IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. TIMOTHY J. McGHEE, Defendant and Appellant.	California Supreme Court No. S169750 Superior Court No. BA244114

APPEAL FROM THE LOS ANGELES COUNTY SUPERIOR COURT

The Honorable Robert J. Perry, Judge

APPELLANT'S REPLY BRIEF

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Argument

I

The trial court prejudicially erred by discharging a qualified and unbiased juror who was deliberating based on the evidence presented.

Appellant argues the trial court erred by finding that Juror No. 5 had an anti-police bias and failed to deliberate. (23 RT 4679.) Instead, that juror simply accepted the defense theory of the case. (AOB 72.)

The police actions in the present case

At trial, the defense established that the investigating detectives contaminated the investigation by coaching the state's key witnesses and offering incentives that no reasonable person could pass up. (21 RT 4352, 4346-4348, 4355-4356, 4374, 4397-4398.)

The level of coaching by the officers is unprecedented in the case law. The witnesses were all gang members, most of whom were high at the time of the alleged incidents or had acknowledged that they did not see the crimes take place, and they were promised and received life changing benefits in exchange for testimony that helped the prosecution.

Gabriel Rivas, the key witness in the Cloudy Martin killing, acknowledged that Detective Teague spent two hours in an unrecorded "preinterview" providing him with details of the crime he should describe when the formal recorded interview began. (13 RT 2662-2663.) Teague essentially told him what to say during the recorded interview.

Mark Reccio was the primary witness in the Ryan Gonzalez killing. He also provided a recorded interview that followed a 90 minute "preinterview" by Detective Teague. (14 RT 2845-2846.)

Duane Natividad was in the car when Margie Mendoza was

killed. He told police he didn't see the shooter, but the detectives presented him with a photo lineup and repeatedly pointed to appellant's photo suggesting that he shot Mendoza. (16 RT 3421, 3438, 3449.)

Juan Rodarte was the primary witness in the uncharged killing of Christina Duran. Detective Teague questioned him about charges he was facing and insisted that Rodarte implicate appellant in Duran's murder. (34 RT 6906.) Teague said he didn't care if Rodarte lied, as long as he implicated appellant. (34 RT 6906.)

Pedro Sanchez was interviewed several times by the detective who always mentioned appellant's name and showed him appellant's photo, but Sanchez still couldn't identify appellant. (12 RT 2462.)

Perhaps the best example of the officers' absolute willingness to break all of the accepted rules for investigating crimes, was shown by their actions in providing all police reports and "murder books" to two prison inmates serving life terms, offering release from prison in exchange for their testimony consistent with the information provided by the police. (2 RT 53-55.) Neither of the witnesses testified, but the evidence supports appellant's claim that the police investigating the case were not involved in a search for the truth. Instead, the police were staging a production where witnesses would say what the officers

directed them to say, in exchange for enormous benefits.

Benefits offered by police

Further evidence of the unreliability of the witness testimony was demonstrated by the tangible benefits the police offered in exchange for their incriminating testimony.

Mark Gonzalez was a key witness in the Cloudy Martin case, and he was given immunity relating to his own murder charge in exchange for incriminating testimony against appellant. (16 RT 3330-3331.)

Wilfredo Reccio was a key witness in the Ryan Gonzalez killing and was facing multiple life terms or a death sentence for a double murder he was believed to have committed. (14 RT 2819-2830.) Charges were never filed in that case, and Teague even offered him food, clothing, housing, dental care, and $5,000 to sweeten the deal. (14 RT 2842, 2868-2869.)

Gabriel Rivas was a crack cocaine and crystal methamphetamine addict who had been arrested for a probation violation, and reported he would have said anything to get back on the street to obtain drugs. (13 RT 2660-2661.) The deputy district attorney acknowledged the prosecution used the drug charge as leverage to get an incriminating statement in this case, and Detective Teague told Rivas those charges

would be dropped if he implicated appellant. (13 RT 2660-2661; 26 RT 5132.)

John Perez, an important witness in the police ambush case, had also been arrested but never faced charges after he testified against appellant. (14 RT 2977-2979.)

And again, relevant to the present issue is the detective's offer of "get-out-of-prison-free" cards for the life prisoners who were given the murder books prior to being interviewed — even though those witnesses were ultimately not called to testify. (2 RT 53-55.)

The witnesses' drug use at the time of the crimes

The defense argued at trial that the state's key witnesses should not be believed for various reasons, including the fact that so many of them were high at the time of the shootings.

Mark Gonzalez was a methamphetamine addict who was high at the time of the police ambush he allegedly viewed. (16 RT 3309, 3314-3315.)

Erica Rhee, Duane Natividad and Monica Miranda were the primary witnesses to the Margie Mendoza shooting. Rhee and Natividad acknowledged they were high on methamphetamine at the time of the killing. (16 RT 3436; 33 RT 6689.) Miranda didn't testify

that she was high at the time of the killing, but she acknowledged that she was an addict who was high when she testified earlier in the case, and admitted that she lied to the police about appellant's involvement. (19 RT 3777, 3782-3784.)

Pedro Sanchez and Juan Cardiel acknowledged they were high on acid at the time of the shooting in their case. (12 RT 2417, 2451, 2453.)

So the defense presented a strong case that the state's witnesses should not be believed and the police cheated while investigating and preparing the case.

This wasn't a case where police overstepped their authority a bit, or performed their duties aggressively. Rather, it's a case where the police officers showed a complete disdain for the law and established guidelines for law enforcement. Juror No. 5 refused to convict a person after this vast misconduct by the police officers who were tasked with investigating the case. Despite the police misconduct, the court ruled that Juror No. 5 was biased against police in general and could not give the prosecution a fair trial. (23 RT 4647.)

Juror No. 5's participation in the deliberations

The record shows that Juror No. 5 disagreed with the others, and two jurors were so frustrated they wrote a note saying Juror No. 5 "was

not capable of making a fair decision... using speculation as facts and has no rational explanation as to why he feels the way he does, other than saying every prosecution witness was coached and lying..." (15 CT 3753.)

But most of the jurors questioned by the court reported that Juror No. 5 was in fact deliberating.

Juror No. 4, the foreperson noted that Juror No. 5 had not "shut down. He's not not talking." (23 RT 4592-4593.)

Juror No. 2 said No. 5 was "leery" of the state's witnesses but not biased. It wasn't that he had a police bias "it's more just a disbelief of the witnesses." (23 RT 4605.)

Juror No. 6 said there was no bias and "Everyone is open-minded." (23 RT 4608.)

Juror No. 3 said No. 5's position was a product of his belief that the police coached the witnesses. (23 RT 4620,4623.)

Juror No. 7 said No. 5 took a narrow view of the evidence but there were "healthy discussions." (23 RT 4626.)

Juror No. 8 said No. 5 was hard-headed at the beginning but then opened up and was "talking more." (23 RT 4630.) He just didn't believe the witnesses because they had been coached. (23 RT 4629, 4631.)

Juror No. 12 said No. 5 had an "anti-police bias" because he believed the witnesses had been coached. (23 RT 4631-4633.)

So the record shows that while there was debate during the deliberations, and the pro-prosecution jurors reported the problem as a general police bias, Juror No. 5 was in fact engaged in the deliberations.

Respondent's argument

Respondent argues the trial court properly found Juror No. 5 was not fairly deliberating on the evidence, and that he had demonstrated a disqualifying bias. (Respondent's Brief (RB) 58.)

Respondent admirably calls the court's attention to *People v. Armstrong* (2016) 1 Cal.5th 432, published after the opening brief in this case. In *Armstrong*, a juror (No. 5) was discharged for failing to deliberate based upon the observations of a single juror who noted Juror No. 5 was looking at her book and sending text messages on her cell phone during deliberations. (*Id.* at p. 451.) The court also found that while the juror initially had an open mind, she failed to "deliberate further" once reaching an opinion based on the evidence. (*Id.* at pp. 451-453.)

This court found the evidence did not support the trial court's findings. First, the evidence suggesting that Juror No. 5 looked at her

book or cell phone during deliberations was "*de minimus*." (*Id.* at p. 452.) Moreover, no failure to deliberate is shown where a juror refuses to change her mind during deliberations, as this is an indication that the juror views the evidence differently from the way others view it. (*Id.* at p. 453.)

Respondent seeks to distinguish *Armstrong* by suggesting that the trial court in that case only spoke with five jurors, unlike the trial court in the present case who spoke with all 12 jurors. (RB 60.) Moreover, in *Armstrong*, unlike the present case, the court did not refer to the note calling the court's attention to the problem. (RB 61.) Appellant suggests these are not meaningful distinctions, and that *Armstrong* supports the present claim that Juror No. 5 was deliberating when discharged.

Regarding bias, respondent suggests that Juror No. 5 was not simply disregarding all of the witnesses who had been coached, he was disregarding all of the prosecution witnesses. (RB 58-59.) So respondent argues that in a case where the police coached most of the witnesses, a juror who refuses to find guilt beyond a reasonable doubt is biased for not considering the testimony of any remaining witnesses who might not have been coached.

Juror No. 5's bias, if any, was against the police officers who cheated in this case by offering freedom to junkie gang members facing life terms on pending murder cases, on the condition that they implicate appellant. The officers even supplied the potential witnesses with the pertinent facts. This was not a bias in the sense of prejudging the case. (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 72-73.)

This was a case where the allegedly offending juror reasonably found the state's case lacked credibility. The better question might be how the pro-prosecution jurors were not questioned for pro-police bias in the face of this scandalous presentation of evidence, where the offending officers "retired" before trial, and could not to be questioned because of claimed disabilities. (13 RT 2685-2686, 2692-2693.)

Respondent suggests Juror No. 5 did not hold the defense witnesses, some of whom had suffered prior convictions, to the same standard as the prosecution witnesses. (RB 59.) But the state has the high burden of convincing the jurors beyond a reasonable doubt as to a defendant's guilt, and where the state presents coached or otherwise unreliable witnesses it doesn't meet its burden simply by showing the defense witnesses may have suffered prior convictions. The prosecution obviously believed it needed to present the tainted witnesses in order to

meet its burden, or it otherwise would have excluded them. Respondent argues Juror No. 5 had a disqualifying bias due to the fact that he rejected the state's case due all of the improprieties.

This is not a case like *People v. Barnwell* (2007) 41 Cal.4th 1038, where the juror was shown to have a bias against police officers in general. Here, the police told the state's key witnesses what to say, and agreed to dismiss pending murder charges against Mark Reccio, Mark Gonzales, Wilfredo Reccio, and they dismissed charges against drug addict Gabriel Rivas who would have done anything to get back on the street to get his drugs, and John Perez.

Respondent claims that despite the massive problems with the way the police handled the key witnesses in this case, Juror No. 5 was biased against all police. But the record shows Juror No. 5 took the reasonable position that he did not believe the state's witnesses who were coached and endorsed by police in this case.

The evidence showed the police cheated, the state's witnesses were gang members and drug addicts who were incentivized to implicate appellant, and that Juror No. 5 refused to convict because of these facts. Moreover, while there was disagreement and pressure on Juror No. 5 during deliberations, he continued discuss the evidence.

The record did not show by a demonstrable reality (or any standard) that he had failed or refused to deliberate. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) He simply disagreed with the others in a case where the police had repeatedly overstepped its lawful authority. His discharge was improper and requires reversal of the judgment.[1]

II

The state committed outrageous government conduct by coaching the gang member witnesses, telling them what to say and conditioning substantial benefits on testimony implicating appellant.

Appellant argues the police misconduct in repeatedly manufacturing evidence by coaching the informants on what to say during recorded interviews, and telling witnesses to select appellant's photo from a lineup constitutes outrageous government conduct in violation of appellant's right to due process. (AOB 83.) Moreover, this evidence tampering also constitutes prosecutorial misconduct because it was done by members of the prosecution team. (AOB 95.)

Respondent doesn't contest any of the allegations of misconduct,

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[1] The prosecutor's offer to appellant of a life without parole sentence if he agreed to waive this appeal is circumstantial evidence that he lacked confidence in the court's decision to discharge the holdout juror. (24 RT 4742-4744.) This discussion followed the trial court's acknowledgment that "throwing the juror off" might later be found to be reversible error. (24 RT 4736.)

and instead argues the issues are forfeited for the lack of an objection in the trial court. (RB 64.)

However, a defendant can raise for the first time on appeal a constitutional issue, or a pure question of law which is presented by undisputed facts. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277.) And the court has the inherent supervisory power to correct deliberate misconduct when no other remedy can restore fairness. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 883.)

Respondent next argues on the merits, that whether the defense of outrageous government conduct even exists in California is an "open question." (RB 64; citing *People v. Smith* (2003) 31 Cal.4th 1207, 1227.)

Appellant asks this court to explicitly find that the defense does apply in this state, and the present case shows a perfect example of it. The police engaged in witness tampering, and the subornation of perjury in trying to convince unreliable gang members with questionable knowledge of the facts to testify against appellant. The police assumed appellant was guilty of the charged crimes, but couldn't offer any convincing proof without manufacturing evidence. The state's decision to proceed in this manner does great damage to the credibility of our criminal justice system, and appellant requests this court apply

the defense of outrageous government conduct.

Respondent mistakenly suggests appellant simply seeks to have this court reweigh the evidence. (RB 66; citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Not so. Appellant asks the court to apply a legal doctrine to the illegal police actions that respondent doesn't challenge.

Appellant further asks this court to find that by turning a blind eye to this activity, the prosecution committed misconduct. (See *People v. Dekraai* (2016) 5 Cal.App.5th 1110, where the court approved of the recusal of the entire DA's office given its implicit or explicit participation in the sheriff's department's confidential informant program.)

Finally, appellant asks this court to find that prosecuting a capital defendant with such manufactured evidence violates the heightened reliability requirement of the Eighth and Fourteenth Amendments. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Respondent offers no argument to this claim.

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III

The police coerced the statement of Gabriel Rivas and the admission of the statement violated appellant's right to due process.

Appellant argues the police coercion of the testimony of Gabriel Rivas violated his right to due process under *People v. Badgett* (1995) 10 Cal.4th 330, 343-345. (AOB 101-110.) Again, Rivas was strung out on crack cocaine and crystal methamphetamine, and was in custody on an assault charge. (13 RT 2658-2661.) He testified that he would have done anything at the time to get back on the street and obtain drugs. (13 RT 2661.) So the police provided him with the details of the Cloudy Martin killing, including the number of shots fired, the number of guns used in the shooting, and Rivas then repeated those details in his recorded statement. (13 RT 2662-2663.)

Respondent again offers no challenge to the facts, but claims the issue has been forfeited for the lack of an objection. (RB 68.) However, given that the facts are not in dispute, this court has the authority to rule on the constitutional issue presented. (*People v. Vera*, supra, 15 Cal.4th at pp. 276-277.) Appellant respectfully asks that the court address the important issue that was produced by the misconduct of the state agents.

On the merits, respondent argues there was no coerced statement because the police simply offered Rivas benefits in exchange for his cooperation, and this is a common and accepted practice. (RB 69.) Respondent further argues that Rivas was equivocal when describing the police coaching, and he also suggested his testimony was influenced by rumors he heard on the street. (RB 70.) That the facts planted by the police were supported by unsubstantiated rumors on the street (that could also have been spread by the police) does not rebut a claim of coercion. Such evidence is inherently unreliable and inadmissible.

Finally, contrary to respondent's claim, the fact that the defense cross-examined Rivas about the coerced statements did not negate the violation. (RB 70.) The police coerced the statement of a drug addict sitting in jail by offering to let him go if he gave a recorded statement with the incriminating facts they provided him.

Respondent argues that any error committed was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24. This is so, according to respondent because Mark Gonzalez testified that appellant admitted participating in the Cloudy Martin killing. (RB 72.) But Gonzalez's testimony was also suspect as he was a violent drug dealer who was given immunity in his own murder case in exchange for his testimony

against appellant. (16 RT 1330-1331.) The state seeks to corroborate the testimony of an unreliable incentivized snitch with the testimony of another incentivized snitch. The state offered Gonzalez (who was facing life in prison) his complete freedom if he testified against appellant. This is hardly overwhelming evidence of guilt independent from the constitutional violation as respondent suggests.

Respondent also suggests overwhelming evidence of guilt was established by the rap lyrics appellant had written, which glorified "execution style murder." (RB 72.) But the author of the lyrics (assuming it was appellant) indicated they were pure fiction, and didn't establish his state of mind at the time of the killing. (See *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35.) This was hardly overwhelming evidence of appellant's guilt in the Cloudy Martin murder.

Respondent also notes the toolmark evidence recovered from the crime scene was matched with the toolmark evidence found in the Pedro Sanchez and Juan Cardiel shooting, and both identified appellant as their attacker. (RB 72.) Both of those witnesses were high on LSD at the time of that incident, and the police repeatedly tried to get the men to identify appellant but neither did, and appellant was acquitted of those charges. (12 RT 2452-2453, 2521.)

This was far less than overwhelming evidence of guilt, and not close to meeting the state's burden of establishing that the conviction of appellant in the Cloudy Martin incident was "surely unattributable" to the error in coercing the testimony of Gabriel Rivas. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

IV

The admission of Rivas's videotaped statement also violated appellant's right of confrontation where the detective who took the statement had lost his memory and could not be questioned.

Appellant argues the introduction of Rivas's statement also violated his confrontation clause rights under *Crawford v. Washington* (2004) 541 U.S. 36, because he never had a chance to cross-examine Detective Teague who had lost his memory and could not be questioned. (AOB 110.)

Respondent argues the issue is forfeited for the lack of an objection. (RB 73.) Appellant again asserts this is a fundamental constitutional issue where the facts are uncontested and may be addressed by this court. (*People v. Vera, supra*, 15 Cal.4th at pp. 276-277.)

Respondent next argues there was no confrontation clause violation because appellant was able to cross-examine Rivas. (RB 73-

74.) Respondent contends that because the state did not offer a statement from Teague, appellant had no constitutional right to cross-examine him. (RB 74.) Respondent misses the point: the state's case on the Cloudy Martin charges was based largely on statements Teague made to Rivas in an earlier untaped "coaching" session. As Rivas himself stated, what he knew about the Cloudy Martin murder was based on "coaching" by Detective Teague. (13 RT 2662-2665.) Under these circumstances, it is obvious that Teague was a material witness to the circumstances and reliability of Rivas' subsequently taped account of the murder. Appellant repeats his claim that he had a right to confront Teague about those statements for the reasons provided in the opening brief.

V

The trial court violated appellant's right of confrontation by admitting Christina Duran's videotaped interview at both phases of the trial.

Appellant argues the trial court violated his Sixth Amendment confrontation clause rights by admitting Christina Duran's videotaped police interview at the guilt and penalty phase trials. (AOB 114.)

The trial court admitted the statement under Evidence Code section 1350, after finding appellant had a motive to kill Duran, and

that he either killed her or had someone else do it. (5 RT 916-917.)

Appellant argues the court's ruling violated *Giles v. California* (2008) 554 U.S. 353, which held the forfeiture-by-wrongdoing doctrine does not trump a defendant's Sixth Amendment rights unless the prosecution establishes defendant's purpose in killing the witness was to prevent her from testifying. (*Id.* at p. 368.)

Respondent first argues the issue is forfeited because the defense failed to assert at trial that Duran gave her statement in exchange for leniency. (RB 85.) However, the issue was fully litigated, and is properly before this court.

Respondent claims that it's not improper to offer benefits to a witness, and in fact, it's a common practice. (RB 85.) While it is a common practice, offering leniency to someone facing criminal charges, in this case murder, certainly reflects on the reliability of the statement. In the present case, Duran was arrested in connection with the Margie Mendoza murder, gave a statement implicating appellant and was then released with a promise that the police would do everything they could to help her, but couldn't guarantee anything specific. This promise was relevant to the reliability of her statement.

Respondent next argues, on the merits, that the trial court

properly found appellant killed Duran for the purpose of preventing her testimony. (RB 86.)

Respondent first claims the court's ruling should be reviewed under the abuse of discretion standard because it involves an evidentiary issue. (RB 87, citing *People v. Waidla* (2000) 22 Cal.4th 690, 725.) However, the claim that the trial court's ruling violated appellant's Sixth Amendment confrontation clause rights is a mixed question of fact and law and is reviewed de novo. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242-1443.)

Contrary to respondent's claim, the trial court did not properly find Duran was killed to prevent her testimony. The court's ruling simply found appellant had a motive to kill Duran because he was concerned that she could implicate him in the Mendoza murder. (5 RT 911.) In reaching its decision, the court found Duran's statement was credible and was not made following a promise of leniency. (5 RT 910.) While it's true the police did not verbally guarantee Duran leniency, they released her immediately after her statement implicating appellant and said they would do everything they could to help her. "We'll do our best." "We'll do what we have to do to protect you." (RB 86, Exh. B, p. 66.) "We can't guarantee anything, the only thing we can

tell you is that we will do everything we can." (RB 86, Exh. B, p. 86.)

So Duran was released from custody after implicating appellant, with the promise that the police would do all they could to help and protect her, although no guarantees were made.

Respondent argues the record supports the court's finding that appellant killed Duran for the purpose of preventing her testimony. (RB 88.) In support of this claim, respondent refers to appellant's alleged statement to Juan Rodarte that he wanted Duran killed because she was "telling on" him. (RB 88.) Respondent neglects to mention that this hearsay statement came from Gabriel Rivas who later told police in a recorded statement that Rodarte had no idea who killed Duran. (4 RT 596.) Rodarte also denied telling anyone that appellant wanted Duran dead, or that he wanted Rodarte's help in killing her. (4 RT 539.)

The record shows that appellant was at the party at Villagran's house on the night of Duran's death, but he passed out and was "about to OD" from his drug ingestion that night. (4 RT 665, 669-670, 743, 746.)

Respondent claims appellant's rap lyrics prove his intent to kill Duran. (RB 89.) But the lyrics were identified by the author as

fictional, and the passage respondent provides refers to a "rat" who was carjacked, "gang raped broom fuck killed" and thrown in a trunk. (RB 89, citing 7 CT 1555.)

Those lyrics don't track the present facts or provide evidence that appellant killed Duran for the purpose of preventing her testimony.

So Duran's statement was given after her arrest for murder under circumstances where she was released from custody by police who would do all they could to help her. These were not circumstances establishing trustworthiness. The evidence further showed appellant was too high to participate in the killing, and the only evidence that appellant wanted Duran killed came from Rivas (the drug addict police released back onto the street) who originally said Rodarte had provided this information, but later denied the fact. And the rap lyrics suggesting rats get "gang raped" and "broom fuck killed" did not establish appellant killed Duran to prevent her from testifying.

Duran's statement was inadmissible under section 1350, and its admission violated appellant's confrontation clause rights under *Giles*.

Respondent further claims any error was harmless given the overwhelming evidence of guilt, which included the testimony of Monica Miranda and Duane Natividad, and the fact that appellant was later

found hiding in the cargo area of Duran's car. (RB 89-90.)

Confrontation clause error is reviewed for prejudice under the *Chapman* standard . (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) Under that standard, the prosecution must show the conviction was "surely unattributable" to the error. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

But the witnesses to the Mendoza killing were drug addicts, who were mostly high at the time of the incident. Monica Miranda was high when she testified. (18 RT 3640.) Natividad was admittedly high on methamphetamine, and couldn't identify appellant in a photo lineup. (16 RT 3432, 3448, 3676; 17 RT 3517.) They had been partying with Erica Rhee who was "hallucinating" at the time. (16 RT 3462, 3465, 3466.)

Respondent now claims that Duran's statement implicating appellant was "quite frankly, inconsequential." (RB 90-91.) But the state felt very differently when arguing so hard for its admission at the guilt and penalty phases. The fact that the state spent so much effort seeking admission of this constitutionally questionable evidence shows it was "consequential" at the time of trial. The state cannot show the convictions and death verdict were surely unattributable to the error in

admitting the statement.

VI

The prosecution committed misconduct by leading the press to the inflammatory rap lyrics allegedly written by appellant.

Appellant argues the prosecutor committed misconduct by releasing to the press inflammatory rap lyrics allegedly authored by appellant. (AOB 124.) The prosecutor did not directly provide the lyrics to the reporter, but rather told the reporter rap lyrics were attached to a motion in response to the reporter's general question about pending pretrial motions. (8 RT 1735.) The reporter then obtained a copy of the motion, and printed the lyrics glorifying gang violence in an article published before voir dire began. (8 RT 1734.)

Defense counsel suggested the prosecutor had committed misconduct by including the lyrics in a public motion, and then steering the reporter to that motion. (8 RT 1734.)

Respondent argues the error was forfeited, and the prosecutor's actions were not sufficiently egregious to constitute a due process denial. (RB 93, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

Respondent acknowledges that defense counsel brought the problem to the court's attention, but claims forfeiture due to the lack of

an express allegation of misconduct along with a request for a curative instruction. (RB 93; citing *People v. Green* (1980) 27 Cal.3d 1, 34.) (See 8 RT 1734 for claim of misconduct.)

Respondent rejects appellant's assertion that the prosecutor directed the reporter to the motion containing the lyrics, or informed the reporter about the lyrics. (RB 94-95.) Instead, respondent claims the prosecutor informed the reporter that his general practice was to confirm the presence of documents in the public record when asked if those documents are in the public record. (RB 85; 8 RT 1736.)

Appellant maintains this is a distinction without a difference. When the reporter was looking around for any newsworthy story before trial, the prosecutor let him know there were inflammatory rap lyrics attached to a public motion. While this action was more subtle than handing the lyrics to the reporter — it was no less misconduct.

Respondent seeks to distinguish *People v. McKinzie* (2012) 57 Cal.4th 1302, 1327, where the court found misconduct after the prosecutor more directly leaked the defendant's statement to the press. (RB 95-96.) Respondent suggests the prosecutor did not initiate the action in the present case, as in *Mckinzie*, but rather simply responded to the reporter's question. (RB 96.) Moreover, "the prosecutor here did

not provide any documents for the media to review." (RB 96.)

Appellant again argues it doesn't matter for the present purposes whether the prosecutor handed the lyrics to the reporter, or suggested the reporter go and find the motion with the attached lyrics. The prosecutor cannot avoid misconduct by claiming he simply confirmed the presence of documents in the public record when asked.

This action infected the trial with unfairness. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) This is especially true when viewed with the state's general misconduct that has been previously described. Although the problems involving possible witness tampering and subornation of perjury were primarily committed by detectives who were no longer on the police force, these problems should be considered with the prosecution's improper act in determining the requisite level of unfairness.

VII

The law at the time of appellant's trial violated his Eighth and Fourteenth Amendment rights by precluding him from rebutting the state's case in aggravation, which relied heavily on the claim of his future dangerousness.

The state's case in aggravation at the penalty phase focused largely on the fact that, if sentenced to the life option, appellant would

be a danger to those working in the prisons as demonstrated by his violence against employees at the local jails and juvenile facilities.

Appellant would have been able to rebut this claim with evidence showing the conditions for life-without-parole inmates were qualitatively different than for those in local jails. But the controlling case law prohibited the introduction of evidence describing the conditions of confinement, or the introduction of evidence showing "a day in the life of a life without parole prisoner." (See *People v. Thompson* (1988) 45 Cal.3d 86, 139; *People v. Grant* (1988) 45 Cal.3d 829, 860; *People v. Fudge* (1994) 7 Cal.4th 1075, 1116, and cases cited in appellant's opening brief at p. 138.)

However, in *People v. Smith* (2015) 61 Cal.4th 18, 58-60, this court recently reversed course, and found that a capital defendant is entitled to rebut evidence of future dangerousness by presenting evidence of the secure conditions he would face if sentenced to life without the possibility of parole.

Appellant argues the state of the law at the time of his trial that prohibited him from presenting such evidence to rebut the state's presentation, violated his fundamental rights under the Eighth and Fourteenth Amendments. (AOB 135-141.)

Appellant acknowledges in the opening brief that he did not raise this issue during his penalty phase retrial, but emphasizes that, given the clear state of the law at the time, it would have been futile to do so. (AOB 136.)

Respondent simply argues that appellant forfeited the argument by failing to object to the law or make an offer of proof in the trial court. (RB 99, citing *People v. Morrison* (2004) 37 Cal.4th 698, 711-712; and *People v. Livaditis* (1992) 2 Cal.4th 759, 778.)

Moreover, respondent makes no reference to the futility exception to the forfeiture rule advanced by appellant. This court recently employed the futility doctrine in *People v. Brooks* (2017) 5 Cal.5th 674, 713, where the capital defendant argued for the first time on appeal that the trial court erred by inquiring into the numerical breakdown of the deadlocked jury.

The Attorney General in *Brooks* argued the issue was forfeited on appeal given the defendant's failure to object in the trial court. (*Ibid.*) The court found "Instead, we agree with the defendant that his claim was preserved for appeal because his objection would have been futile. As this court has explained, 'reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection

would have been futile or wholly unsupported by substantive law then in existence.'" (*Ibid.*, citing *People v. Welsh* (1993) 5 Cal.4th 228, 237.)

The futility doctrine applies here given the state of the law regarding the introduction of evidence describing prison conditions for life inmates at the time of appellants' penalty phase retrial. He reasserts that the law's prohibition against presenting such evidence where the state relied heavily on his future dangerousness deprived him of a fair trial and violated his rights under the Eighth and Fourteenth Amendments.

VIII

The prosecution violated appellant's due process rights by delaying the penalty phase retrial until after it successfully prosecuted appellant for a jail disturbance and thereafter used evidence of that offense in aggravation at the penalty retrial.

Appellant argues that the prosecution acted vindictively or otherwise violated his due process rights by delaying his penalty phase retrial (following a hung jury) until after it prosecuted the jail disturbance case, thus creating an evidentiary advantage at the penalty retrial. (AOB 142-148.)

The record shows many examples of the state's overly aggressive prosecution of appellant in this case. Nevertheless, the prosecution

could not secure a death verdict at the penalty phase. It then manipulated the proceedings by placing the penalty phase retrial on hold until such time that it could secure an additional conviction following the jail riot case. The prosecution thereafter relied on that evidence to convince the second penalty phase jury to recommend death.

Respondent contends the argument is misplaced because the claim is essentially one of vindictive prosecution in the jail riot case — that is the state acted vindictively in proceeding with that case when it did — and the asserted error is thus "unrelated to the instant matter and inappropriate for inclusion in this appeal." (RB 103.) Contrary to respondent's claim, appellant presently argues that the state's manipulation of the proceedings violated his right to due process in this case.

Respondent suggests that the state didn't need to seek a conviction in the jail disturbance case because evidence of that incident would have been admissible regardless of whether there had been a conviction. (RB 104, citing *People v. Russell* (2010) 50 Cal.4th 1082, 1127, Penal Code section 190.3, factors (a)-(b).) But the error is the same whether the evidence was admitted as violent criminal activity

under section 190.3, subd.(b) or a felony conviction under subdivision (c).

Respondent fails to acknowledge defense counsel's claim that having to prepare for the jail riots case limited his ability to prepare for the penalty phase retrial. (See AOB 144.) And the delay resulted in the loss of an important witness who died before the penalty phase retrial. (30 RT 5816.) The defense felt so strongly about this unfair tactic that it sought to recuse the trial judge who overruled the objection to the procedure. (AOB 144; 30 RT 5813, 5816-5817.)

Appellant maintains that the manipulation of the proceedings in the manner described violated his due process rights. The only significant difference between the two penalty phase trials was the evidence regarding the jail riot case. (30 RT 5797.)

Conclusion

The errors in the present case require reversal of the entire judgment.

Date: 5/3/17

Respectfully submitted,

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Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 6,579 words, as determined by the word count feature of the program used to produce the brief.

Dated: 5/3/17

Patrick Morgan Ford

PATRICK MORGAN FORD

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. On May 5, 2017, I served an *Appellant's Reply Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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Additionally, I electronically served a copy of the above document as follows: 1) Court of Appeal, 4d2nbrief@jud.ca.gov. and 2) Attorney General, ADIEService@doj.ca.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on May 5, 2017, at San Diego, California.

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