the prosecutor told the jury that Moore "encouraged, initiated, coerced these killings as much as Lee Harris." (7 RT 1660.) Mr. Moore was no longer acting under the control of "another person who planned these crimes" and there was "no evidence" Harris controlled Mr. Moore. (8 RT 1958-1959.)

In his opening brief, Mr. Moore contended that the prosecutor's starkly inconsistent positions violated Due Process and required a new penalty phase. (ASOB 47-51.) He separately contended the prosecutor's argument violated the Eighth Amendment. (ASOB 51-53.) In a judicial notice motion, he provided both the Court and opposing counsel with the specific portions of the Harris transcripts on which he relied. Of course, as to opposing counsel this was entirely unnecessary since the California Attorney General had formally represented the state in both Harris appeals and had unfettered access to the transcripts from those trials. (*See People v. Harris*, *supra*, 36 Cal.3d at p. 42; *People v. Harris* (1987) 191 Cal.App.3d 819, 820.)

In its supplemental brief, the state takes a calculated and strategically quite clever approach to this issue. The state refuses to address the merits of this issue at all. Not a single word.

Instead, respondent notes that this Court has not yet ruled on the pending application for judicial notice. (SRB 18.) Then, respondent advises the Court it has simply *refused* to review those portions of the Harris record which were specifically provided to it and on which Mr. Moore's claim was based:

> "Respondent's counsel has not reviewed the transcript of Harris's trials to evaluate the claim of inconsistent theories." (SRB 18, n.4.)

To the contrary, although the state was counsel in both Harris appeals and therefore has unrestricted access to the records of both Harris trials -- and although Mr. Moore's judicial notice motion provided the precise portions of the transcripts on which he has relied -- the state informs the Court that it needs more time to brief this issue:

> "Should this Court grant appellant's request for judicial notice, respondent respectfully requests leave and sufficient time to review the transcripts of Harris's trial and to prepare an appropriate response to appellant's claim of inconsistent theories." (SRB 18, n.4.)

Respondent then cites *People v. Sakarias* (2000) 22 Cal.4th 596 for the proposition that judicial notice should be denied. (SRB 18.)

While Mr. Moore certainly can appreciate the strategy behind respondent's refusal to review the Harris transcripts or brief the merits of the issue, the absence of a substantive response on this issue does not advance the search for a just result. To the contrary, this strategy hinders the Court both in resolving the merits of the issue itself and in ruling on the request for judicial notice. As one court has stated, "[b]ecause the propriety of taking judicial notice usually requires an analysis of the substantive issues involved, the decision whether or not judicial notice will in fact be taken will normally be postponed and made at the time the cause is considered on the merits as an additional appellate issue." (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493-494.) That is why this Court's rulings on judicial notice requests usually appear in the text of the Court's opinions addressing the merits of the issue. (*See, e.g., People v. Jacinto* (2010) 49 Cal.4th 263, 272 n.5; *In re Reeves* (2005) 35 Cal.4th 765, 777; *In re Varnell* (2003) 30 Cal.4th 1132, 1144, n.7.) Of course, this reasoned approach is no longer possible here, precisely because of the state's peremptory refusal to address the merits of the claim, or even review the Harris materials.

Indeed, the state's tactic in refusing to address the merits of this claim on appeal here is flatly inconsistent with the position the state took in *In re Allison*, S042478. There, the state repeatedly argued that a claim of inconsistent arguments was waived unless raised on appeal. (*In re Allison*, SO42478, Respondent's Informal Response to Petition for Writ of Habeas Corpus ["Response"] at p. 3; *see also* Respondent's Supplemental Letter Brief of June 16, 1995 at p. 1 [the inconsistent arguments claim "could have been, but was not, raised on direct appeal."].) This Court agreed with the state and rejected the defendant's attempt to raise the issue in state habeas proceedings.

(*In re Allison*, S042478, Order of April 16, 1997 at p. 1.) The state is asking this Court to blind itself to the very claim it successfully demanded the defendant raise on appeal in *Allison*.

The state should be judicial estopped from this sea change in positions. As the United States Supreme Court has explained, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (*New Hampshire v. Maine* (2001) 532 U.S. 742, 749.) The judicial estoppel doctrine is to "to protect the integrity of the judicial process . . . [by] prohibiting parties from deliberately changing positions according to the exigencies of the moment." (*Id.* at pp. 749-750.) Or, as Judge Trott wrote in applying the doctrine against the state in a criminal case, it is "intended to protect against a litigant playing fast and loose with the courts." (*Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037.)

Concern with the integrity of the judicial system is not confined to the federal courts. California courts have recognized that "[j]udicial estoppel is an equitable doctrine aimed at preventing fraud on the courts" by "prohibit[ing] a party from taking inconsistent positions in the same or different judicial proceedings." (*M. Perez Co. v. Base Camp Condominiums Ass'n No. One* (2003) 111 Cal.App.4th 456, 463.) In California courts, too, the doctrine "is intended to protect against a litigant playing fast and loose with the courts." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) "It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (*Ibid.*)

The state's refusal to review the Harris materials -- or brief the merits of Mr. Moore's claim -- pending resolution of the judicial notice motion is surprising for another reason. When it benefits the People's cause, the state itself often requests judicial notice of records from other cases. (*See, e.g., People v. Webster* (1991) 54 Cal.3d 411, 428 n.4 [request denied]; *People v. Millard* (2009) 175 Cal.App.4th 7, 20, n.3 [request granted]; *People v. Cole* (2008) 165 Cal.App.4th Supp. 1, 5 n.3 [granted]; *In re Marquez* (2007) 153 Cal.App.4th 1, 11 n.8 [denied]; *People v. Bizieff* (1990) 226 Cal.App.3d 130, 133, n.2 [granted].) Such requests make sense because, as this Court has repeatedly made clear, the primary question in deciding whether judicial notice is appropriate is whether the information sought to be noticed is reasonably subject to dispute. (*People v. Hill* (1998) 17 Cal.4th 800, 847, n.9; *People v. Wiley* (1995) 9 Cal.4th 580, 594.) And certified records from other cases are rarely, if ever, in dispute. As a consequence, this Court (and others) often take judicial notice of records from another case. (*See, e.g., County of San Diego v. State* (1997) 15 Cal.4th 68, 83, n.7; *Estate of Castiglioni* (1995) 40 Cal.App.4th 367, 370, n.3.) This includes the records of the separate trial of a co-defendant in order to decide whether a prosecutor presented inconsistent arguments. (*People v. Hoover* (1987) 186 Cal.App.3d 1074, 1082 n.1.)

Rather than address any of these authorities, respondent relies on *People v. Sakarias*, *supra*, 22 Cal.4th 596, to argue that judicial notice should not be granted.

Sakarias does not change the longstanding rules regarding judicial notice, and certainly does not support the state's refusal to brief the merits of this issue. In *Sakarias*, a capital defendant alleged on appeal that the prosecutor at his trial improperly relied on a

theory of the case that was different from the theory he presented at the separate and earlier trial of a co-defendant. The defendant asked for judicial notice of transcript pages from the co-defendant's earlier trial. After both parties briefed the merits of the claim, and after oral argument, the Court ruled on the judicial notice motion. The Court refused to take judicial notice because it could not "determine whether, in the period between the two trials, significant new evidence surfaced [to justify the prosecutor's changed position]." (22 Cal.4th at p. 636.) Accordingly, the Court ruled the matter was best resolved in habeas proceedings. (*Ibid.*)

The reason judicial notice was denied in *Sakarias* has no application here at all. Here is why.

The contrary position the prosecutor took in Harris's trial was taken both (1) at Harris's first trial in 1980, years *before* the Moore trial (just as in *Sakarias*) and (2) at Harris's second trial in 1985, *after* the Moore trial (in stark contrast with *Sakarias*). In other words, unlike *Sakarias* there can be no question here as to whether "in the period between the two trials, [the prosecutor obtained] significant new evidence" which caused him to switch theories at Mr. Moore's trial. This is so because the prosecutor took the same theory at *both* Harris trials, one *before* Mr. Moore's trial and one *after*. The entire reason the Court refused to take judicial notice in *Sakarias* -- to see if there was a fact-based reason the prosecutor switched theories -- has no application here. And equally important, the *Sakarias* court ruled on the judicial notice motion only after the state had discussed the merits and provided information about the claim which informed the Court that it should resolve the matter in state habeas proceedings.

This issue is properly before the Court. The state's refusal to read the Harris materials or brief the merits of the issue is brinksmanship. Because the state has not disputed the merits of the claim, a reply on the merits is not plausible. Either the state should be ordered to brief the merits of the issue, or the penalty phase should be reversed. (*See People v. Bouzas* (1991) 53 Cal.3d 467, 480 [the state's failure to respond to an argument raised by a criminal defendant is an "apparent conc[ession]" of the point.].)

IV. THE TRIAL COURT'S EXCLUSION OF EVIDENCE AND ARGUMENT REGARDING HARRIS'S LIFE SENTENCE VIOLATED STATE AND FEDERAL LAW.

Harris and Moore were both charged with this crime, and tried separately. Teri Avery, the state's main witness, testified about the role both men had in the crime. Avery testified that (1) Moore never said anything about killing anyone, (2) Harris was "the brains behind" the crime, (3) Harris assaulted Mrs. Crumb and strangled her, (4) Harris ordered Avery to get a knife and stab Mrs. Crumb, becoming angry when she did not stab hard enough and (5) Harris ordered Avery to wipe down the coffee table to get rid of fingerprints. (6 RT 1346, 1348, 1352-1354, 1359, 1423-1424.)

In light of Harris's primary role in the crimes, and during the penalty phase, Mr. Moore sought to inform the jury that Harris had received a life sentence. (7 RT 1907.) He asked for an instruction telling the jury it could consider this fact in mitigation. (7 RT 1737.) The trial court refused to permit any evidence about Harris's sentence, it refused to instruct the jury as requested, and it refused to permit argument on this point. (7 RT 1907, 1972-1973.)

In his opening brief, Mr Moore contended that the trial court's ruling required a new penalty phase for five reasons. First, he contended that under binding United States Supreme Court precedent -- *Parker v. Dugger* (1991) 498 U.S. 308 -- evidence that an equally culpable co-defendant received a life sentence may not be excluded under the Eighth Amendment. (ASOB 57-63.) Recognizing that this Court had distinguished *Parker* in a number of cases, Mr. Moore explained in some detail why that distinction

itself ignored not only United States Supreme Court precedent, but this Court's own precedent as well. (ASOB 63-69.) Second, he contended that even if the Eighth Amendment did not itself require admission of this evidence, admission was required under the Due Process Clause to rebut the prosecutor's specific argument that the facts of this crime alone required death. (ASOB 69-71.) Third, he contended that the trial court's separate refusal to allow defendant to argue this subject at the penalty phase violated the Sixth Amendment right to present closing argument on all relevant points in a case. (ASOB 72-74.) Fourth, he contended that even if the trial court's rulings did not violate the federal constitution, they violated state law, specifically the provisions of section 190.3 which permit capital defendants to introduce "any matter relevant to . . . sentence." (ASOB 74-76.) Finally, he contended that these errors require a new penalty phase. (ASOB 77-80.)

Respondent disagrees for five reasons. First, respondent briefly cites this Court post-*Parker* precedent and argues that "appellant provides no persuasive reason to reconsider" this line of authority. (SRB 20.) Second, respondent argues that this evidence was not admissible to rebut the prosecutor's penalty phase closing argument. (SRB 22.) Third, respondent argues that since there was no basis for admitting evidence of Harris's life sentence under federal law, the trial court did not violate Mr. Moore's right to present closing argument on a relevant issue. (SRB 22.) Fourth, respondent argues that because there was no right to admit this evidence under federal law, there is no right to admit it under state law either. (SRB 22.) Finally, respondent argues that any error was harmless. (SRB 23.)

Each of these arguments will be addressed in turn. As discussed below, respondent's arguments are meritless and reversal of the penalty phase is required.

A. The Eighth Amendment Does Not Permit States To Exclude Evidence Of A Life Sentence Imposed On An Equally Culpable Co-defendant.

In *Parker v. Dugger* (1991) 498 U.S. 308 the United States Supreme Court held that in a capital defendant's penalty phase, mitigating evidence that an equally culpable co-defendant received a life sentence may not be excluded from consideration under the Eighth Amendment. In its post-*Parker* opinions, this Court has consistently concluded that admission of this type of evidence is *not* required by the Eighth Amendment. This Court has explained its view that *Parker* rests on the premise that in Florida, evidence of a co-defendant's life sentence is admissible not because of the Eighth Amendment, but because Florida state law permits such evidence at the penalty phase of a Florida capital trial. (ASOB 63-69.) As noted above, in a short argument respondent argues that "appellant provides no persuasive reason to reconsider" this line of authority. (SRB 20.)

The state's approach to *Parker* must be rejected for four reasons. First, it reflects a fundamentally incorrect understanding of Florida law. Like the California death penalty statute, the Florida statute sets forth mitigating factors which a sentencer may consider. Like the California statute, the Florida statute does not include *any* reference to the sentence of a co-defendant. To the contrary, the definition of mitigation under the Florida statute looks almost identical to that under the California statute:

"Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty." (Fla. Rev. Stat. § 921.141(6). *Compare* California Penal Code § 190.3, subdivisions (a) - (k).)

Perhaps because the Florida statute itself does not even mention sentences of a co-defendant, the Florida Supreme Court has made clear that evidence of an equally culpable co-defendant's sentence is admissible in Florida *not* because of some specific requirement of Florida state law, but because of the Eighth Amendment requirement that mitigating evidence not be excluded from the penalty phase. (*See, e.g., O'Callaghan v. State* (Fla. 1989) 542 So.2d 1324, 1326 [citing *Hitchcock v. Dugger* (1987) 481 U.S. 393 and holding that precluding the sentencer from considering the lesser sentence of a codefendant was constitutional error]; *Campbell v. State* (Fla. 1990) 571 So.2d 415, 419, n.4 [citing *Lockett v. Ohio* (1978) 438 U.S. 586 and holding that mitigation includes

"[d]isparate treatment of an equally culpable codefendant."]; *Downs v. State* (Fla. 1990) 572 So.2d 895, 899 [citing *Lockett* and noting that evidence of defendant's role in the offense compared to several codefendants was "valid mitigation in light of the fact that codefendants got lesser sentences or were not prosecuted at all."]; *compare Herring v. State* (Fla. 1984) 446 So.2d 1049, 1056 [although the Eighth Amendment does not require admission of evidence regarding life sentences in unrelated cases, it permits evidence of a codefendant's life sentence "in order to allow the jury to know all the facts and circumstances surrounding an offense and its participants."].) Of course, as this Court itself has properly recognized, in assessing the meaning of another state's law, the state supreme court from that state is the final arbiter of the meaning of that state's law. (*See, e.g., People v. Warner* (2006) 39 Cal.4th 548, 554.)

In short, in *Parker* the United States Supreme Court found constitutional error in the sentencer's refusal to consider mitigating evidence of a co-defendant's life sentence. The Florida statutes and case law make clear that consideration of this evidence was not required by state law, but by the Eighth Amendment itself. That is why *Parker* controls this case.

Second, the approach to *Parker* advocated by the state here also ignores the Supreme Court's decision in *Richmond v. Lewis* (1992) 506 U.S. 40. There, the defendant was convicted of capital murder. At his penalty phase, he introduced mitigating evidence of a co-defendant's lesser sentence. The trial court found aggravating circumstances outweighed mitigation and imposed death. On appeal, the five-justice Arizona supreme court found that the trial court had considered an

aggravating factor that was unconstitutionally vague. A divided state court nevertheless affirmed the death sentence -- two justices wrote the principal opinion affirming the sentence, two justices wrote a separate concurrence and one judge dissented.

The United States Supreme Court granted relief as to the death sentence. The Court first noted that the trial sentencer's "findings as to mitigation" included the fact that several codefendants had not been charged. (506 U.S. at p. 44.) Although the state reviewing court could have properly imposed death after invalidating one of the aggravating factors which went into the trial court's sentencing decision, the state court could only do so by "actually perform[ing] a new sentencing calculus." (506 U.S. at p. 49.) Relief was required precisely because the two-justice concurrence did not consider the mitigating evidence and, absent such consideration, defendant had been denied the type of "individualized sentence" required by the Eighth Amendment. (506 U.S. at pp. 49-52.) Like *Parker*, *Richmond* establishes that a capital sentencer's failure to consider mitigating evidence of a co-defendant's lesser sentence violates the Eighth Amendment.[3]

Third, the state's approach to *Parker* is wrong because -- although this Court has not had occasion to address the point -- the Florida state-law rationale on which this Court's post-*Parker* cases rest have not discussed *Barclay v. Florida* (1983) 463 U.S.

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[3] According to the Arizona Supreme Court, the Arizona mitigation statute was amended after *Lockett* so that it would "conform to . . . constitutional requirements." (*State v. Lopez* (Ariz. 1993) 857 P.2d 1261, 1269.) In Arizona, like Florida, these "constitutional requirements" preclude trial courts from excluding mitigating evidence of a co-defendant's lesser sentence. (*Compare State v. Watson* (Ariz. 1978) 586 P.2d 1253, 1256-1257 [remanding for re-sentencing where sentencer refused to consider mitigation, including fact that co-defendant got a lesser sentence, under pre-*Lockett* statute] *with State v. Watson* (Ariz. 1981) 628 P.2d 943, 947 [on remand, mitigation including life sentence of co-defendant, is considered and court imposes life sentence].)

939. In *Barclay*, the Supreme Court held that mere errors of state law in assessing factors weighed in deciding penalty do *not* implicate the federal constitution at all. (ASOB 65-66.) If this Court's reading of *Parker* was correct, and the only error in *Parker* was one of state law, then pursuant to *Barclay* the United States Supreme Court would not have found constitutional error.

Fourth, the Florida state-law rationale ignores this Court's own treatment of trial court errors in refusing to consider mitigating evidence required only by state law. Specifically, this Court has held that improper exclusion of lingering doubt evidence at the penalty phase -- evidence which is admissible only because of state law -- is state law error only. (ASOB 66-68, *citing People v. Hamilton* (2009) 45 Cal.4th 863, 912; *People v. Gay* (2008) 42 Cal.4th 1195, 1223.) This approach simply cannot be squared with a reading of *Parker* for the proposition that the exclusion of penalty phase evidence only admissible under state law violates the federal constitution.

Respondent addresses none of these issues. Nor does respondent address -- or even cite -- the explicit definition of mitigation set forth by the Supreme Court.

But Supreme Court cases are pesky things. Ignoring them will not make them go away. The United States Supreme Court has explained that in deciding whether evidence is mitigating within the meaning of the Eighth Amendment, "the question is simply whether the evidence is of such a character that it "might serve 'as a basis for a sentence less than death.'" (*Tennard v. Dretke* (2004) 542 U.S. 274, 287.)

So the ultimate question here is whether evidence of Harris's life sentence met the Supreme Court's definition of mitigating evidence. While it is true that this Court's *post-Parker* precedents hold that evidence of a co-defendant's sentence is *not* mitigating, the fact of the matter is that this view departs from the overwhelming weight of authority from around the country.

For decades now, evidence of a co-defendant's sentence has been routinely admitted and argued as mitigation in capital trials around the country. Thus, courts in Delaware, Mississippi, Alabama, Indiana, Arizona, Missouri, Colorado, Florida and Maryland have long held this evidence is mitigating. (*See, e.g.*, *Garden v. State* (Del. 2004) 844 A.2d 311, 317 ["[O]ur courts . . . have long recognized a co-defendant life sentence as a mitigating factor."]; *Howell v. State* (Miss. 2003) 860 So.2d 704, 762 [trial court properly instructed the jury that life sentence on co-defendants was evidence of mitigation]; *Ex parte Burgess* (Ala. 2000) 811 So.2d 617, 628 [error for trial court to refuse to consider lesser sentences of codefendants in sentencing defendant to death]; *Holmes v. State* (Ind. 1996) 671 N.E.2d 841, 850-851 [capital sentencer finds that co-defendant's life sentence was a mitigating factor]; *State v. Towery* (Ariz. 1996) 920 P.2d 290, 311 [capital sentencer finds as a fact in mitigation co-defendant's sentence for second degree murder]; *State v. Shinn* (Mo. App. 1994) 874 S.W.2d 403, 407 [citing *Lockett* and concluding that a co-defendant's lesser sentence "can be a mitigating factor . . . ."]; *State v. Schurz* (Ariz. 1993) 859 P.2d 156, 165 [capital sentencer finds as a fact in mitigation that co-defendant received probation]; *State v. Ferguson* (Del.Super. 1992) 642 A.2d 1267, 1269-1270 [citing *Lockett* and concluding "that information about [co-defendant's lesser] sentence is admissible at [defendant's] penalty hearing."]; *People v.*

Rodriguez (Colo. 1990) 794 P.2d 965, 996 [trial court properly instructed jury that "[y]ou may consider as a mitigating factor that [defendant's] co-defendants have received sentences less than the death penalty."]; *State v. Marlow* (Ariz. 1989) 786 P.2d 395, 402 ["disparity between the sentences of accomplices of the sort that occurred in this case must be considered and may be found as a mitigating circumstance and weighed against any aggravating circumstances, in determining whether to impose the death penalty."]; *Lamb v. State*, 532 So.2d 1051, 1052 (Fla. 1988) [trial court found co-defendant's 17-year sentence to be a mitigating factor]; *Riley v. State* (Del. 1985) 496 A.2d 997, 1026 ["Evidence offered as to mitigating circumstances was . . . that [the co-defendant] received a less severe penalty."]; *Johnson v. State* Md. 1985) 495 A.2d 1, 16-17 [approving instructions which left "the jury . . . free to either conclude that [codefendant's lesser] sentence was a mitigating factor or disregard it entirely."]. *See also Flanagan v. State* (Nev. 1996) 930 P.2d 691, 699 [holding that "it was proper and helpful for the jury to consider the punishments imposed on the co-defendants."]; *Riley v. State* (Del. 1990) 585 A.2d 719, 730 [fact that co-defendant received a less severe sentence is a "mitigating factor"]; *State v. Goodman* (N.C. 1979) 257 S.E.2d 569, 590 [citing *Lockett*, trial court properly instructed capital sentencing jury to consider evidence of no-death sentence given to co-defendant].) The consistent practice in these states shows that in a capital case, evidence regarding the life sentence of a co-defendant has been repeatedly recognized as precisely the type of evidence which "is of such a character that it "might serve 'as a basis for a sentence less than death.'" (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 287.) But there is more.

The United States Congress -- in passing the federal death penalty act -- *required* that capital sentencers consider in mitigation a co-defendant's non-death sentence. (*See*, 18 U.S.C. § 3592, subdivision (a)(4) ["In determining whether a sentence of death is to be imposed on a defendant, the finder of facts shall consider any mitigating factor, including the following: (4) . . . Another defendant or defendants, equally culpable in the crime, will not be punished by death."].) Congress's judgment is important in two respects. First, in assessing the scope of the Eighth Amendment in connection with capital punishment, the Supreme Court often relies on what Congress has done. (*See, e.g., Roper v. Simmons* (2005) 543 U.S. 551, 567 [in holding that the death penalty for juveniles violates the Eighth Amendment, the Court relies on the fact that in the federal death penalty act, Congress excluded juveniles from the death penalty]; *Atkins v. Virginia* (2003) 536 U.S. 304, 314, n.10 [in holding that the death penalty for the mentally retarded violates the Eighth Amendment, the Court relies on the fact that in the federal death penalty act, Congress excluded the mentally retarded from the death penalty].) Second, the fact that Congress felt that a co-defendant's lesser sentence was so important that it *required* capital sentencers to consider this evidence in every case is a strong indication that -- just as the courts of Delaware, Mississippi, Alabama, Indiana, Arizona, Missouri, Colorado, Florida and Maryland have concluded -- the lesser sentence on a co-defendant falls squarely within the broad definition of mitigation the Supreme Court laid out in *Tennard v. Dretke, supra.*[4]

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[4] Congress was not alone in believing evidence of a co-defendant's sentence was so mitigating it could not be excluded from the capital sentencing calculus. Other legislatures have reached the same conclusion. (*See, e.g.*, N.H. Rev. Stat. § 630:5, subdivision (vi)(g) ["In determining whether a sentence of death is to be imposed upon a defendant," the jury shall consider whether "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."].)

This Court's reading of *Parker* is untenable. It cannot be reconciled with Florida law, it cannot be reconciled with *Richmond*, it cannot be reconciled with *Barclay*, it cannot be reconciled with this Court's lingering doubt cases, it cannot be reconciled with the extremely broad definition of mitigation set forth in *Tennard* and it cannot be reconciled with case law and statutes from around the country recognizing that this evidence is mitigating. Although the rule of *stare decisis* is important, "previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result." (*Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679.) The United States Supreme Court has similarly held that *stare decisis* should not shield decisions from review, especially in "constitutional cases, because in such cases 'correction through legislative action is practically impossible." (*Payne v. Tennessee* (1991) 501 U.S. 808, 828.)

That is exactly what is involved here. This Court's post-*Parker* precedents have held that in capital cases, the Eighth Amendment permits states to exclude evidence showing that an equally culpable co-defendant received a sentence less than death. Those precedents are wrong and should be reconsidered.

B. Due Process Does Not Permit The State To Tell A Jury That The Crime Itself Merits Death But Exclude Evidence Which Rebuts That Very Proposition.

The prosecutor told the penalty phase jury that there were "two categories" of evidence it should consider in determining if Mr. Moore should die: (1) evidence surrounding the crimes themselves and (2) evidence surrounding the defendant himself.

(8 RT 1956.) The prosecutor relied on both categories; in no uncertain terms, the prosecutor told the jury that the first of these categories -- evidence involving the crime itself -- "points in one direction, towards death." (8 RT 1958.) According to the prosecutor, "[t]he facts surrounding the murders . . . make this a case where the death penalty is and should be imposed." (8 RT 1964.)

In light of the prosecutor's argument, Mr. Moore should have been permitted to argue that the crime itself did not inescapably call for death or -- in the prosecutor's own words -- "point[] in one direction, towards death." To make this argument, Mr. Moore sought to introduce evidence that although Harris was arguably more culpable -- because he was the "brains of the operation" according to the state's own star witness and killed one of the victims himself -- he received a life sentence for his role in this very same crime. The trial court excluded this evidence. In his supplemental brief, Mr. Moore contended that even if this evidence was not relevant mitigation under the Eighth Amendment, his separate Due Process right to rebut the state's case did not permit the state to (1) argue to the jury that the crime itself called for death while (2) keeping out evidence that Harris had not received death for this very same crime. (ASOB 69-71.)

Respondent does not address the prosecutor's argument at all. (SRB 21-22.) Instead, respondent simply argues that Due Process did not entitle Mr. Moore to admission of this evidence because that evidence is "irrelevant at the penalty phase." (SRB 22.)

With all due respect, in the state's argument the dog is chasing his tail. Trying to resolve the Due Process issue presented here in the abstract -- without any consideration at all of the prosecutor's argument -- cannot be done. Mr. Moore's Due Process rebuttal argument (as distinct from his Eighth Amendment mitigation argument) depends entirely on the question of whether evidence of Harris's sentence was relevant to rebut the specific argument made by the prosecutor in this case. And on this subject, respondent says nary a word.

With good reason. The prosecutor told the jury that the crime itself was a sufficient basis to impose death. In this situation, Mr. Moore should have been permitted to rebut this argument with evidence showing that the crime itself was not sufficient to impose death, at least as to Harris, the arguably more culpable brains of the operation. In light of the prosecutor's specific argument, exclusion of this evidence violated Due Process.

C. The Trial Court Violated The Sixth Amendment Right To Present A Defense In Precluding Mr. Moore From Relying On Harris's Sentenced In Asking The Jury To Spare His Life.

After excluding all evidence that Harris had received a life sentence, the trial court went on to preclude Mr. Moore from asking the jury in closing argument to spare his life based on Harris's sentence. (7 RT 1907.) In his supplemental opening brief, Mr. Moore contended that -- assuming the trial court's initial rulings excluding the Harris evidence violated the Eighth Amendment or the Due Process Clause -- this further limitation violation his Sixth Amendment right to present a defense. (ASOB 72-74.)

In its response, the state accurately notes that this argument is derivative. (SRB 22.) That is, as Mr. Moore himself noted in his supplemental brief, if the trial court did not violate either the Eighth Amendment or the Due Process Clause (or state law) in excluding the Harris evidence, then there is no separate constitutional violation in precluding argument on the subject. (ASOB 72; SRB 22.) Accordingly, there is no further need to discuss the issue here. If the trial court's exclusion of the Harris evidence was improper, the Sixth Amendment right to present a defense has also been violated. If the trial court's exclusion of the Harris evidence was proper, there has been no violation of this right.

D. The Trial Court's Exclusion Of The Harris Evidence Violated State Law.

In his supplemental opening brief, Mr. Moore separately contended that the trial court's exclusion of the Harris evidence violated Penal Code section 190.3, which permitted capital defendants to introduce "any matter relevant to . . . mitigation, and sentence, including *but not limited to* the nature and circumstances of the present offense . . . and the defendant's character, background, history mental condition and physical condition." (Emphasis added). (ASOB 74-76.) Mr. Moore explained that pursuant to long-accepted principles of statutory construction, the Legislature must have intended that the phrase "any matter relevant to sentence" meant something different from "any matter related to mitigation," otherwise one of the two phrases would be without any meaning at all. (ASOB 75.)

For reasons which are not entirely clear, respondent contends that this argument is also derivative and depends "on the validity of [Mr. Moore's] earlier arguments regarding the admissibility of the evidence of Harris's sentence . . . ." (SRB 22.) In fact, however, the state law argument is entirely separate, has nothing at all to do with the constitutional arguments discussed earlier, and depends entirely on a statutory construction of section 190.3 from the 1977 death penalty statute and state-law principles of statutory construction. (ASOB 75-76.)

Respondent has not responded to the merits of the state-law statutory construction argument. No further reply is possible.

E. The Trial Court's Error In Excluding This Mitigating And Rebuttal Evidence, And Precluding Any Argument On The Matter, Cannot Be Found Harmless.

Finally, respondent argues that any error which did occur was harmless. Respondent argues this is so because (1) "the evidence against appellant of the charged crimes and the aggravating factors . . . was overwhelming" and (2) "the jury was well aware of the relative culpability of Harris in light of Avery's eyewitness testimony . . . ." (SRB 23.) In making its harmless error argument the state does not even discuss the mitigating evidence that was presented at trial. (SRB 23.) The state's argument should be rejected for two reasons.

First, even if this case involved only the exclusion of relevant mitigating or rebuttal evidence from the penalty phase, the case would not properly be the subject of a

harmless error test. Errors which prevent a capital jury from considering mitigating evidence are generally not subject to harmless error review. (*See, e.g., Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296 [instructional error precluding full jury consideration of mitigating evidence at defendant's penalty phase; held, death sentence reversed without application of a harmless error test]; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 247-265 [same]; *Penry v. Johnson* (2001) 532 U.S. 782, 796-803 [same]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328 [same]; *Eddings v. Oklahoma* (1982) 455 U.S. 104 [sentencer refuses to consider evidence regarding defendant's childhood; held, death sentence reversed without application of a harmless error test]; *Lockett v. Ohio* (1978) 438 U.S. 586 [state statute precluded sentencer from considering mitigating evidence; held, death sentence reversed without application of a harmless error test].) While this Court has certainly charted a different course (*see, e.g., People v. Lucero* (1988) 44 Cal.3d 1008, 1032), the fact of the matter is that this case does not involve simply the exclusion of evidence. As discussed above, this case involves the exclusion of evidence *and* the trial court's preclusion of any argument on the subject area.

Although respondent urges this Court to employ a harmless error test, it does not cite a single case which has ever applied such a test when a trial court has completely precluded closing argument in a relevant area. (SRB 22.) And the law is quite to the contrary -- such limitations on the right of a defendant to test the state's case generally require reversal without a showing of prejudice. (*See, e.g., Herring v. New York* (1975) 422 U.S. 853.)

Second, even if a harmless error test could properly be applied here, reversal of the penalty phase would be required. Respondent accurately notes that there was significant evidence tying Mr. Moore to the charged crimes. But that is always the situation in the penalty phase of a capital trial; after all, by definition the jury has already found the defendant guilty beyond a reasonable doubt. Even assuming a harmless error test is proper when this kind of critical evidence and argument is excluded from a capital penalty phase, the question is *not* whether there is significant evidence of guilt, but whether the state can prove the absence of this evidence harmless beyond a reasonable doubt in connection with the penalty phase.

At a minimum, this requires an analysis of the mitigating evidence which was presented at the penalty phase. (*See In re Sakarias* (2005) 35 Cal.4th 140, 166-167 [analyzing mitigating evidence presented at trial to see if improper prosecutorial argument was harmless]; *People v. Lucero*, *supra*, 44 Cal.3d at p. 1032 [analyzing mitigating evidence presented at trial to see if exclusion of additional mitigating evidence was harmless].) Respondent ignores this principle, and the case law, entirely. Respondent also ignores the case in mitigation.

In fact, however, as Mr. Moore discussed in his supplemental brief, although Mr. Moore represented himself, this was not a case without mitigation. Defendant was raised by a alcoholic father who beat defendant and his siblings with extension cords, gave his children drugs, forced them to steal for him and beat them if they refused. (7 RT 1877, 1881, 1888, 1892, 1897, 1899, 1916, 1929, 1931.) According to defendant's older sister, defendant's father was most abusive to defendant. (7 RT 1929.) The father was raping at

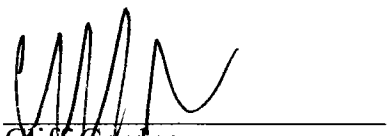
least one of defendant's sisters. (7 RT 1898.) Moreover, the fact of the matter is that according to the state's star witness, Harris was not only the "brains" of the operation, but he was the actual killer of at least one of the victims. (6 RT 1346, 1352-1353.) On this record, evidence and argument that the brains of the operation had only received a life sentence cannot be deemed harmless. Reversal is required.

CONCLUSION

For all these reasons, and for the reasons set forth in Mr. Moore's original opening and reply briefs and his supplemental opening brief, reversal of the guilt and penalty phases is required.[5]

DATED: 3/8/11

Respectfully submitted,



Cliff Gardner
Attorney for Appellant

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

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 9507 words in the brief.

Dated: 3/8/11.

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, CA 94702. I am not a party to this action.

On March 8, 2011 I served the within

Appellant's Supplemental Reply Brief, S075726

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

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

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Declarant