SUPREME COURT COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

Honorable Lantz Lewis, Judge

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

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

ARGUMENT

I. MR. RICES'S RIGHT TO A RELIABLE PENALTY PHASE WAS VIOLATED WHEN THE PROSECUTOR RELIED UPON A JUVENILE CONVICTION IN URGING THE JURY TO IMPOSE DEATH.

A. Introduction.

Under state law, at the penalty phase of a capital trial prosecutors are free to introduce juvenile convictions of a defendant and rely on those convictions in asking the jury to impose death. (*People v. Pride* (1992) 3 Cal.4th 295, 256-257.) Pursuant to this rule, the prosecutor here did just that. (15 RT 2307.)

In his opening brief, Mr. Rices contended that admission of this evidence violated the Eighth Amendment in light of three Supreme Court cases: *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011 and *Miller v. Alabama* (2012) ___ U.S. ___, 132 S.Ct. 2455. (AOB 219-224.) The state disagreed arguing that these cases did not preclude admission of juvenile convictions to enhance. (RB 116-119.)

But there is an entirely separate Eighth Amendment reason that juvenile

convictions may not be admitted in a capital penalty phase. The Supreme Court has recognized that the death penalty is a qualitatively different punishment than any other. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (*See, e.g., Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638, n.13.) Procedures which risk undercutting this heightened need for reliability violate the Eighth Amendment. (*See, e.g., Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118-119 (O'Connor, J., concurring); *Lockett v. Ohio* (1978) 438 U.S. 586; *Gardner v. Florida* (1977) 430 U.S. 349, 362.)

Here, the state introduced a prior juvenile conviction at the penalty phase. But that juvenile conviction was obtained without providing Mr. Rices the right to a jury trial. As discussed below, the Supreme Court has recognized that the jury trial right is designed to ensure a reliable result. Thus, regardless of whether juvenile convictions are properly admitted for enhancement purposes in non-capital trials, the Eighth Amendment requirement of reliability precludes such convictions from being admitted at the penalty phase of a capital trial.

B. The State May Not Seek To Impose A Death Sentence Based On A Conviction Obtained In The Absence Of Sixth Amendment Protections.

The Sixth Amendment guarantees that defendants in state criminal proceedings are entitled to certain procedural protections, including the rights to counsel, confrontation and jury trial. The Supreme Court has long held that these rights are specifically designed to ensure the reliability of the proceedings. (*Lewis v. United States* (1980) 445 U.S. 55, 72 ["the absence of counsel impairs the reliability of a felony conviction . . . ."]; *Crawford v. Washington* (2004) 541 U.S. 36, 61 ["the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence . . . ."]; *United States v. Booker* (2005) 543 U.S. 220, 244 ["the right to a jury trial" protects "the interest in fairness and reliability."].)

Because these rights are directly related to reliability, the Supreme Court has for more than 40 years consistently held that where a defendant has been convicted *without* being afforded one of these essential rights, the state may *not* subsequently use that conviction for impeachment, sentencing or enhancement. (*See, e.g., Loper v. Beto* (1972) 405 U.S. 473, 484 [state could not impeach defendant with a prior conviction where the state obtained that conviction without affording defendant his Sixth Amendment right to counsel because in such a situation the prior conviction "lacked reliability"]; *United States v. Tucker* (1972) 404 U.S. 443 [in sentencing a defendant, a sentencing judge may not consider a prior conviction where the state obtained that conviction without affording

defendant his Sixth Amendment right to counsel]; *Burgett v. Texas* (1967) 389 U.S. 109, 115 [state could not enhance a defendant's sentence based on a prior conviction where the state obtained that conviction without affording defendant his Sixth Amendment right to counsel].) The Court has emphasized that the holdings in "*Burgett*, *Tucker* and *Loper* . . . [all] depended upon the reliability of a past . . . conviction;" each of these cases sought to avoid subsequent use of any prior conviction "that is unreliable." (*Lewis v. United States*, *supra*, 445 U.S. at p. 67.)

What the Supreme Court explicitly precluded in *Burgett* -- reliance on a prior conviction to enhance where the prior was unreliable because the procedural protections of the Sixth Amendment had not been provided -- is exactly what occurred here. After all, as noted above, the Supreme Court has explicitly recognized that the Sixth Amendment right to a jury trial -- just like the Sixth Amendment right to counsel -- protects the defendant's interest in a reliable result. (*United States v. Booker*, *supra*, 543 U.S. at p. 244.) "[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 67. *Accord Williams v. Florida* (1970) 399 U.S. 78, 100.) Here, in Mr. Rices's capital penalty phase the state introduced and relied on a conviction obtained at a juvenile proceeding at which Mr. Rices had no right to a jury trial. Just as in *Burgett*, *Loper* and *Tucker*, the state's subsequent use of a conviction

obtained in a proceeding where the defendant was not afforded a Sixth Amendment right designed specifically to ensure the reliability of that conviction was improper.

The Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 directly supports this result. There, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at 490.) The Court carved out an exception to this general rule for prior convictions, which need *not* be submitted to a jury. (*Id.* at p. 490.) Prior to *Apprendi*, the Court foreshadowed the logical reason for this exception, explaining that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." (*Jones v. United States* (1999) 526 U.S. 227, 249.) Indeed, the Court reiterated this rationale in *Apprendi* itself, confirming that the prior conviction exception depended on "the certainty that procedural safeguards attached to the 'fact' of prior conviction" and noting that there was a "vast difference" between accepting the validity of a prior conviction in which the defendant "had the right to a jury trial" and one in which his guilt was determined by a single judge. (*Apprendi*, *supra*, 530 U.S. at pp. 488, 496.)

The prior conviction exception set forth in both *Jones* and *Apprendi* is entirely

consistent with the rule set forth in *Loper*, *Burgett* and *Tucker*. Where a prior conviction is established "through procedures satisfying the . . . jury trial guarantee[]" of the Sixth Amendment, there is no reason to again require that conviction to be proven yet again to a jury under either *Apprendi* or *Burgett*. The reliability concerns at the core of the Sixth Amendment -- and of both *Apprendi* and *Burgett* -- are addressed by providing a jury at the initial trial. But where the prior conviction was obtained *without* affording defendant a jury trial, the reliability concerns of the Sixth Amendment, *Burgett* and *Apprendi* are all directly implicated, and the conviction should not fall into the prior conviction exception set forth in *Apprendi*.

In making this argument, Mr. Rices recognizes that in *People v. Nguyen* (2009) 46 Cal.4th 1007 this Court held that the Sixth Amendment itself did *not* preclude the state from using juvenile convictions to enhance a sentence *in the non-capital context*. (46 Cal.4th at p. 1028.) Justice Kennard wrote a dissent on this exact point. (46 Cal.4th at pp. 1028-1034.)

This case does not involve the Sixth Amendment issue involved in *Nguyen*. Nor does it involve a non-capital case. Instead, even assuming (as *Nguyen* held) that juvenile convictions are permissible to enhance in the non-capital context pursuant to the *Sixth* Amendment, the question here is whether the *Eighth* Amendment requirement of

reliability permits the same practice in a capital case. In this context it is worth noting that even where a procedure does not violate the Constitution in connection with non-capital proceedings, that same procedure *can* violate the Eighth Amendment's more exacting requirement of reliability when applied to a capital case. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. at pp. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]. *See Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Supreme Court distinguishes between the protections of the due process clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."]. *Compare Furman v. Georgia* (1972) 408 U.S. 238 [standardless capital sentencing violates the Eighth Amendment] *with McGautha v. California* (1971) 402 U.S. 183 [standardless capital sentencing does not violate Due Process].)

In short, the Supreme Court has long recognized that the jury trial right -- like other rights in the Sixth Amendment -- protects the defendant's interest in "fairness and reliability." (*United States v. Booker, supra*, 543 U.S. at p. 244.) Permitting the state to obtain a death judgment on a conviction obtained without this protection cannot be reconciled with the Eighth Amendment requirement of reliable penalty phase procedures.

Admission of the juvenile conviction was error.[1]

---

[1] In both his opening and reply briefs, Mr. Rices has explained why the state would be unable to prove beyond a reasonable doubt that admission of this evidence was harmless. (AOB 230-231; ARB 116-118.) Rather than repeat that argument, he incorporates it by reference here.

II. THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED MR. RICES'S DUE PROCESS RIGHTS IN FAILING TO PROVIDE THE DEFENSE WITH A COPY OF MILLER'S PRE-TRIAL "FREE TALK" WITH POLICE.

Prior to trial, and unbeknownst to defense counsel, co-defendant Miller had a several-hour-long "free talk" with police. Normally Penal Code section 1054.1, subdivision (b) would have required the state to disclose this statement to the defense. Instead of disclosing this statement, however, the state sought to keep it a secret by filing a Penal Code section 1054.7 motion with the trial court to avoid disclosure. (3 CT 590-591.) At a subsequent in camera hearing from which defense counsel was excluded, the state as moving party justified this request, in part, by noting that "John Doe 1" "will not be called as a witness by the People." (4 CT 769.) On November 26, 2008 the trial court granted the state's motion. (4 CT 769.)

But as discussed in some detail in the opening and reply briefs, Miller was called as a witness and the Rices jury was reconvened to hear his testimony. Miller testified that Rices was a prominent gang member, that he (Miller) participated in the crime only because he was scared of Rices and that Rices shot the victims as they were pleading for their lives. (13 RT 1909-1921, 1939, 1958-1959.)

In his opening brief, Mr. Rices contended that once it became clear that Miller was

going to be a witness -- regardless of who called him -- the trial court's November 26, 2008 ruling had to be modified so that Miller's statements to police were provided to the defense. (AOB 176-184.) His argument was that nothing in section 1054.7 authorized the state to (1) obtain statements from a witness prior to trial, (2) introduce inculpatory evidence through that witness yet (3) keep the witness's pre-trial statements to police a secret. In its brief, the state argued that the trial court had no duty to revise its order because "there are a whole host of situations where the trial court is under no obligation to act without a request from the moving party." (RB 102.)

In light of the state's argument that the trial court did not err in failing to revise its order *sua sponte*, there is an entirely separate reason to reverse the death verdict in this case. If the state is correct that the trial court had no duty to revise its order absent a request from the prosecution (as "moving party"), then the prosecution had an obligation to make such a request once it became clear Miller would testify. In this situation, the prosecutor's failure to make such a request -- and disclose this inculpatory evidence required by section 1054.1, subdivision (b) -- violated Mr. Rices's due process rights.

Under the Due Process Clause, criminal defendants are entitled to a "meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485; *accord Baldwin v. Hale* (1864) 1 Wall. 223, 233.) To be "meaningful," of

course, the opportunity to be heard must occur "at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552.) It also requires "a reasonable opportunity to know the claims of the opposing party and to meet them." (*Morgan v. United States* (1938) 304 U.S. 1, 18.)

Courts throughout the country have agreed that the state's failure to timely disclose inculpatory evidence may violate the defendant's due process right to a fair trial by destroying his ability to prepare a defense. (*See, e.g., Duong v. Hedgpeth* (C.D. Cal. 2011) 2011 WL 5161952 at *5; *United States v. Tamura* (9th Cir. 1982) 694 F.2d 591, 599; *United States v. Royball* (9th Cir. 1977) 566 F.2d 1109, 1110; *Lindsey v. Smith* (11th Cir. 1987) 820 F.2d 1137, 1151; *Ghoulson v. Estelle* (5th Cir. 1982) 675 F.2d 734, 738-739; *Smith v. Estelle* (5th Cir. 1979) 602 F.2d 694, 699-701, *affirmed on other grounds*, *Estelle v. Smith* (1981) 451 U.S. 454.) Moreover, when the state's failure to timely disclose inculpatory evidence prevents a criminal defendant from effectively confronting evidence against him, the defendant's Sixth Amendment right to confrontation has also been violated. (*See, e.g., Kentucky v. Stincer* (1987) 482 U.S. 730, 738; *Delaware v. Fensterer* (1985) 474 U.S. 15, 20; *United States v. Alvarez* (1st Cir. 1993) 987 F.2d 77, 85; *United States v. Baum* (2d Cir. 1973) 482 F.2d 1325, 1331-1332; *United States v. Padrone* (2d Cir. 1969) 406 F.2d 560, 560-561; *State v. Thomkins* (Iowa Sup. Ct. 1982) 318 N.W.2d 194, 198; *State v. Stapleton* (Mo. 1976) 539 S.W.2d 644,

659.)

The surprise (and prejudice) to a defendant increase when the state fails to disclose inculpatory evidence that a defendant would *expect* to see during the discovery process, for then the defendant is led to believe the evidence does not exist. (*See, e.g., United States v. Tamura, supra*, 694 F.2d at p. 599; *United States v. Royball, supra*, 566 F.2d at p. 1110; *accord Lindsey v. Smith, supra*, 820 F.2d at p. 1151, n.18 [the state's violation of a discovery order is relevant to the constitutional analysis because it "increase[s] the likelihood that defendants would be justified in preparing their defenses in the belief that certain inculpatory evidence will not be introduced at trial."].) Thus, "[s]urprise can be as effective as secrecy in preventing effective cross-examination, in denying the opportunity for counsel to challenge the accuracy or materiality of evidence and in foreclosing the debate between adversaries [which] is often essential to the truth seeking function of trials." (*Smith v. Estelle, supra*, 602 F.2d at p. 699.)

This fundamental concern with reliability is at the heart of this case. Prior to trial, Miller spoke with police. In this interview -- which *was* provided to defense counsel during the discovery process -- Miller admitted his culpability in the crime, the idea to rob the store was his, he did other robberies with defendant, he knew they were going to do a robbery that night and he had bragged about the murders to others. (37 CT 8390-8391,

8405-8406, 8412, 8416-8417, 8423, 8426-8427, 8437, 8449-8456, 8477-8482, 8495-8500, 8521, 8537, 8541-8542, 8564, 8566-8567.) In terms of preparing the defense -- that is, selecting a jury, making an opening statement, preparing to confront the state's case and making objections to testimony -- defense counsel would obviously base his tactical decisions on the information which had been provided to him.

Had defense counsel had access to the free talk he would have known (1) Miller's version of events was now very different from what he originally told police and (2) Miller came up with this new version of events only after he was a "potential cooperating witness" looking to get a a "benefit or plea bargain" in his own case. (40A SCT 8886.) Thus, precisely because the prosecution did not disclose the free talk, in preparing the defense Mr. Rices's lawyer was under a substantial misimpression about Miller's position. Defense counsel did not know that Miller would say the idea to rob the store came from Rices, he (Miller) was uncomfortable with the idea, he had never committed a robbery with Rices before, he did not learn of the robbery until they parked across the street from the store that night, he told Rices not to kill anyone and he did not brag about the murder to other people. (40A SCT 8902, 8925-8927, 8933-8934, 8936.) Unaware of any of this, defense counsel was -- through no fault of his own -- unprepared to respond to this evidence with rebuttal evidence, make appropriate motions when Miller was called, address this evidence at trial during cross-examination or consider this evidence in

the process of selecting the jury or making his opening or closing arguments.

At the end of the day, the Rices jury was permitted to hear Miller's testimony. There is no dispute (and the trial prosecutor conceded) that this testimony was adverse to Mr. Rices and constituted aggravating evidence. There is no dispute that defense counsel for Mr. Rices never received a copy of Miller's free talk with police. And there is no real dispute that -- because Miller was in fact called as a witness -- defense counsel was entitled to see the free-talk transcript pursuant to section 1054.1.

But under the unique circumstance of this case -- where defense counsel did not know about the free talk -- he could not request it. Thus, the responsibility of ensuring defense counsel received the free talk fell either to the trial court or the prosecutor -- the only parties who actually knew about it. If the state is correct in its Respondent's Brief that the trial court had no duty to change its ruling absent a "request from the moving party" (RB 102), then the prosecution -- as the "moving party" behind the section 1054.7 motion to keep the free talk a secret -- had an obligation to seek a new ruling. The state cannot have it both ways -- it cannot argue that (1) the trial court did not err because the prosecutor did not seek a new ruling and (2) the prosecutor did not err because he acted

under the guise of the court's prior ruling. A new penalty phase is required.[2]

---

[2] In both his opening and reply briefs, Mr. Rices has explained why the state would be unable to prove beyond a reasonable doubt that the failure to disclose this evidence was harmless. (AOB 184-190; ARB 99-103 and n.15.) Once again, rather than repeat that argument, he incorporates it by reference here.

CONCLUSION

For all these reasons, and for the reasons set forth in the opening and reply briefs, the case should be reversed for a new penalty phase.

DATED: 1/5/17

Respectfully submitted,

Cliff Gardner
Attorney for Appellant
Jean Pierre Rices

CERTIFICATE OF COMPLIANCE

I certify that the accompanying non-redacted brief is double spaced, that a 13-point proportional font was used, and that there are 3230 words in the brief.

Dated: 1/5/17

Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

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

On January 6, 2017, I served the within

APPELLANT'S SUPPLEMENTAL BRIEF

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

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

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

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

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

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

I declare under penalty of perjury that the foregoing is true. Executed on January 6, 2017, in Berkeley, California.

Declarant