Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 8/15/2022 at 3:27:55 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 8/15/2022 by Larry Blake, Jr., Deputy Clerk

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHNNY MORALES, Defendant and Appellant.	**Capital Case** No. S137307 (San Bernardino Co. Superior Court No. FVA 015456)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

HONORABLE INGRID A. UHLER

MARY K. McCOMB
State Public Defender
C. DELAINE RENARD
Supervising Deputy State Public Defender
State Bar No. 169893
1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300
delaine.renard@ospd.ca.gov

Attorneys for Appellant

TABLE OF CONTENTS

Page

I. THE JUDGMENT MUST BE REVERSED BECAUSE THE STATE DEPRIVED MR. MORALES OF HIS RIGHT TO THE ASSISTANCE OF CAPITAL DEFENSE COUNSEL AT THE CRITICAL PRETRIAL AND PLEA-BARGAINING STAGES IN VIOLATON OF THE SIXTH AMENDMENT AND ARTICLE I, SECTION 14 OF THE CALIFORNIA CONSTITUTION; ALTERNATIVELY, THE MATTER MUST BE REMANDED TO THE TRIAL COURT TO CONDUCT A NEW HEARING INTO MR. MORALES'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PLEA-BARGAINING STAGE..... 27

A. Introduction 27

B. The State's Failure to Provide Mr. Morales with the Assistance of Capitally Competent Counsel to Which he Was Entitled During the Critical Plea Bargaining and Pre-Trial or Pre-Bargain Stages was Presumptively Prejudicial and Demands Reversal of the Judgment..... 35

1. Mr. Rozenberg tacitly admitted that he had not provided capitally competent assistance during his tenure and the court determined that he was unqualified in law and in fact to represent Mr. Morales in a capital case, against a potential death sentence 35

2. The superior court's delay in relieving Mr. Rozenberg violated its duties and deprived Mr. Morales of the assistance of capitally competent counsel in making the irrevocable life and death choice between accepting or rejecting the capital plea bargain offer..... 45

TABLE OF CONTENTS

Page

3. The record of Mr. Rozenberg's actual performance confirms the court's errors deprived Mr. Morales of his state and federal constitutional rights to the assistance of competent counsel in the critical plea-bargain and pre-bargain stages of this capital case 49

   a. Mr. Rozenberg only met once with Mr. Morales privately and often failed to show up in court 50

   b. Mr. Rozenberg conducted no penalty phase investigation 57

   c. Mr. Rozenberg did not avail himself of resources and procedures by which to obtain capital case assistance that prevailing professional norms demanded in this case 61

   d. The state offers no meaningful response to the remaining evidence that Mr. Rozenberg failed entirely to function as capital defense counsel 66

4. The superior court's erroneous provision and retention of an unqualified attorney who failed to function as capital defense counsel throughout the pre-trial stage left Mr. Morales unaided by competent counsel in making the irrevocable choice between facing death by rejecting the plea bargain offer or sparing his life by accepting it 68

TABLE OF CONTENTS

Page

5. Because the state was at fault for Mr. Rozenberg's complete failure to function as the capitally competent counsel to which Mr. Morales was entitled during the critical pre-trial and plea-bargaining stages, prejudice must be presumed, and the matter remanded for reinstitution of the capital plea bargain proceedings 77

C. If this Court Determines that Mr. Morales Bears the Burden of Proving Prejudice from the Superior Court's Dereliction of its Duties to Provide him the Assistance of Competent Counsel Under *Strickland*'s Second Prong, the Matter Must be Remanded to the Trial Court with Directions to Hold a New *Strickland* Hearing that Comports with the Law and Fundamental Fairness that Was Lacking In its First Hearing 90

1. The trial court's rationale for excluding highly relevant testimony on the ground that it was relevant only to the first, presumed deficient performance prong and irrelevant to second, prejudice prong of the *Strickland* test at issue was inconsistent with its actual analysis, the law, and due process 92

a. Brief summary of the proceedings and the court's rationale for excluding the testimony 92

b. Respondent's agreement that the trial court's actual analysis reached and resolved the first, deficient performance prong of the *Strickland* test compels the conclusion that the court erred in refusing to hear the proffered testimony it recognized as relevant and necessary to resolve that prong 96

TABLE OF CONTENTS

Page

c. The trial court erred by excluding the testimony on the ground that it was irrelevant to the prejudice prong of the *Strickland* test 98

2. The trial court's factual findings were internally irreconcilable and based on speculation due to an evidentiary gap created by its exclusion of Messrs. Rozenberg and Morales's testimony 101

II. THE DEATH JUDGMENT MUST BE VACATED BECAUSE THE PROSECUTION'S 11th HOUR DECISION TO SEEK DEATH WAS ACTUALLY VINDICTIVE IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS 116

A. Introduction 116

B. The Claim is Not Forfeited. 119

C. The Prosecutor's Use of the Death Penalty to Force Mr. Morales to Accept a Plea Deal was Improper and Unconstitutional 121

III. THE PROSECUTOR'S MISCONDUCT FIRST IN MISLEADING THE TRIAL COURT INTO ADMITTING OTHERWISE IRRELEVANT AND INFLAMMATORY SEXUAL ASSAULT EVIDENCE AND THEN IN URGING THE JURORS TO INFER FROM IT THAT MR. MORALES COMMITTED AN UNCHARGED ATTEMPTED RAPE OF THE VICTIM BEFORE SHE WAS KILLED, TOGETHER WITH THE TRIAL COURT AND TRIAL COUNSEL'S FAILURE TO PREVENT AND MITIGATE THAT MISCONDUCT, UNDERMINE CONFIDENCE IN THE TRUE FINDING ON THE DEATH-QUALIFYING SPECIAL CIRCUMSTANCE ALLEGATION IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS 126

TABLE OF CONTENTS

Page

A. Introduction 126

B. The State's Dispute Over the Legal Principles Governing the Trial Court's Rulings Permitting the Prosecution to Proceed on the Attempted Rape Felony Murder Theory Is Without Basis in the Law 129

C. The Prosecutor's Offers of Evidence were False, Misleading, and Otherwise Inadequate and the Trial Court and Defense Counsel Failed to Discharge their Duties to Check the Prosecutor and Avoid the Introduction of Irrelevant and Highly Inflammatory Evidence for the Ostensible Purpose of Proving a Sham Attempted Rape Felony-Murder Theory..... 136

1. The prosecutor's first offer of proof was false and resulted in the trial court's erroneous evidentiary rulings 136

2. The prosecutor had no competent evidence, and did not reasonably anticipate producing competent evidence, to support his second offer of proof and the trial court erred in basing its evidentiary rulings on it 143

3. The true evidence contradicted the two most critical offers of proof and had no tendency in reason to prove that Mr. Morales attempted to rape the victim, as the state recognized below 149

4. Defense counsel did not forfeit Mr. Morales's right to raise his constitutional claim on appeal, which respondent ultimately, albeit unwittingly, recognizes 150

TABLE OF CONTENTS

Page

D. The Errors Resulted in the Jury's Erroneous Reception of Evidence and Remarks That Mr. Morales Had Committed Uncharged Sexual Crimes Against the Victim, Which Were Irrelevant, Highly Inflammatory, and Immune from Fair Adversarial Testing 153

1. Absent the misleading offers of proof and sham attempted rape felony murder theory, the sexual assault evidence was irrelevant and neither admitted nor admissible to bolster Angel Ivan's credibility 154

2. The Improper Inference that Mr. Morales Allegedly Attempted to Rape the Victim Before She was Killed Permeated the State's Case-in-Chief and The Prosecutor's Tactics Effectively Immunized the Inference from Fair Adversarial Testing 162

E. The Prosecutor Improperly Exploited the Errors It Created in His Guilt Phase Summation to the Jurors 169

F. Defense Counsel Failed to Perform in Accord with Objective Standards of Reasonable Assistance Demanded in a Capital Murder Trial with Respect to the Admission of Evidence and Prosecutor's Argument that Mr. Morales Attempted to Rape the Victim Before She Was Killed 173

1. Whether due to defense counsel error, state error, or some combination thereof, the jurors should never have been exposed to, or subjected to voir dire on, an inflammatory attempted rape felony-murder special circumstance that was unsupported by sufficient evidence and not in issue in the case 174

TABLE OF CONTENTS

Page

2. Mr. Morales accepts respondent's concession that additional objections to the prosecutor's offers of proof and the evidentiary rulings based thereon were unnecessary to alert the trial court to the errors raised on appeal and preserve them for appellate review 176

3. Defense counsel's failure to object to the prosecutor's misconduct in summation and move to strike the attempted rape evidence and admonish the jurors accordingly was incompatible with prevailing professional norms in capital cases 177

G. The Cumulative Effect of the Errors Committed by The Prosecutor, The Trial Court, And Mr. Morales's Own Counsel Deprived Mr. Morales Of a Fundamentally Fair Trial and Constitutionally Reliable Verdict on The Death-Qualifying Special Circumstance Allegations..... 180

IV. THE CUMULATIVE EFFECT OF ERRORS COMMITTED IN BOTH THE GUILT AND THE PENALTY PHASES VIOLATED STATE LAW AS WELL AS MR. MORALES'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FUNDAMENTALLY FAIR PENALTY TRIAL AND A HIGHLY RELIABLE DEATH VERDICT 196

A. Introduction 196

B. The Putative Unadjudicated Sex Crimes Based on the Guilt Phase Evidence Were Subject to the Proof Beyond a Reasonable Doubt Standard Under Factor (b) 198

TABLE OF CONTENTS

Page

C. Respondent Tacitly Concedes the Condition of the Victim's Clothing and Erroneously Admitted Guilt Phase Evidence Were Insufficient to Prove Beyond a Reasonable Doubt that Mr. Morales was Criminally Liable for Attempting to Rape or Commit any Other Specific Sexual Crime Against the Victim 206

D. The Prosecutor's Argument Urging the Jurors to Consider the Putative Unadjudicated Sexual Criminal Activity in Aggravation Was Replete with Errors on the Part of Both the Prosecutor and the Trial Court 207

1. The prosecutor argued in aggravation the uncharged sexual crimes evidence, which was one factor bringing that unadjudicated criminal activity within the purview of the proof beyond a reasonable doubt requirement under factor (b) 208

2. The prosecutor misstated the evidence and improperly encouraged the jurors to consider a crime someone else committed as a factor aggravating Mr. Morales's personal culpability and weighing in favor of his death 213

3. Defense Counsel did not forfeit Mr. Morales's right to challenge the prosecutor's improper argument on appeal and the trial court erred in refusing to admonish the jurors to disregard it 220

TABLE OF CONTENTS

Page

E. The Trial Court Erred by Instructing the Jurors to Consider All Guilt Phase Evidence and Unadjudicated Violent Criminal Activity in Determining the Appropriate Penalty but Failing to Instruct Them the Prosecutor Bore the Burden of Proving Beyond a Reasonable Doubt Mr. Morales's Commission of a Specific Unadjudicated Violent Crime, Absent Which they Were to Disregard any Such Evidence in Determining the Appropriate Penalty 223

F. Defense Counsel's Performance Regarding the Unadjudicated Violent Sexual Crimes Fell Below an Objective Standard of Reasonably Competent Assistance at the Penalty Phase of a Capital Murder Trial 225

1. Defense counsel's failure to move to preclude the use in aggravation of the erroneously admitted guilt phase evidence as proof of unadjudicated sexual crimes fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial 226

2. Defense counsel's failure to correct the trial court's misimpression of the law and elaborate on the objections they did make to the prosecutor's penalty phase summation fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial 227

TABLE OF CONTENTS

Page

3. Defense counsel's failure to invoke the trial court's sua sponte duty to instruct on factor (b)'s proof beyond a reasonable doubt standard or to request further instruction on the elements of the specific crimes the prosecution bore the burden of proving fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial 230

4. Defense counsel's failure to rebut the prosecutor's penalty phase summation concerning the unadjudicated criminal activity fell below objective standards of reasonably competent assistance in the penalty phase of a capital case 231

G. The Death Judgment Must be Reversed Because the Cumulative Effect of the Foregoing Errors, Particularly in Combination with the Guilt Phase Errors on the Same Subject, Was Prejudicial and Violated Mr. Morales's State and Federal Constitutional Rights to A Fair Penalty Trial and a Highly Reliable Death Verdict Under the Sixth, Eighth and Fourteenth Amendments 233

V. THE TRIAL COURT VIOLATED MR. MORALES'S RIGHTS UNDER STATE LAW AND THE FEDERAL CONSTITUTION BY DENYING HIS PETITION FOR ACCESS TO INFORMATION NECESSARY TO INVESTIGATE EVIDENCE OF POSSIBLE JUROR MISCONDUCT FOR THE PURPOSE OF A NEW TRIAL MOTION 235

TABLE OF CONTENTS

Page

VI. RESPONDENT HAS FAILED TO DEMONSTRATE THAT A REMAND FOR THE TRIAL COURT TO EXERCISE ITS DISCRETION OVER WHETHER TO DISMISS THE FIREARM ENHANCEMENTS ALLEGED AND IMPOSED PURSUANT TO PENAL CODE SECTION 12022.53 WOULD NOT BE FUTILE 238

CONCLUSION 242

CERTIFICATE OF COUNSEL..... 243

DECLARATION OF SERVICE 244

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Allen v. Woodford
(9th Cir. 2005) 395 F.3d 979 61

Arizona v. Fulminante
(1991) 499 U.S. 279 233

Banks v. Dretke
(2004) 540 U.S. 668 176

Bell v. Cone
(2002) 535 U.S. 685 ..... 78, 79, 85

Blackledge v. Perry
(1974) 417 U.S. 21 120

Bobby v. *Van Hook*
(2009) 558 U.S. 4 31

Bordenkircher v. Hayes
(1978) 434 U.S. 357 ..... 119, 122, 125

Brady v. United States
(1970) 371 U.S. 742 122

Correll v. Ryan
(9th Cir. 2008) 539 F.3d 938 231

Cuyler v. Sullivan
(1980) 446 U.S. 335 ..... 78, 79

Eddings v. Oklahoma
(1982) 455 U.S. 104 217

Enmund v. Florida
(1982) 458 U.S. 782 ..... 217, 218

Furman v. Georgia
(1972) 408 U.S. 238 ..... 121, 122

TABLE OF AUTHORITIES

Page(s)

Giglio v. United States
(1972) 405 U.S. 150 ..... 137, 138, 215

Glasser v. United States
(1942) 315 U.S. 60 ..... 46, 79, 80, 82

Herring v. New York
(1975) 422 U.S. 853 231

Hill v. Lockhart
(1985) 474 U.S. 52 78

Hinton v. Alabama
(2014) 571 U.S. 263 ..... 60, 63

Holloway v. Arkansas
(1978) 435 U.S. 475 ..... 46, 79, 80

Kansas v. Marsh
(2006) 548 U.S. 163 217

Kaur v. Ashcroft
(9th Cir. 2004) 388 F.3d 734 ..... 91, 97

Kerciku v. I.N.S.
(7th Cir. 2003) 314 F.3d 913 ..... 91, 97

Kimmelman v. Morrison
(1986) 477 U.S. 365 60

Kyles v. Whitley
(1995) 514 U.S. 419 ..... 181, 183

Lafler v. Cooper
(2012) 566 U.S. 156 ..... 30, 46, 83, 98

Lockett v. Ohio
(1978) 438 U.S. 586 ..... 124, 217

Mayfield v. Woodford
(9th Cir. 2001) 270 F.3d 915 ..... 61, 62

TABLE OF AUTHORITIES

Page(s)

McKinney v. Rees
(1993) 993 F.2d 1378..... 172

McMann v. Richardson
(1970) 397 U.S. 759..... 81

Mickens v. Taylor
*(*2002) 535 U.S. 162..... 80

Missouri v. Frye
(2012) 566 U.S. 134..... 83

Mitchell v. Mason
(6th Cir. 2003) 325 F.3d 732..... 87, 88

Monge v. California
(1998) 524 U.S. 721..... 124

Moore v. Bryant
(7th Cir. 2003) 348 F.3d 238..... 104

North Carolina v. Pearce
(1969) 395 U.S. 711..... 120

Osagiede v. United States
(7th Cir. 2008) 543 F.3d 399..... 67

Padilla v. Kentucky
(2010) 559 U.S. 356..... 83

Payne v. Tennessee
(1991) 501 U.S. 808..... 218

Penry v. Lynaugh
(1989) 492 U.S. 302..... 217

Robinson v. Schriro
(9th Cir. 2010) 595 F.3d 1086..... 219, 220

Roe v. Flores-Ortega
(2000) 528 U.S. 470..... 78

TABLE OF AUTHORITIES

Page(s)

Romano v. Oklahoma
(2004) 512 U.S. 1 ..... 221, 233

Rompilla v. Beard
(2005) 545 U.S. 374 ..... 59, 175

Spears v. Mullin
(10th Cir. 2003) 343 F.3d 1215 233

Strickland v. Washington
(1984) 466 U.S. 668 ..... passim

Taylor v. Kentucky
(1978) 436 U.S. 478 ..... 150, 233

Tejada v. Dubois
(1st Cir. 1998) 142 F.3d 18 152

Tison v. Arizona
(1987) 481 U.S. 137 ..... 217, 218

Tuilaepa v. California
(1994) 512 U.S. 967 217

United States v. Bagley
(1985) 473 U.S. 667 175

United States v. Cronic
(1984) 466 U.S. 648 ..... passim

United States v. Goodwin
(1982) 457 U.S. 368 122

United States v. Luna
(9th Cir. 1994) 21 F.3d 874 ..... 137, 139, 161

United States v. Meyer
(D.C. Cir. 1987) 810 F.2d 1242 125

United States v. Morris
(6th Cir. 2006) 470 F.3d 596 ..... 86, 87

United States v. Vasquez-Chan
(9th Cir. 1992) 978 F.2d 546..... 190, 191

United States v. Whimpy
(5th Cir. 1976) 531 F.2d 768..... 137, 139, 161

Walton v. Arizona
(1990) 497 U.S. 639..... 42, 167

Washington v. Hofbauer
(6th Cir. 2000) 228 F.3d 689..... 167, 216

Wheat v. United States
(1988) 486 U.S. 153..... 46, 79, 82

Wiggins v. Smith
(2003) 539 U.S. 510..... 59, 61

Williams v. Taylor
(2000) 529 U.S. 362..... 58, 60

Wood v. Georgia
(1981) 435 U.S. 261..... 78, 79

Woodard v. Collins
(5th Cir. 1990) 898 F.2d 1027..... 72

Woodson v. North Carolina
(1976) 428 U.S. 280..... 65, 124, 217

Zant v. Stephens
(1993) 462 U.S. 862..... 65

Zapata v. Vasquez
(9th Cir. 2015) 788 F.3d 1106..... 173

STATE CASES

Armenta v. Churchill
(1954) 42 Cal.2d 448..... 155, 159

TABLE OF AUTHORITIES

Page(s)

City of Santa Cruz v. Municipal Court
(1989) 49 Cal.3d 74 236

Diaz v. Carcamo
(2011) 51 Cal.4th 1148..... 155, 159

Evans v. Paye
(1995) 32 Cal.App.4th 265..... 237

Gardner v. Superior Court
(2010) 185 Cal.App.4th 1003..... 36

In re Alvernaz
(1992) 2 Cal.4th 924.....passim

In re Gay
(2020) 8 Cal.5th 1059..... 31

In re Resendiz
(2001) 25 Cal.4th 230..... 104

In re Vargas
(2000) 83 Cal.App.4th 1125..... 104

Keenan v. Superior Court
(1982) 31 Cal.3d 424 61

Lorenzana v. Superior Court
(1973) 9 Cal.3d 626 121

People v. Adcox
(1988) 47 Cal.3d 207 65

People v. Albarran
(2007) 149 Cal.App.4th 214..... 172

People v. Anderson
(2001) 25 Cal.4th 543..... 177, 220

People v. Avila
(2006) 38 Cal.4th 491..... 132, 133

TABLE OF AUTHORITIES

Page(s)

People v. Bacon
(2010) 50 Cal.4th 1082 ..... 199, 201, 203

People v. Bain
(1971) 5 Cal.3d 839 167

People v. Baker
(1954) 42 Cal.2d 550 193

People v. Barnett
(1998) 17 Cal.4th 1044 ..... passim

People v. Bean
(1988) 46 Cal.3d 919 190

People v. Beardslee
(1991) 53 Cal.3d 68 218

People v. Bell
(1989) 49 Cal.3d 502 ..... 167, 237

People v. Billingsley
(2018) 22 Cal.App.5th 1076 239

People v. Bolton
(1979) 23 Cal.3d 208 ..... 139, 222, 223

People v. Bolton
(2008) 166 Cal.App.4th 343 43

People v. Boyd
(1985) 38 Cal.3d 762 ..... 224, 227, 229

People v. Brown
(1993) 17 Cal.App.4th 1389 160

People v. Carlin
(2007) 150 Cal.App.4th 322 ..... 142, 144

People v. Carrasco
(2014) 59 Cal.4th 924 62

TABLE OF AUTHORITIES

Page(s)

People v. Centeno
(2014) 60 Cal.4th 659 139

People v. Coddington
(2000) 23 Cal.4th 529 42

People v. Crew
(1991) 1 Cal.App.4th 1591 239

People v. Cummings
(1993) 4 Cal.4th 1233 160

People v. Daniels
(1991) 52 Cal.3d 815 43

People v. Davis
(1995) 10 Cal.4th 463 ..... 130, 131

People v. Dennis
(1986) 177 Cal.App.3d 863 91

People v. Dyer
(1988) 45 Cal. 3d 26 65

People v. Edwards
(1991) 54 Cal.3d 787 121

People v. Ewoldt
(1994) 7 Cal.4th 380 155

People v. Fletcher
(1996) 13 Cal.4th 451 164

People v. Fosselman
(1983) 33 Cal.3d 572 167

People v. Frierson
(1979) 25 Cal.3d 142 175

People v. Grimes
(2016) 1 Cal.5th 698 123

TABLE OF AUTHORITIES

Page(s)

People v. Guerrero
(1976) 16 Cal.3d 719 172

People v. Guiton
(1993) 4 Cal.4th 1116..... 130

People v. Harvey
(1984) 163 Cal.App.3d 90 192

People v. Hill
(1998) 17 Cal.4th 800..... 137, 138, 139, 222

People v. Holt
(1997) 15 Cal.4th 619..... 81

People v. Jennings
(2010) 50 Cal.4th 616..... 132, 133

People v. Jurado
(2006) 38 Cal.4th 72..... 122, 124

People v. Key
(1984) 153 Cal.App.3d 888 160

People v. Lopez
(2020) 66 Cal.App.5th 561..... 105

People v. Love
(1961) 56 Cal.2d 720 155

People v. Lucas
(1995) 12 Cal.4th 415..... 121

People v. Malone
(1988) 47 Cal.3d 1 ..... 208, 211, 212, 214

People v. McDaniels
(2018) 22 Cal.App.5th 420..... 239

People v. McKelvy
(1987) 194 Cal.App.3d 694 193

TABLE OF AUTHORITIES

Page(s)

People v. McKenzie
(1983) 34 Cal.3d 616 46

People v. Milner
(1988) 45 Cal.3d 227 ..... 150, 221, 233

People v. Moore
(2006) 39 Cal.4th 168..... 91

People v. Olguin
(1994) 31 Cal.App.4th 1355..... 193

People v. Panah
(2005) 35 Cal.4th 395..... 165

People v. Patterson
(2017) 2 Cal.5th 885..... 104, 122

People v. Phillips
(1985) 41 Cal.3d 29 224

People v. Pitts
(1990) 223 Cal.App.3d 606 160

People v. Powell
(1967) 67 Cal.2d 32 ..... 166, 167, 185

People v. Partida
(2005) 37 Cal.4th 428..... 121

People v. Ray
(1996) 13 Cal.4th 313..... 218

People v. Robertson
(1982) 33 Cal.3d 21 ..... 199, 203

People v. Robinson
(1954) 42 Cal.2d 741 194

People v. Rodrigues
(1994) 8 Cal.4th 1060..... 137, 142, 144, 145

TABLE OF AUTHORITIES

Page(s)

People v. Rundle
(2008) 43 Cal.4th 76 168

People v. Russell
(2010) 50 Cal.4th 1228 200

People v. Schmies
(1996) 44 Cal.App.4th 38 ..... 144, 145

People v. Scott
(1987) 194 Cal.App.3d 550 160

People v. Scott
(2011) 52 Cal.4th 452 ..... 186, 187

People v. Stankewitz
(1990) 51 Cal.3d 72 216

People v. Stanley
(1995) 10 Cal.4th 764 ..... passim

People v. Thomas
(1992) 2 Cal.4th 489 ..... 218, 224

People v. Thompson
(1979) 98 Cal.App.3d 467 160

People v. Towler
(1982) 31 Cal.3d 105 237

People v. Tully
(2012) 54 Cal.4th 952 ..... 208, 209

People v. Vance
(2010) 188 Cal.App.4th 1182 ..... 172, 186

People v. Williams
(1997) 16 Cal.4th 153 ..... 56, 68, 119

People v. Williams
(2013) 58 Cal.4th 197 ..... 42, 43

TABLE OF AUTHORITIES

Page(s)

People v. Zamora
(2022) 73 Cal.App.5th 1084 237

Placer Ranch Partners v. County of Placer
(2001) 91 Cal.App.4th 1336 68

Richardson v. Superior Court
(2008) 43 Cal.4th 1040 ..... 181, 195

Roberts v. Lomanto
(2003) 112 Cal.App.4th 1553 68

Rockwell v. Superior Court
(1976) 18 Cal.3d 420 124

Sabi v. Sterling
(2010) 183 Cal.App.4th 916 ..... 68, 119

Sand v. Superior Court
(1984) 34 Cal.3d 567 ..... 36, 124

Smith v. Superior Court
(1968) 68 Cal.2d 547 43

Stickel v. San Diego Elec. Ry. Co.
(1948) 32 Cal.2d 157 ..... 137, 142

Townsel v. Superior Court
(1999) 20 Cal.4th 1084 237

Twiggs v. Superior Court
(1983) 34 Cal.3d 360 ..... 120, 125

Valdez v. State
(Okla. Crim. App. 2002) 46 P.3d 703 67

STATE STATUTES

Code of Civ. Proc.
§ 237 ..... 235, 236

TABLE OF AUTHORITIES

Page(s)

Code Civ. Proc.
§ 237 subd.(b) 236, 237

Evid. Code
§ 350..... 167
§ 1101..... 130
§ 1150..... 236

Pen. Code
§ 190.3..... 208, 211, 218
§ 190.3(b) 196, 218
§ 190.3(c)..... 197
§ 987, subd. (d) 61, 81
§ 987.9..... 81
§ 995..... 174, 175
§ 1385..... 239
§ 12022.53..... 238, 239

CONSTITUTIONAL PROVISIONS

U.S. Const. amends
5..... 126
6.....passim
8..... 126, 128, 221, 234
14 ..... 27, 116, 126, 128

COURT RULES

Cal. Rules of Court, rules
4.117 81
8.605 81
8.613(b)(2)..... 36

San Bernardino County Superior Court Rules
Former Rule 1451 61
1413 .....passim
1419 33

TABLE OF AUTHORITIES

Page(s)

JURY INSTRUCTIONS

CALCRIM No. 763 65

CALJIC No. 8.88 65

OTHER AUTHORITIES

American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (1989) ..... passim

American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. Feb. 10, 2003) reprinted in 31 Hofstra L. Rev. 913 ..... passim

American Bar Association, ABA Standards for Criminal Justice: Prosecution and Defense Function (3d ed. 1993) 31

American Bar Association, *ABA Standards for Criminal Justice: Prosecution and Defense Function* (1993) 69, 72

Crocker, *Is the Death Penalty Good for Women?* (2001) 4 Buffalo Crim. L. Rev. 917 205

Pen. Code, Part 1, Title 9 "Of Crimes Against the Person Involving Sexual Assault" 224

Shatz, *The Meaning of Meaningful Appellate Review in Capital Cases: Lessons from California* (Winter 2016) 56 Santa Clara L. Rev. 79 ..... 205, 206

ARGUMENT[1]

I.
THE JUDGMENT MUST BE REVERSED BECAUSE THE STATE DEPRIVED MR. MORALES OF HIS RIGHT TO THE ASSISTANCE OF CAPITAL DEFENSE COUNSEL AT THE CRITICAL PRETRIAL AND PLEA-BARGAINING STAGES IN VIOLATON OF THE SIXTH AMENDMENT AND ARTICLE I, SECTION 14 OF THE CALIFORNIA CONSTITUTION; ALTERNATIVELY, THE MATTER MUST BE REMANDED TO THE TRIAL COURT TO CONDUCT A NEW HEARING INTO MR. MORALES'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PLEA-BARGAINING STAGE

A. Introduction

In the opening brief, Mr. Morales argued the judgment must be reversed because the superior court deprived him of his rights to the assistance of competent counsel during critical capital pre-trial and plea-bargaining stages in violation of the Sixth Amendment and state law. (Appellant's Opening Brief [AOB]:107-249.) Specifically, the superior court committed two interrelated errors that resulted in the violation. First, although this was a "capital" case from the moment special circumstances were alleged as a matter of law, the superior court violated its duty to follow its own rules and

---

[1] The absence of a reply in this brief to any particular argument or allegation made by respondent does not constitute a concession, abandonment, waiver of forfeiture of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects Mr. Morales's view that the issue has been adequately presented and the positions of the parties fully joined.

procedures, specifically Rule 1413 of the San Bernardino County Superior Court Rules (Rule 1413), which governs the appointment of specially qualified counsel in capital (as well as special circumstance-"LWOP") cases by appointing an unqualified attorney, Wayne Rozenberg, to represent Mr. Morales. A year and a half into his tenure and at the outset of the formal, "exploding" capital plea bargain proceedings, Mr. Rozenberg notified the superior court that he was incompetent in law and in fact to handle a capital case. [2] The court agreed and relieved him on that ground, but committed its second error – and violated its constitutional duties – by delaying that ruling until *after* Mr. Morales made his irrevocable decision to reject the plea offer and the plea bargain proceedings terminated with prejudice. This record alone establishes that as a result of the court's dereliction of its duties, Mr. Morales was denied his state and federal constitutional rights to the assistance of competent counsel, measured by prevailing professional norms in capital cases, during the critical plea bargain and pre-trial or pre-bargain stages of this capital case, without need for inquiry into Mr. Rozenberg's actual performance. (AOB:141-165.) In any event, that record does not stand alone.

The record of Mr. Rozenberg's actual performance corroborates his admission, and the superior court's finding, of his capital incompetency and demonstrates that, as a direct and

---

[2] An "exploding" plea offer is one that must be accepted or rejected immediately

foreseeable result of the superior court's errors, Mr. Rozenberg failed entirely to function as Mr. Morales's *capital* defense counsel throughout his tenure during the critical pre-trial and plea-bargaining stages of this capital prosecution. (AOB:165-212.) Put another way, Mr. Rozenberg's performance bore none of the hallmarks of the professional norms that prevail in *capital* cases. (*Ibid.*) Because the superior court was directly responsible for the foreseeable and easy-to-prevent lapse in representation, the prejudice test announced in *Strickland v. Washington* (*Strickland*) (1984) 466 U.S. 668, 694-695 is inapplicable and prejudice instead must be presumed. (AOB:212-216.) Hence, the judgment must be reversed, and the matter remanded with directions for the plea bargain proceedings to begin anew with the prosecution's reinstatement of the plea-offer. (AOB:163-165, 216.)

Alternatively, should this Court determine that Mr. Rozenberg's performance is subject to the *Strickland* prejudice test notwithstanding the superior court's considerable role in his unreasonable performance, the trial court's post-verdict hearing into whether that test was satisfied was neither a full nor a fair one. (AOB:217-249.) Instead, the trial court misapplied the appropriate legal standard, refused to hear the highly relevant and non-cumulative testimony of Messrs. Morales and Rozenberg, and then substituted its own speculation for the very evidence it refused to hear. (AOB:231-249.) Hence, the matter must be remanded with directions to the trial court to afford Mr. Morales the full and fair hearing, including a meaningful opportunity to present critical

evidence on the question of prejudice, to which he was entitled but was denied. (*Ibid.*)

Respondent disagrees that Mr. Morales was deprived of his state and federal constitutional rights to the assistance of counsel under any standard. (RB:62-90.) Before turning to the specific matters that are in dispute, it should assist the Court to begin with some fundamental matters that are not in dispute.

First, respondent does not dispute that a "capital case" under California law and for purposes of the state and federal guarantees to the assistance of competent counsel is one wherein death-qualifying special circumstance allegations have been alleged, unless the prosecution affirmatively announces its intention *not* to seek the death penalty at trial. (See AOB:129-130, citing authorities.) Hence, respondent does not dispute that this was a "capital" case from the moment the prosecution alleged death-eligible special circumstances against Mr. Morales. (See AOB:129-131, 147-149, 179, 182-183.)

Next, respondent does not dispute that the right to the "assistance of counsel" guaranteed under the state and federal constitutions is the right to the "assistance of *competent* counsel" (*Lafler v. Cooper* (2012) 566 U.S. 156, 162, italics added) as measured by "prevailing professional norms" (*Strickland, supra,* 466 U.S. 668, 687-691). (AOB:158-159, citing additional authorities.) Nor does respondent dispute that in capital cases like this one, the "prevailing professional norms" by which attorney competence is measured are those that specifically apply in capital cases – norms

that are much more expansive than those in noncapital murder cases. (See AOB:129-137, and authorities cited therein.) While respondent and Mr. Morales agree the ABA Capital Guidelines are not necessarily "inexorable commands" in every case (see AOB:113, quoting *Bobby* v. *Van Hook* (2009) 558 U.S. 4, 17; RB:65), respondent does not dispute the Supreme Court and this Court have consistently turned to them as "guides" in identifying the prevailing professional norms by which counsel's assistance is measured for Sixth Amendment purposes (AOB:112-113, citing authorities; see also *In re Gay* (2020) 8 Cal.5th 1059, 1077-1078) or that the prevailing professional norms guiding this Court's assessment of whether Mr. Morales received the assistance of competent counsel in the critical pre-trial and plea-bargaining stages of this capital case are found in the 1989 and 2003 revision of the *American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (hereafter "1989 ABA Capital Guidelines" and "2003 ABA Capital Guidelines") and the *American Bar Association Standards for Criminal Justice: Prosecution and Defense Function* (3d ed. 1993) (hereafter "1993 ABA Standards"). (See AOB:113-114 & fn. 15, 129-139). Nor does respondent dispute that prevailing professional norms in capital cases demand that counsel must *immediately* commence preparation for a capital murder trial upon the filing of death-qualifying special circumstances against their client. (See AOB:134-139, citing authorities.)

Finally, respondent does not dispute that the manifest intent of Rule 1413 is to effectuate the foregoing principles and ensure that defendants against whom special circumstances have been alleged receive effective assistance of uniquely qualified *capital* counsel who will provide capital case assistance from the moment death qualifying special circumstances are alleged, even if the prosecution is in fact undecided over whether to act on the death penalty election it made by filing the special circumstance allegations and actually seek that penalty at trial, including the pre-trial and plea-bargaining stages. (AOB:109, 139-141, 147-148, citing authorities.)[3]

---

[3] As set forth in the opening brief, Rule 1413 was enacted in September 1997 and provided at the time of Mr. Rozenberg's appointment and throughout his tenure:

> The Public Defender of San Bernardino County shall represent all indigent persons charged with a capital or life-without-possibility-of-parole (LWOP) case. If the Public Defender declares a conflict of interest and/or is relieved from representing a person charged with a capital or LWOP case, then the Court shall appoint counsel from the "Capital/LWOP Case Panel." The Court and counsel shall adhere to the requirements and procedures of the Capital/LWOP Case Panel.
>
> The San Bernardino County Superior Court established a Capital/Life Without Parole (LWOP) Case Panel of qualified attorneys to be appointed to represent indigent defendants in Capital and LWOP cases. Every attorney who has permitted his or her name to be included on and to remain on the Capital Case Panel agrees to accept the appointment in Capital and/or LWOP cases according to the terms of the Fee Schedule Agreement for Capital/LWOP Case Appointments, in effect for cases appointed after September 1, 1997.

Respondent concedes the superior court violated Rule 1413 when it appointed attorney Rozenberg rather than the capitally qualified Public Defender (RB:66) and does not dispute the court thereby violated its duty to follow its own rules and procedures, which carry the legal force of statute. (AOB:108, 140, 143-146, 150, citing authorities.)

In sum, the critical principles underlying Mr. Morales's claim he was denied the assistance of competent counsel to which he was entitled under the state and federal constitutions are not in dispute: this was a "capital" case from the moment the special circumstances were alleged; from that moment, Mr. Morales was entitled to the assistance of competent counsel, as measured by prevailing professional norms in capital cases (hereafter "capitally competent counsel"), who would immediately commence preparations for a capital murder trial; the purpose of Rule 1413 is to effectuate these principles; and the superior court violated Rule 1413 and state law by appointing Mr. Rozenberg and not the Public Defender or counsel specially qualified by the court on its Rule 1413 panel. The only real dispute is over whether Mr. Morales nevertheless received the

---

The rule has since been renumbered several times without substantive change. At the time of counsel's appointment in this case in 2002, the rule was renumbered 1450.3. Two years later, it was renumbered Rule 1419. It has since been renumbered again as Rule 1413. For ease of reference, Mr. Morales has cited the original and current number of the rule – Rule 1413.

assistance of capitally competent counsel during Mr. Rozenberg's year-and-a-half tenure in the pre-trial and plea-bargaining stages.

In this regard, respondent asserts that Mr. Rozenberg never admitted, and the superior court never determined, that he was incompetent in fact to handle a capital case. (RB:68-72.) To the contrary, respondent contends that Mr. Rozenberg's performance was "reasonable," although respondent cites to no objective standard of "reasonableness," or prevailing professional norm by which to measure "reasonableness." (RB:74-75.) In any event, respondent contends that because Mr. Rozenberg was present, provided some assistance, and was not "prevented [by the state] from assisting" (RB:76), the presumption of prejudice is unavailable to Mr. Morales who must satisfy both prongs of the *Strickland* test to obtain relief (RB:72-4, 76-77). Finally, respondent contends the trial court properly resolved the appropriate *Strickland* prejudice test against Mr. Morales in the hearing below, disputing that the hearing was so flawed as to warrant remand for a new hearing into whether Mr. Morales satisfied the *Strickland* test for ordinary ineffective assistance of counsel. (RB:79-90; compare AOB:217-249.)

As Mr. Morales will demonstrate below, respondent's assertions and argument are without merit.

B. The State's Failure to Provide Mr. Morales with the Assistance of Capitally Competent Counsel to Which he Was Entitled During the Critical Plea Bargaining and Pre-Trial or Pre-Bargain Stages was Presumptively Prejudicial and Demands Reversal of the Judgment

1. Mr. Rozenberg tacitly admitted that he had not provided capitally competent assistance during his tenure and the court determined that he was unqualified in law and in fact to represent Mr. Morales in a capital case, against a potential death sentence

As noted in the Introduction, *ante*, there is no dispute that the superior court violated Rule 1413 by appointing an unqualified attorney, Mr. Rozenberg, to represent Mr. Morales in this capital case. (See AOB:141-150.) The court compounded that error when it failed to relieve Mr. Rozenberg immediately upon his declaration – made at the outset of the capital plea-bargaining proceeding – that he was not on the Rule 1413 panel qualified to handle death penalty cases and indeed could not and would not represent Mr. Morales if he rejected the plea offer and Mr. Morales were tried capitally, or when this "became" a capital case. (AOB:150-157.) Mr. Rozenberg's declaration was pregnant with constitutional meaning.

Certainly, it revealed his ignorance of the fact that this already was a capital case and had been a capital case throughout his appointment tenure, which respondent does not dispute. Nor does respondent dispute that the law and prevailing professional norms are clear that the triggering event for a capital case is the filing of death-eligibility special circumstance allegations, *not* any

affirmative prosecution announcement (which California law does not require in any event) that it will actually seek the death penalty at trial. (AOB:129-131, 147-149, 179, 182-183, citing, inter alia, *Sand v. Superior Court* (1984) 34 Cal.3d 567, 571-575, *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1007 and 1989 ABA Capital Guidelines, Guideline 11.3; see also Cal. Rules of Court, rule 8.613(b)(2) [prosecution presumed to seek death penalty upon filing special circumstance allegations].) Similarly, as Mr. Morales explained in the opening brief and respondent does not dispute, the filing of special circumstances triggers the "immediate" and fundamental duty of counsel to commence preparations for a capital murder trial, *even if the prosecution has not made a final decision over whether actually to seek that penalty at trial*, including, inter alia, "*immediate*[]" investigation into mitigation and aggravation (2003 ABA Capital Guidelines, Guideline 1.1, Commentary, *supra*, at pp. 925-926, italics added), and immediate and ongoing "close contact" with the client (*id.* Guideline 10.5, *supra*, at p. 1005). (AOB:134-137, citing additional authorities in accord). The need for this immediacy is to enable counsel to discharge their duties to "employ[] strategies" – including but not limited to plea negotiations – "to have the case designated by the prosecution as a noncapital one." (1989 ABA Capital Guidelines, Guideline 11.3; accord, e.g., 2003 ABA Capital Guidelines, Guideline 1.1, Commentary, *supra*, at pp. 925-926, italics added; 1989 ABA Capital Guidelines, Guidelines 11.4.1, 11.8.3; see AOB:129-131, 134-137, citing these and other authorities.)

It necessarily follows from Mr. Rozenberg's ignorance of the capital nature of this case that he had not *treated* it as a capital case, either, in accord with these prevailing professional norms and at the critical pre-trial and plea-bargaining stages. (AOB:168, 179-183.) Respondent offers no meaningful rebuttal to this logical inference. (See RB:68-71.) Instead, respondent vaguely asserts that Mr. Rozenberg's remark that he was "essentially ready" a few months into his tenure indicates that he adequately prepared for trial. (RB:70.) Among the many problems with respondent's logic is that Mr. Rozenberg announced "essentially ready" for trial while laboring under the impression that this was a non-capital case and he was preparing for a non-capital trial based on his revelation of ignorance and many other factors detailed in the opening brief. (AOB:179-187, 253-254.) Hence, his announcement of "essentially ready" for a non-capital murder trial has absolutely no tendency in reason to demonstrate that he had prepared for a *capital* murder trial or provided *capital* case assistance. [4]

---

[4] And in fact, there is a wealth of record evidence from which to question respondent's assertion that Mr. Rozenberg's announcement of "essentially ready" meant that he had adequately prepared even for a *non-capital* trial, including the evidence that he delayed 10 months before utilizing the services of any investigator, only began using them less than two months before announcing "essentially ready," and was not responsive to the investigators' questions, reports, or requests for direction. (2RT:108-1; AOB:179-180.)

In addition to his revelation of ignorance over the capital nature of this case, Mr. Rozenberg explicitly admitted he was not qualified by law and tacitly admitted he was not qualified in fact to provide capital case assistance to Mr. Morales when he informed the court and Mr. Morales that he would have to withdraw for that reason if this "became" a capital case. (AOB:150-157.) Again, it follows from all of these remarks that Mr. Rozenberg did not and simply could not provide Mr. Morales with the capital case assistance to which he was entitled. (*Ibid.)*

Respondent disputes that Mr. Rozenberg tacitly admitted he was unqualified in fact to represent a defendant, like Mr. Morales, facing a potential death sentence. (RB:68-71.) According to respondent, Mr. Rozenberg sought to withdraw "solely" because he believed his absence from the Rule 1413 panel (or his lack of qualification by law) required his withdrawal, not because he believed he was unqualified in fact to represent Mr. Morales. (*Ibid*.)

As a preliminary matter, respondent acknowledges that such a putative belief would be mistaken. (RB:69, 71.) While Rule 1413 prohibits *appointing* counsel not specially qualified under that rule to special circumstance cases, neither that rule nor any other law requires the *removal* of already-appointed counsel who is otherwise competent in fact to handle a case solely on the technical ground did not qualify for the appointment by rule. (RB:69, 71; see AOB:155-157, citing authorities.) To the contrary, once appointed or retained, the law not only permits an attorney who is unqualified by rule but qualified in fact to continue to represent the defendant; it strongly

favors the continuity of factually qualified counsel, particularly where substitution of counsel would subvert the defendant's speedy trial rights. (AOB:155-157, and authorities cited therein.)

Respondent's theory that Mr. Rozenberg's remarks were merely expressing his mistaken belief that Rule 1413 absolutely required his withdrawal from cases covered by that rule due to his absence from the qualified panel does not withstand logical scrutiny of the record of what actually was said and done below.

As a matter of simple logic, if Mr. Rozenberg were concerned "solely" with Rule 1413 and his belief that it prohibited him from handling cases covered by that rule, as respondent contends, it necessarily follows that he would have moved to withdraw much earlier *regardless* of whether this was a capital or a non-capital special circumstance, or "LWOP," case rather than conditioning his intended withdrawal on this case becoming a capital case. (See 2RT:138-139, 144; AOB:151-152.) As Mr. Morales explained in the opening brief but respondent conveniently ignores, Rule 1413 covers *special circumstance* prosecutions and hence creates a "Capital/LWOP case panel" of attorneys specially qualified for appointment to such cases. (AOB:151-153.) Hence, even Mr. Rozenberg's mistaken belief that this was a non-capital special circumstance and *not* a capital case made no difference under Rule 1413 – it "required" (according to respondent's theory of Mr. Rozenberg's belief) his withdrawal due to the existence of special circumstances and his exclusion from the panel. But Mr. Rozenberg drew a clear distinction between his ability to represent Mr. Morales

at a capital trial and his ability to do so at a noncapital trial wherein "LWOP" would be the maximum penalty Mr. Morales faced: if the case were tried as a noncapital "LWOP" trial, Mr. Rozenberg explained, then he was ready, willing, and able to continue representing Mr. Morales – notwithstanding his technical lack of qualification due to his exclusion from the Rule 1413 panel. In contrast, he explained that if the case were tried capitally, he would have to withdraw. (*Ibid.)* It is clear from these remarks that Mr. Rozenberg understood his exclusion from the Rule 1413 panel did not require his withdrawal so long as he was (in his opinion) qualified *in fact* to handle a case covered by that rule. The only reasonable inference to draw from his remarks is that he was declaring his incompetence in fact to handle a capital case.

Mr. Morales further argued that by subsequently granting Mr. Rozenberg's request to withdraw and ordering the substitution of the capitally qualified Public Defender (who should have been appointed in the first place under the Rule and other state law), the superior court agreed that Mr. Rozenberg was not only unqualified by law to handle a capital case but incapable in fact of providing competent capital assistance. (AOB:155-157.*)* Respondent disagrees based on the same theory it offered as to Mr. Rozenberg's remarks: the trial court, like Mr. Rozenberg, was operating under the assumption that Rule 1413 required the removal of appointed counsel who are not qualified members of its panel in capital cases, regardless of their actual qualifications. (RB:68-71.) Hence, respondent contends, like Mr. Rozenberg's remarks, the court's

ruling relieving him reflects only its determination that he was not qualified by law, or Rule 1413, not that he was also unqualified in fact to handle a capital case. Like its interpretation of Mr. Rozenberg's remarks, respondent's interpretation of the court's ruling defies any logical reconciliation with the record.

Logically, if the court (like Mr. Rozenberg) were operating under the mistaken belief that Rule 1413 alone required Mr. Rozenberg's removal due to his exclusion from its panel of attorneys specially qualified for appointed to special circumstance cases, regardless of his competency in fact, it would necessarily follow the court would have relieved him immediately when he announced that he was not on the panel. But it was only *after* the plea bargain proceedings terminated with prejudice and the prosecution confirmed that it would therefore seek the death penalty at trial the court finally relieved Mr. Rozenberg. (AOB:151-153, 157-158.) This record is irreconcilable with a mistaken belief on the part of the court that Rule 1413 required the removal of counsel who are not on its panel qualified for appointment to special circumstance cases in such cases, regardless of their actual qualifications. To the contrary, the record is reconcilable only with the court's agreement with Mr. Rozenberg's announced self-appraisal that: (1) he was qualified in fact to handle a non-capital special circumstance case and would continue to do so if "LWOP" were the maximum penalty the prosecutor would seek on the special circumstance allegations at trial, notwithstanding his exclusion from the Rule 1413 panel of counsel qualified for appointment to special circumstance cases; but

(2) in contrast, he was neither qualified in law, or by Rule 1413, nor in fact to handle a capital murder trial and therefore was unable to assist Mr. Morales in a capital case wherein the prosecution sought the death penalty at trial.

Furthermore, as a matter of law, respondent's argument the court's ruling simply reflected a mistake of law and not a determination of Mr. Rozenberg's actual competence flies in the face of the well-settled presumption that "judges are presumed to know the law and to apply it in making their decisions." (*Walton v. Arizona* (1990) 497 U.S. 639, 653; accord, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *People v. Price* (2001) 25 Cal.4th 1046, 1069, fn. 13.) It must be presumed, therefore, that the court knew Rule 1413 alone did not demand Mr. Rozenberg's removal, after he had represented Mr. Morales for a year and a half, regardless of his actual qualifications. (See AOB:155-157, and authorities cited therein.) Respondent has cited to no evidence or logical inference to overcome that presumption.

It must also be presumed the court knew and discharged its duty to vigilantly protect the speedy trial rights of Mr. Morales and the public. (See, e.g., *People v. Williams* (2013) 58 Cal.4th 197, 250-251.) In this regard, as discussed in the opening brief but effectively ignored by respondent, a year and a half into Mr. Rozenberg's tenure and more than a month before the superior court relieved him, a firm trial date of November 11, 2003, had been set to effectuate Mr. Morales's unambiguous invocation of his speedy trial rights. (AOB:155-157, citing 2RT:131; see also 2RT:127-128, 130-

131, 148-149, 153.) The court and the parties all understood the substitution of counsel less than a month before this capital trial was scheduled to commence would require substitution of counsel and a substantial continuance and thereby subvert Mr. Morales's invocation of his speedy trial right. (AOB:155, citing 2RT:148-151.)

Under these circumstances, the court could only subvert Mr. Morales's speedy trial rights by relieving Mr. Rozenberg if it was necessary to ensure that Mr. Morales received the assistance of competent counsel. (AOB:155-157, citing, inter alia, *People v. Daniels* (1991) 52 Cal.3d 815, 846-847, *Smith v. Superior Court* (1968) 68 Cal.2d 547, 559, 561-562, and *People v. Bolton* (2008) 166 Cal.App.4th 343, 356-359.) As this Court has explained, under circumstances like these, "the trial court must balance a defendant's right to a speedy trial with his right to competent counsel." (*People v. Williams, supra,* 58 Cal.4th 197, 250.) In so doing, "'the trial court has an affirmative constitutional obligation to bring the defendant to trial in a timely manner.' [Citation.] [and] "must be vigilant in protecting the interests of the defendant, the prosecution, and the public in having a speedy trial." (*Id.* at p. 251.) Hence, where defense counsel moves to withdraw on the ground of his own incompetency after the defendant has invoked speedy trial rights and granting the motion would subvert those rights in order to ensure the effective assistance of substitute counsel, the court must deny the motion absent a sufficient, affirmative showing that current counsel is unable to render constitutionally effective assistance. (*People v. Bolton*, *supra,* 166 Cal.App.4th at pp. 356-359 [trial court erred in

granting counsel's request to withdraw on virtual eve of trial based on inadequate, "minimal showing" of disqualifying conflict of interest, which erroneously subverted defendant's speedy trial rights and resulted in involuntary waiver of (substitute) counsel in order to effectuate speedy trial rights].) As Mr. Morales explained in the opening brief, applying to the court's ruling the presumption that it knew and followed the law in making it, can only be reconciled with its determination that the speedy trial rights at stake were outweighed by the constitutional demand that Mr. Morales receive the assistance of capitally competent counsel because Mr. Rozenberg was simply incapable of providing it. (AOB:155-157.)

The state's only acknowledgment of Mr. Morales's speedy trial invocation in this context consists of a single, baffling sentence: "if Morales was concerned about his speedy trial rights, as he now suggests, he should have objected to Mr. Rozenberg's request to be relieved on that ground." (RB:69.) Without supporting analysis or argument, Mr. Morales is unable to divine the point of this sentence. To the extent that respondent is making some kind of assertion about Mr. Morales's inability to object for the first time on appeal that the court's ruling subverted his speedy trial rights, Mr. Morales makes no such objection. To the contrary, he *agrees* with the court's ruling that Mr. Rozenberg could not provide the effective assistance of counsel in this capital case and therefore Mr. Morales's speedy trial rights were outweighed by the need to provide him with such assistance.

For all the foregoing reasons as well as those in the opening brief, it is clear Mr. Rozenberg necessarily admitted that he was incompetent both in law and in fact to handle a capital case and the superior court relieved him for the same reason. Respondent's perfunctory argument to the contrary is contradicted by the record, logic, and fundamental legal principles, and must be rejected.

2. The superior court's delay in relieving Mr. Rozenberg violated its duties and deprived Mr. Morales of the assistance of capitally competent counsel in making the irrevocable life and death choice between accepting or rejecting the capital plea bargain offer

As explained above and in the opening brief, the trial court did not relieve Mr. Rozenberg when the issue of his incompetency arose during the "exploding" capital plea bargain proceeding and before Mr. Morales made his irrevocable choice between accepting the offer (and sparing his life) and rejecting it (and facing a death sentence). (AOB:157-165.) It was only after Mr. Morales rejected the offer, which terminated all future plea negotiations with prejudice, and the prosecution confirmed its election to seek the death penalty at trial, that the court relieved Mr. Rozenberg due to his inability to provide the effective assistance of competent counsel in a capital murder trial. (AOB:151-153, 157-158.) But, as Mr. Morales explained in the opening brief, an attorney who is incompetent to handle a capital murder trial is necessarily incompetent to handle capital plea bargain proceedings where the consequence of rejecting the offer is facing the death penalty at trial. (AOB:157-165, and

authorities cited therein.) Hence, in failing to relieve Mr. Rozenberg immediately upon his declaration of capital incompetence, *before* Mr. Morales made an inadequately informed and irrevocable choice between a life sentence and a capital murder trial and potential death sentence, the superior court violated its fundamental and affirmative "duty . . . to protect the right of the accused to have the assistance of counsel" and ensure the assistance Mr. Morales received comported with state and federal constitutional standards. (*Glasser v. United States* (*Glasser*) (1942) 315 U.S. 60, 71-72, quoted at AOB:163; AOB:163-164, citing in accord, inter alia, *Wheat v. United States* (1988) 486 U.S. 153, 161; *Holloway v. Arkansas* (1978) 435 U.S. 475, 485; and *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627.) The court's breach of those duties served to deprive Mr. Morales of the assistance of competent counsel, as measured by prevailing professional norms in capital case, during the critical capital plea bargain proceedings, which demands reversal of the judgment and remand for the prosecution to reinstate the plea bargain offer and the plea bargain proceedings to begin anew. (AOB:163-165, citing, inter alia, *Lafler v. Cooper*, *supra*, 566 U.S. at p. 174.)

Respondent does not dispute the principle that an attorney who is incompetent in fact to represent a defendant against a potential death sentence at trial is necessarily incompetent in fact to represent a defendant against a potential death sentence in plea-bargain and pre-trial or pre-bargain proceedings, as well. (See RB:66-78.) Nor does respondent dispute that if Mr. Rozenberg

admitted and/or the court determined that he was incompetent both in law and fact to handle a capital case, the court violated its fundamental constitutional duties and deprived Mr. Morales of the assistance of competent counsel during the plea bargain proceedings by delaying its ruling relieving him until after the plea bargain proceeding terminated with prejudice. (*Ibid.*) Finally, respondent does not dispute that if the superior court did deprive Mr. Morales of the assistance of competent counsel during the plea bargain proceedings, remand for reinstatement of the plea bargain offer to Mr. Morales through a capitally competent defense attorney is the appropriate remedy. (*Ibid.)*

Respondent's only dispute is with Mr. Morales's argument that Mr. Rozenberg admitted, and the superior court determined, that Mr. Rozenberg was incompetent both in law and in fact to represent Mr. Morales in a capital case. (RB:68-72.) Mr. Morales having already replied to and refuted this argument in Part 1, *ante,* no further discussion of this aspect of the issue is necessary. For all the reasons set forth above and in the opening brief, on this record alone, the superior court's dual errors in first appointing and second failing to relieve Mr. Rozenberg when the issue of his incompetency first arose deprived Mr. Morales of the assistance of capitally competent counsel during the critical capital plea-bargain proceeding and the pre-trial or pre-bargain stage preceding it. (AOB:141-165.) The judgment must be reversed and the matter remanded for the prosecutor to reinstate the plea bargain offer and

for Mr. Morales to consider it while assisted by capitally competent counsel.

In any event, as Mr. Morales explained at length in the opening brief, the foregoing record does not stand alone. The additional record of Mr. Rozenberg's actual performance only confirms what was necessarily implicit in his remarks to the court about the need to withdraw and the court's responsive ruling relieving him: he was unqualified not only in law but also in fact to represent a defendant against a potential death sentence at any stage of a capital case and indeed failed entirely to function as *capital* defense counsel operating under prevailing professional norms in capital cases throughout his tenure. (AOB:165-212.) The deprivation of Mr. Morales's right to the assistance of capitally competent counsel during the critical pre-trial and plea-bargaining stages was the direct and foreseeable result of the superior court's violations of its duties under Rule 1413 and the state and federal constitutions. Those duties exist to prevent the very harm Mr. Morales suffered here. Hence, the second *Strickland* prejudice prong, which places on the defendant the burden of proving prejudice from discrete and ordinary attorney errors, is inapplicable here and prejudice must be presumed. (AOB:212-216, and authorities cited therein.)

3. The record of Mr. Rozenberg's actual performance confirms the court's errors deprived Mr. Morales of his state and federal constitutional rights to the assistance of competent counsel in the critical plea-bargain and pre-bargain stages of this capital case

As previously stated and as respondent does not dispute, Mr. Rozenberg's remarks during the plea bargain proceeding revealed his ignorance of the capital nature of this case and the corresponding need to provide capitally competent assistance, as measured by prevailing professional norms in capital cases, from the moment the special circumstances were alleged. Consistent with his mistaken view that this was a non-capital, not a capital case, the record of Mr. Rozenberg's actual performance demonstrates that he failed entirely to function as capital defense counsel and provide capital case assistance. (AOB:165-212.)

Respondent broadly asserts that Mr. Rozenberg's pre-trial performance was "reasonable" under the state and federal constitutions. However, respondent does not cite *any* prevailing professional norms to support this broad assertion, much less prevailing professional norms in *capital* cases, which respondent otherwise does not dispute provide the measure of attorney "reasonableness" or competence in this capital case. (RB:73-73.) More critically, while respondent does not dispute that this was a "capital" case from the moment the special circumstances were alleged, respondent's arguments skirt the critical question of whether Mr. Morales received *capital* case assistance by myopically

arguing the non-capital case assistance Mr. Rozenberg did (nominally) provide was adequate to satisfy the state and federal constitutions.

a. Mr. Rozenberg only met once with Mr. Morales privately and often failed to show up in court

In his opening brief, Mr. Morales detailed the evidence demonstrating that Mr. Rozenberg's single meeting with him at the jail and his brief and sporadic courtroom appearances during the year and a half of his tenure were inadequate to satisfy his duty of consultation under prevailing professional norms in capital cases in order to: (1) create an attorney-client relationship of trust; (2) conduct prompt or "*immediate*" investigation into potential mitigation and aggravation; and (3) provide the guiding hand of capital counsel to Mr. Morales in making the life and death choice between accepting or rejecting prosecutor Mazurek's plea bargain offer. (AOB:170-178; see also AOB:121-128, 134-137, citing authorities.)

In response, the state makes the conclusory assertion that Mr. Rozenberg "consulted appropriately with Mr. Morales" based on his single visit to Mr. Morales in the jail and occasional courtroom appearances (RB:74.) Respondent does not support its assertion of "appropriateness" with citation to any authority, capital or otherwise. (*Ibid.*) Nor does respondent acknowledge any of the prevailing professional norms in capital cases Mr. Morales cited in the opening brief as demonstrating Mr. Rozenberg's contact and

consultation with Mr. Morales was far from "appropriate" but rather woefully inadequate. (See AOB:177-178, citing, inter alia, 2003 ABA Capital Guidelines, Guideline 1.1, Commentary & 10.5, *supra*, at pp. 925-926, 1005; 1989 ABA Capital Guidelines, Guidelines 11.3, 11.4.1, 11.4.2, & 11.8.3 & Commentaries; see also AOB:135-137.) And in citing Mr. Rozenberg's courtroom appearances as the primary bases for its assertion, respondent simply ignores the extensive evidence detailed in the opening brief regarding the timing and value of Mr. Rozenberg's courtroom appearances and the timing and circumstances of his single jail visit with Mr. Morales. (AOB:170-178; see also AOB:187-191.)[5]

---

[5] In a footnote, respondent compares the record of Mr. Rozenberg's single jail visit to the visits of successor counsel-deputy public defenders (DPDs). (RB:74, fn. 18.) It is not an apt comparison for several reasons. Mr. Rozenberg was appointed to Mr. Morales's case for a year and a half during which time he visited Mr. Morales only once and his investigator visited only twice (and Mr. Rozenberg would not communicate with the investigators). (1SCT:139-140; AOB:184-186.) In contrast, the DPDs represented Mr. Morales for only a year – a shockingly brief amount of time in which to both prepare for and try a capital murder trial, along with related matters such as the competence of predecessor counsel. The DPDs were forced by the court's errors to build a capital case from the ground up in only a matter of months. Despite the harried circumstances of their own appointment and representation, the DPDs – in accord with prevailing professional norms in capital cases – immediately built a defense team consisting of two attorneys, a psychologist, and an investigator. During the single year of the DPDs' capital representation, Mr. Morales had 23 defense team visits in the jail: seven attorney visits, ten defense psychologist visits, and five investigator visits. (1SCT:141-144.) The comparison therefore undermines, rather than supports, respondent's assertion

To supports its assertion of "appropriate" consultation, respondent points to Mr. Rozenberg's vague (and untested) declaration that during his brief and sporadic court appearances, "there would be discussions with Mr. Morales wherein he indicated that he understood what was happening and did not have any questions that were not answered." (29CT:8245; RB:74.) Although it is not entirely clear, it seems Mr. Morales and respondent agree that this statement about "what was happening" referred to Mr. Rozenberg's "discussions" with prosecutor Young about a plea deal whereby Mr. Morales would enter guilty pleas to offenses carrying a 50-year-to-life sentence in exchange for dismissal of the special circumstance allegations. (29CT:8245-8247; RB:75; compare AOB:186-191.) Indeed, respondent puts great stock in these "discussions" as conclusive proof that Mr. Rozenberg provided constitutionally adequate assistance to Mr. Morales. (RB:75-76.) But in so doing, respondent simply ignores Mr. Morales's extended discussion in the opening brief of Mr. Rozenberg's declaration in this regard and the constitutional significance of his "discussions" with Mr. Young. (AOB:186-191.) The omission is telling.

---

that Mr. Rozenberg adequately communicated and consulted with Mr. Morales to satisfy prevailing professional norms in capital cases. Had they had the additional year and a half to prepare they had lost due to Mr. Rozenberg's erroneous appointment, the pressures on them would have been mitigated and they would have been able to arrange for even more visits.

As set forth in the opening brief, while "what was happening" referred generally to the plea discussions with prosecutor Young, it was otherwise unclear from Mr. Rozenberg's declaration exactly what that phrase meant (and, of course, the trial court refused to hear Mr. Rozenberg's testimony where he could have elaborated). But from the rest of the record, it becomes clear what that phrase did *not* mean: consultation with Mr. Morales about the most critical factor – for Mr. Morales – in the plea discussions and indeed the centerpiece of the prosecution's case: his recorded conversation with his mother. (AOB:187-191.)

As set forth in the opening brief but ignored by respondent, Mr. Rozenberg stated in his declaration that "when it was disclosed to Mr. Morales" that his mother had secretly recorded their conversation about the crimes, Mr. Morales told Mr. Rozenberg that his amenability to the plea deal he was brokering with Mr. Young would depend on his personal review and understanding of the recording. (29CT:8245-8247; AOB:187-190.) The record shows that Mr. Morales made that request *at least* as early as the preliminary hearing and it was *a year later* before Mr. Rozenberg finally arranged for an *investigator* to take the recording to jail and review it with Mr. Morales. (AOB:187-190.) Of course, an investigator could not adequately consult with or advise Mr. Morales about the legal implications of the recording. Consultation with counsel in understanding what the recording meant for Mr. Morales was indispensable to receiving counsel's effective assistance. (*Ibid*.) As the state recognized at trial and again recognizes on appeal

(RB:141-147), that recording was the linchpin of the state's case for guilt. Mr. Morales's ability to appreciate the risks and probable outcome of the trial depended in considerable part on his understanding of the legal implications from the recording, which no layperson could divine on their own. First, the recording was admissible, despite its nonconsensual, surreptitious nature and the involvement of law enforcement. Second, although the recording was problematic given its largely unintelligible and incomplete nature and although it contained no clear confession to personally shooting the victim, those problems offered no basis for Mr. Morales's acquittal of the murder and related felony charges. Because it was clear from the recording that Mr. Morales admitted to participating in the felonies that resulted in the victim's death, that was more than enough to convict him of the underlying felonies and first-degree murder under the then-extant felony murder rule and therefore even the best possible outcome was a murder conviction carrying a life sentence. (See AOB:188-189.)

Yet, after Mr. Morales was finally able to listen to the recording, Mr. Rozenberg never visited him at the jail to discuss its legal implications with him. (AOB:187-190.) And while Mr. Morales submits that Mr. Rozenberg could not adequately consult with him about the recording during one of his brief, rare appearances, the question is largely academic because Mr. Rozenberg was absent for the next four court sessions (over the course of 11 weeks) after Mr. Morales reviewed the recording. (AOB:188-189.) During that time, Mr. Rozenberg twice defied court orders to appear and – most

importantly – ignored Mr. Morales's own request to appear so that Mr. Morales could speak to him. (AOB:189.) Mr. Rozenberg did not appear again until the plea discussions with Mr. Young ended due to Mr. Young's removal from the case and the substitution of prosecutor Mazurek. (AOB:189-190.)[6] Hence, in discussing "what was happening" with Mr. Morales, Mr. Morales agrees that Mr. Rozenberg was referring to the fact of his plea negotiations with Mr. Young, but it is clear that he was not *meaningfully consulting* with him about that potential plea bargain.

And, of course, for all the reasons set forth in the opening brief and in the following sections, it is equally clear that in discussing "what was happening" with Mr. Morales, Mr. Rozenberg was *not* consulting with him about the *capital* ramifications of this case, the results of any penalty phase investigation, the need for any penalty phase investigation, any matter pertaining to penalty phase investigation, such as his background and history, or the strategies to employ to avoid the death sentence Mr. Rozenberg did not even realize his client faced. Nor could they have meaningfully consulted about Mr. Mazurek's capital plea bargain offer. After Mr. Rozenberg's "first opportunity" to speak with Mr. Mazurek during a court session, Mr. Rozenberg missed the next two court sessions and did not appear again until that Mr. Mazurek's "exploding" plea offer

---

[6] Even then, he missed the following two court appearances and did not appear again until the date of prosecutor Mazurek's "exploding" plea offer. (AOB:189-190.)

was made. (AOB:175-176, 189-190.) The only opportunity to discuss that offer was the 30-minute period during the plea bargain proceeding itself (and without the benefit of any penalty phase investigation).

For these and all the other reasons set forth in the opening brief, whatever Mr. Rozenberg told Mr. Morales about "what was happening" during his brief and sporadic courtroom appearances, it did not come close to approximating the kind of client consultation and communication demanded for *competent* assistance under prevailing professional norms in capital cases. (AOB:176-178, citing authorities; see also AOB:120-121, 131, 134-135.) In ignoring those norms as well as the record marshaled in Mr. Morales's opening brief, and in failing to cite any supporting authority or professional norm to the contrary, respondent's assertion that Mr. Rozenberg's consultation with Mr. Morales was "appropriate[]" is meaningless and this Court should pass it without consideration. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1182 [claim presented without "adequate" supporting legal argument is "not properly raised"]; *People v. Williams* (1997) 16 Cal.4th 153, 315, and authorities cited therein ["points 'perfunctorily asserted without argument in support' are not properly raised"]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [reviewing court may pass without consideration "argument" made without citation to supporting authority].) In any event, the Court should reject it as meritless.

b. Mr. Rozenberg conducted no penalty phase investigation

Mr. Morales next demonstrated in his opening brief that the delayed and minimal investigation Mr. Rozenberg directed was contrary to prevailing professional norms in capital cases because, inter alia, it completely omitted any penalty phase investigation. (AOB:179-191.) Respondent perfunctorily counters that Mr. Rozenberg "conducted reasonable investigations." (RB:74-75.) Once again, respondent cites no supporting authority or professional norm in support of this argument and ignores the prevailing professional norms in capital cases Mr. Morales cited throughout his brief as measures of "reasonable" counsel in capital cases. (*Ibid.*) Indeed, respondent's *only* "argument" concerning the critical *penalty phase* investigation consists of a single sentence: "the investigator's discussions with Morales and his family members [who were significant prosecution witnesses at the guilt phase] would likely have produced relevant information, such as mitigating character, background, and history evidence, similar to the family history ultimately presented at the penalty phase." (RB:75.)

It is apparent the state does not dispute Mr. Rozenberg did not direct any penalty phase investigation. Indeed, that fact is indisputable: Mr. Rozenberg himself was under the mistaken impression that this was not a capital case and consequently directed no capital case investigation; the investigators he retained swore that Mr. Rozenberg did not inform them this was a capital case and their billing records corroborated that they, like Mr.

Rozenberg, investigated with the mistaken belief that this was a noncapital "LWOP" case (987.2CT:4, 10.); successor counsel-deputy public defenders represented after their own investigation that "no attorney for [Mr. Morales] considered the case to be a death case and no mitigation efforts began until the Public Defender was appointed" (28CT:7905; see also 28CT:7939-7940; 15RT:3331) and the trial court found that "there was never any [penalty phase] investigation" during Mr. Rozenberg's tenure (13RT:2812). (AOB:179-187, 221.)

Instead, what respondent seems to suggest is that if a noncapital murder investigation will "likely . . . produce[]" information that could also be relevant to a penalty phase (that neither counsel nor the investigator contemplates), that is enough to provide competent capital case assistance. (RB:75.) Respondent is correct to the limited extent that a noncapital murder investigation often turns up basic information that could also be used in the penalty phase of a capital case, like the defendant's place of birth or number of siblings. The same would be true of a blind date. But the constitution demands more capital investigation into mitigation and aggravation than what an ad executive could uncover from a blind date over a martini. Under prevailing professional norms in capital cases, mitigation investigation "requires extensive and generally unparalleled investigation into personal and family history," as well as school, medical and psychological records. (2003 ABA Capital Guidelines, Guideline 10.7, *supra,* at p. 1033, cited at AOB:134, also citing in accord, inter alia, *Williams v. Taylor* (2000) 529 U.S. 362,

396 [requires a "thorough investigation into the defendant's background"] and *Wiggins v. Smith* (2003) 539 U.S. 510, 523-525.) This is not the kind of information typically produced in a noncapital murder investigation. Nor is there any basis in the record for respondent's suggestion that the de minimis investigation in this case produced such information. (RB:75.) Even by non-capital standards, the appointed investigators swore their investigation in this case was beneath their standards for "LWOP" cases due to Mr. Rozenberg's failure to consult and give them direction. (AOB:184-186.) Similarly, investigation into aggravating evidence is an indispensable part of the penalty phase investigation competent capital counsel are duty-bound to conduct, which will not inadvertently be discovered in an ordinary noncapital guilt investigation. (AOB:134, citing, inter alia, *Rompilla v. Beard* (2005) 545 U.S. 374, 387-389 & fn. 7 and 2003 ABA Capital Guidelines, Commentary to Guideline 1.1, *supra*, at pp. 926-927.) At bottom, unintentionally picking up bits of information that might be useful in a penalty phase over the course of a delayed and negligible noncapital murder investigation does not comport with prevailing professional norms in capital cases.

Furthermore, respondent does not dispute that Mr. Rozenberg's failure to conduct or direct any intentional, focused penalty phase investigation is attributable to his mistaken belief that this was a noncapital case until "Mr. Mazurek came onto the case" and obtained internal approval to seek the death penalty at trial. (29CT:8246; AOB:181-186.) An attorney's failure to conduct a

timely and thorough penalty phase investigation in a capital case based on a *mistaken belief* the case is a noncapital one is unquestionably unreasonable and contrary to prevailing professional norms. (*Williams v. Taylor*, *supra,* 529 U.S. 362, 395; see also, e.g., *Hinton v. Alabama* (2014) 571 U.S. 263, 274; *Kimmelman v. Morrison* (1986) 477 U.S. 365, 385.)

Finally, throughout its argument, respondent broadly insists that Mr. Rozenberg's "discussions" with the prosecution to broker a plea deal necessarily amounted to competent "assistance" within the meaning of the Sixth Amendment. (RB:63, 67, 75, 77) But in making this assertion, respondent ignores that without having conducted vital penalty phase investigation (and without having consulted with Mr. Morales about the critical tape recording), any efforts Mr. Rozenberg made toward brokering a plea deal were empty and meaningless under prevailing professional norms in capital cases, as reflected not only in the ABA Capital Guidelines but also in the case law. (AOB:186-187, and authorities cited therein.)

For these and all the other reasons set forth in the opening brief but ignored by respondent, it is beyond any reasonable dispute that Mr. Rozenberg failed entirely to conduct the *capital* investigation into a penalty phase after the death-qualifying special allegations were alleged, as demanded by prevailing professional norms in capital cases (AOB:179-191, citing authorities; see also AOB:131-137, citing authorities.)

c. Mr. Rozenberg did not avail himself of resources and procedures by which to obtain capital case assistance that prevailing professional norms demanded in this case

In his opening brief, Mr. Morales cited prevailing professional norms in capital cases dictating that lead counsel appointed in a capital case move for the appointment of a mitigation specialist/investigator as well as second, qualified counsel (or "*Keenan* counsel"). (AOB:191-195, citing 2003 ABA Capital Guidelines, Guidelines 4.1.A.1 & Guidelines 1.1, Commentary, at pp. 925, 952, 959 & 1989 Capital Guidelines, Guidelines 2.1 [same], 8.1 & 11.4.1(D)(3)(C)].) California law specifically provided mechanisms for such assistance at the time of Mr. Rozenberg's representation. (AOB:191-195, citing Pen. Code, § 987, subd. (d), *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 429, and San Bernardino County Rules of Court, Former Rule 1451.) While *competent* counsel's failure to heed these guidelines is not necessarily unreasonable in every case, when an attorney is unqualified or inexperienced with capital cases, his or her failure to do so is inexcusable. (AOB:191-195, citing, inter alia, *Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 998 and *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 927-928.)

In *Wiggins v. Smith, supra,* 539 U.S. at p. 524, for instance, the United States Supreme Court cited the preparation of a social history report as part of the standard of care in a capital case and held that, among other deficiencies, counsel's failure to retain a

forensic social worker to prepare such a report despite the availability of a funding mechanism for that purpose was contrary to prevailing professional norms in capital cases and incompetent within the meaning of the Sixth Amendment. Similarly, in *Mayfield v. Woodford, supra*, 270 F.3d at pp. 927-928, the Court of Appeals for the Ninth Circuit held that defense counsel's pre-trial performance did not comport with prevailing professional norm in significant part because he failed to move to associate qualified second, or "*Keenan*" counsel.

In a single sentence, respondent counters that these lapses were "reasonable" given that Mr. Rozenberg "had been on the case for over a year, had extensive criminal experience including eight murder trials, the facts and legal issues were not complex, the cause of death was undisputed and Morales confessed to multiple people and was identified by others." (RB:75.) Respondent's cursory assertion suffers from several flaws.

The only authority to which respondent cites in support of its assertion is this Court's decision in *People v. Carrasco* (2014) 59 Cal.4th 924, 955-956, unaccompanied by any exposition as to how that case has any bearing on this one. (RB:75.) In fact, *Carrasco* is inapposite. It addressed the showing necessary for the appointment of second counsel and determined the lower court did not abuse its discretion in refusing retained counsel's request for the appointment of a second attorney based on the various circumstances of that particular case. (*Ibid*.) The questions presented here and in *Carrasco* are very different ones and in any event there were no

allegations or showing in *Carrasco* that the court erroneously appointed an unqualified attorney to a capital case, that the unqualified appointed attorney was also incompetent in fact to handle a capital case, and indeed that the unqualified appointed attorney failed to provide capital case assistance by, inter alia, conducting penalty phase investigation. As respondent's failure to support its citation to *Carrasco* with any argument or analysis suggests, it is inapposite here.

Otherwise, as is the case with respondent's other assertions of "reasonableness," respondent cites no prevailing professional norm in any form in support of its assertion here. Nor does it counter Mr. Morales's citations to authority supporting his argument that Mr. Rozenberg's performance in this regard was unreasonable. Hence, this Court should pass respondent's assertion in this regard without consideration. In any event, it is without merit.

Respondent's characterization of Mr. Rozenberg's omissions as "reasonable" suggests that he made a conscious decision not to avail himself of capital case assistance resources. But in truth his omissions were due to his ignorance of the fundamental definition of a capital case, mistaken belief this was a noncapital case "LWOP" case, and ignorance of the need to provide capital case assistance. In this regard, it is black letter law that a decision by counsel that is based on a mistaken belief is fundamentally unreasonable. (See, e.g., *Hinton v. Alabama, supra*, 571 U.S. at p. 274, and authorities cited therein.)

To the extent respondent is suggesting that Mr. Rozenberg was qualified and capable of handling a capital case without available, capitally competent assistance, it is belied by the record examined and analyzed in detail in the opening brief (and above) but ignored by respondent. Respondent's reliance on the fact that Mr. Rozenberg "had been on the case for over a year" is puzzling. (RB:75.) The case was a capital one from the outset of Mr. Rozenberg's appointment and therefore demanded qualified capital assistance throughout the year (plus) to which respondent refers. (See AOB:147-149, 160-161, 168-169, 210; see also AOB:129-137, citing authorities.) The fact that he had "been on [this capital] case for over a year" without treating this as a capital case or availing himself of vital resources necessary to provide capital case assistance to Mr. Morales is evidence of his *in*competency and *un*reasonable performance, not the other way around.

Respondent's representation that Mr. Rozenberg had handled "eight murder trials" is simply untrue. (RB:75.) Mr. Rozenberg simply represented in his declaration that he had "handled numerous *homicide* cases, and have tried approximately 8." (29CT:8246, italics added.) A "homicide" trial is not synonymous with a "*murder* trial[]." (RB:75, italics added.) And trying eight non-capital "homicide" cases certainly does not demonstrate that Mr. Rozenberg was sufficiently competent to handle a *capital* case without the assistance of available, experienced professionals. To the contrary, the facts that Mr. Rozenberg did not understand that this was a "capital" case, much less provide any capital case

assistance, for the year-and-a-half of his appointment is compelling proof that he was incapable of providing such assistance alone and without the aid available to him.

Finally, the implicit premise of respondent's reliance on Mr. Morales's confession to felony murder and his (putative) identification by witnesses is that Mr. Rozenberg did not need capital resources because the state's strong case against Mr. Morales for felony murder made it futile for Mr. Rozenberg to prepare a penalty phase defense. If that were Mr. Rozenberg's thinking, it only further demonstrates his fundamental ignorance of how a capital case works. Even the strongest case for guilt has little bearing on the penalty phase, wherein the California jurors are instructed the question is whether the defendant's individual culpability is so aggravated "*above and beyond*" his commission of the basic crime that death is appropriate (or whether the defendant's personal background, history, or culpability so mitigates the crime that life is appropriate). (CALJIC No. 8.88 & CALCRIM No. 763, citing *People v. Dyer* (1988) 45 Cal. 3d 26, 77-78 & *People v. Adcox* (1988) 47 Cal.3d 207, 269-270; accord, e.g., *Zant v. Stephens* (1993) 462 U.S. 862, 876-878; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) In any event, even in the face of a strong case for *death*, the constitution demands more of capital defense counsel than simply throwing up their hands and not trying. Respondent's implication to the contrary is anathema to the constitutional guarantee to the *assistance* of competent counsel.

For these and all the other reasons set forth in the opening brief, Mr. Rozenberg's failure to avail himself of resources necessary to provide capital case assistance to Mr. Morales did not comport with professional norms prevailing in capital cases and hence with constitutionally reasonable assistance.

d. The state offers no meaningful response to the remaining evidence that Mr. Rozenberg failed entirely to function as capital defense counsel

In his opening brief, Mr. Morales argued that Mr. Rozenberg's performance at the preliminary hearing was – in the words of the trial court – "negligent," "ridiculous" and clearly made without "any kind of thought process" that Mr. Morales faced a "potential[] . . . death penalty." (AOB:197 [quoting from trial court's remarks at 13RT:2829-2830] & *id.* 195-197.) Further, he never litigated *anything* on Mr. Morales's behalf, including bringing a meritorious motion to dismiss the attempted rape special circumstance allegation to, inter alia, attempt to dissuade the prosecution from exercising its discretion to seek death at trial, as prevailing professional norms in capital cases demand. (AOB:195-199, and authorities cited therein.) The state's only response to this evidence and argument consists of a single sentence, unsupported by argument or analysis. (RB:75.)

Mr. Morales further argued that Mr. Rozenberg's performance was also contrary to prevailing professional norms in capital cases in failing to alert the superior court to the state's violation of state

and international law by neglecting to notify Mr. Morales of his right to consular assistance, failing himself to notify Mr. Morales of his right to assistance or indeed to notify the consulate that the United States was seeking the death penalty against one of its citizens, or to avail himself of the consulate's ready assistance. (AOB:201-209, citing, inter alia, *Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399, 407-412 [counsel ineffective for failing to protect, seek enforcement, and inform client of consular rights], *Valdez v. State* (Okla. Crim. App. 2002) 46 P.3d 703, 710 [counsel ineffective where he did not "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate"] and 2003 ABA Capital Guidelines, Guideline 10.6, *supra,* at p. 1012 [duties to assist foreign nationals].) The state relegates its response to this argument to a footnote. (RB:89-90, fn. 21).

Finally, Mr. Morales argued that Mr. Rozenberg's failure to bill for the time he spent on Mr. Morales's case, with the explanation that it "hardly seemed worth the effort" (2SCT:316), buttresses the other record evidence that he spent minimal time on Mr. Morales's case and certainly did not invest the amount of time and work demanded by prevailing professional norms in capital cases. (AOB:199-201, and authorities cited therein.) Indeed, the trial judge herself expressed her lack of confidence, after considering "the entire situation," that "Mr. Rozenberg spent any time or effort on this case, quite frankly." (13RT:2824-2825.) His cavalier attitude that billing "hardly seemed worth the effort" was emblematic of his

approach to this capital case itself. (AOB:199-201.) The state also relegates its response to this evidence and argument to a footnote, bereft of argument or analysis. (RB:76, fn. 19.)

The state's "responses" in the foregoing respects are improperly presented and therefore this Court should pass them without consideration. (See, e.g., *People v. Barnett, supra,* 17 Cal.4th at p. 1182 [claim presented without adequate supporting argument not properly raised]; accord, *People v. Williams, supra*, 16 Cal.4th at p. 206; see also, e.g., *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947 ["Footnotes are not the appropriate vehicle for stating contentions on appeal"]; accord, *Placer Ranch Partners v. County of Placer* (2001) 91 Cal.App.4th 1336, 1342, fn. 9; *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562.) In any event, considering respondent's disregard of the law and facts detailed in the opening brief concerning these matters, there is no need to reply to the state's perfunctory response and therefore Mr. Morales considers these issues to be fully joined by the briefs on file with the Court.

4. The superior court's erroneous provision and retention of an unqualified attorney who failed to function as capital defense counsel throughout the pre-trial stage left Mr. Morales unaided by competent counsel in making the irrevocable choice between facing death by rejecting the plea bargain offer or sparing his life by accepting it

Mr. Morales argued that Mr. Rozenberg's complete failure to treat this matter as the capital case or function in any meaningful way as competent counsel under prevailing professional norms in

capital cases throughout his tenure in the pre-trial stage made it impossible for him to provide Mr. Morales with the assistance to which he was constitutionally entitled in the plea-bargaining proceedings. (AOB:210-212; see also AOB:160-163.) Respondent briefly disagrees on the ground that "Mr. Rozenberg had investigated enough and knew enough to appreciate the risks going forward, especially given Morales's taped confession." (RB:78.) Of course, Mr. Morales's "taped confession" and Mr. Rozenberg's (minimal) investigation colored only the "risks" of *conviction* and indeed the likelihood of *conviction* is the only risk Mr. Rozenberg said he explained to Mr. Morales. (AOB:152, 161-162.)

As Mr. Morales explained in the opening brief, he was entitled at the capital plea-bargain proceedings to the assistance of counsel who had treated and investigated this as a capital case and who could provide Mr. Morales with his "independent evaluation of the charges, applicable law, and evidence" with respect to *both* the guilt and the penalty phases of the unitary capital case, as well as "the risks and probable outcome" of the capital trial, including the ultimate "outcome" of a death verdict. (*In re Alvernaz* (1992) 2 Cal.4th 924, 933, cited at AOB:158-162, citing in accord, inter alia, 1993 ABA Standards, Std. 4-5.1(a) [counsel has a duty to advise of the "probable outcome" of "all aspects" of the case]; see also AOB:123-128, and authorities cited therein.) The state's only response is to point to Mr. Rozenberg's declaration that he "explained to [Morales] what the offer was, why he should accept that offer, and what would happen if he refused" (29CT:8246) as

proof that he satisfied his duties in this regard (RB:78). But respondent ignores the wealth of record evidence demonstrating that Mr. Rozenberg simply could not and did not advise Mr. Morales concerning the applicable law and anticipated evidence *at a penalty phase* and its "probable outcome."

First, respondent ignores that Mr. Rozenberg recounted for the court the advice he had given Mr. Morales that the basis for his opinion that Mr. Morales should accept the plea offer was only the high "likelihood Mr. Morales would be *convicted."* (2RT:139, italics added; AOB:152, 161-162, 240-242.) Mr. Rozenberg did not mention anything about sentencing at all, much less about a penalty phase, or the "probable outcome" of a *capital* murder trial and "risk" of a death verdict. (*In re Alvernaz, supra*, 2 Cal.4th at p. 933; AOB:152, 161-162, 240-242.)

Indeed, as explained in the opening brief but essentially ignored by respondent, Mr. Rozenberg was simply incapable of providing such advice given his ignorance of the most rudimentary aspects of a capital case and his failure to treat this prosecution as a *capital* case in any way by the time of the plea bargain proceeding. Given that he had no store of knowledge from which to advise Mr. Morales about a capital murder trial or the likelihood of a death verdict, and that his only account of the advice he had given Mr. Morales omitted any mention of a penalty phase or death sentence, it seems likely that Mr. Rozenberg simply did not offer Mr. Morales *any* counsel concerning a penalty phase and potential death sentence apart. Indeed, Mr. Morales's failure to appreciate the very

real possibility that he would be sentenced to death if he rejected the offer is apparent from his words to the court in rejecting it. As explained in the opening brief, the superior court told this Latino defendant that it was concerned he was letting his "machismo" get in the way of taking the deal. (2RT:140-143, cited at AOB:152.) Mr. Morales replied that under *either* alternative, the result would be the "same" – "it's still my life in prison." (2RT:143, cited at AOB:152, 161.) Of course, Mr. Morales was not guaranteed a "life in prison" if he rejected the offer and went to trial, but rather faced the very real possibility of a death sentence and execution. Had he received capitally competent assistance in considering the plea bargain offer, Mr. Morales would have understood as much. His remarks indicating that he did not appreciate the difference, considered in light of the record as a whole, could only be attributable to the absence of capitally competent assistance of counsel. In any event, even if Mr. Rozenberg did give Mr. Morales some advice concerning a penalty phase and its likely outcome based upon the "applicable law" and anticipated "evidence" in aggravation and mitigation (*In re Alvernaz, supra*, 2 Cal.4th at p. 933), it still would have been tantamount to no advice at all due to, inter alia, his complete failure to conduct any penalty phase investigation and his patent ignorance of the legal principles governing capital proceedings. (AOB:124-128, 135-136, 186-187, citing, inter alia, 2003 ABA Capital Guidelines, Guidelines 10.9.1 & Commentary, at p. 1040 [capital defense counsel have duty to investigate guilt and penalty phases before discharging duty to pursue favorable plea negotiations], 1989 ABA

Capital Guidelines, Guidelines 11.4.1 and 11.4.2 and commentary [same], 1993 ABA Standards, *supra,* Standard 4-6.1, subd. (b) ["under no circumstances" should counsel recommend taking a plea offer without first investigating], and *Woodard v. Collins* (5th Cir. 1990) 898 F.2d 1027, 1029 [it is "always unreasonable" for counsel to advise client to accept plea bargain offer without prior investigation].)

Moreover, having failed meaningfully to consult with Mr. Morales for well over a year, having visited him only once in the jail during his year-and-a-half tenure, having ignored his request to appear in court to meet with him, having failed to litigate anything on Mr. Morales's behalf, and having failed to avail himself of other resources to aid in creating an attorney-client relationship of trust such as retaining a mitigation specialist and/or securing consular assistance, Mr. Morales was unassisted by an attorney he could trust in making the critical life and death choice between accepting and rejecting the plea bargain offer. As set forth in the opening brief, prevailing professional norms in capital cases dictate that counsel make every effort to build trust with an overwhelmed client facing a potential death sentence as an essential prerequisite to providing the client with *effective* advice concerning the risks and benefits of a plea bargain offer and ultimately whether to accept or reject it. (AOB:122, 136-137, 177-178, 199, 208-209, 211-212, and authorities cited therein.) This is so due in considerable part to the unparalleled stakes in capital plea bargaining, which usually requires the defendant to choose between a lifetime in prison and a potential

death sentence. Indeed, it is difficult to conceive of a role more demanding of trust than that of a capital defense attorney advising his client to voluntarily surrender the rest of his life to prison in order to save his life. As the ABA Capital Guidelines counsel, "full consultation with the client" (1989 ABA Capital Guidelines, Guideline 11.4.2, Commentary) and "[e]stablishing a relationship of trust with the client is essential . . . to ensure that the client will listen to counsel's advice on . . . the advisability of a plea" (2003 ABA Capital Guidelines, Guideline 10.5, Commentary, *supra*, at p. 1008; see also, 2003 ABA Capital Guidelines, Guidelines 10.9.1, 10.9.2 & Commentaries, *supra*, at pp. 1039, 1046-1046.) A capital "client will not – with good reason – trust a lawyer who visits only a few times . . . ." (2003 ABA Capital Guidelines, Guideline 10.5, Commentary, *supra*, at p. 1008; accord, 1989 ABA Capital Guidelines, Guidelines 11.4.1, 11.4.2 11.6.1 & 11.8.3) and "will, quite reasonably, not accept counsel's advice about the case" when he or she fails to "conduct meaningful investigation" (2003 ABA Capital Guidelines, Guideline 10.9.2, Commentary, *supra,* at pp. 1045-1046).

Moreover, as set forth in Part B-3-a, *ante,* and the opening brief, Mr. Rozenberg understood that Mr. Morales's amenability to a plea deal carrying a 50-year-to-life term depended on his review and understanding of the significantly unintelligible tape-recorded conversation with his mother. (AOB:187-190.) Presumably, Mr. Rozenberg was also aware the recording was the cornerstone of the state's case. Indeed, the "risks" of a first-degree murder conviction *and* true findings on the felony-murder special circumstance

allegations were largely defined by the legal import of that recording and how the jurors could interpret it.[7] (*In re Alvernaz, supra*, 2 Cal.4th at p. 933; see AOB:411-421 [discussing importance of recording to prosecution's case as compared to other evidence].) Mr. Rozenberg's contemptuous disregard for Mr. Morales with respect to his request to review and discuss the recording all but assured Mr. Morales would have no trust in his advice about the plea offer and no meaningful understanding of the "risks" even of conviction and death-eligibility, much less about the risk of a death verdict. (*In re Alvernaz, supra*, 2 Cal.4th at p. 933.)

Despite Mr. Rozenberg's knowledge of its importance to convincing Mr. Morales to take the deal he claimed to be so busy trying to broker, Mr. Rozenberg took a year or more to honor Mr. Morales's request to review the recording and even then sent an investigator in for the review rather than review it with Mr. Morales to consult about its legal implications. Indeed, he *never* consulted with Mr. Morales after Mr. Morales was finally able to review it. He did not visit him at the jail, was absent from courtroom sessions following Mr. Morales's review of the recording, and even disregarded court orders and Mr. Morales's request to appear personally in court in order to talk. The only opportunity Mr. Morales had for Mr. Rozenberg to answer his questions and

---

[7] Both at trial and on appeal, the state sets aside the other evidence and relies almost exclusively on the recording as proof of Mr. Morales's guilt and death eligibility. (See AOB:417-418, 421, citing 29RT:2625-2626, 2643, 2658-2663; RB:133-134, 144-145.)

concerns about the recording after he reviewed it was the 30-minute consultation period he had with Mr. Rozenberg on the day of the "exploding" plea bargain offer. (AOB:187-190.) Under all of these circumstances, Mr. Morales "quite reasonably, [did] not accept counsel's advice" to take the plea deal. (2003 ABA Capital Guidelines, Guideline 10.9.2, Commentary, *supra,* at pp. 1045-1046.)

Furthermore, given the counterintuitive complexities of the recording's legal implications from a lay perspective – from its admissibility, through its many unintelligible passages and the intelligible passages triggering the felony murder rule, and to the import of passages from which the jurors could find true or not true the death-eligibility special circumstance allegations – Mr. Morales submits the 30-minute period Mr. Morales was finally granted with Mr. Rozenberg was woefully inadequate for Mr. Rozenberg to consult meaningfully with Mr. Morales about it, ensure he understood its significance as showing *why* his risks of being "convicted" were so high, and advise Mr. Morales of all the other considerations in weighing the pros and cons of the plea offer.[8]

---

[8] It would be a pain-staking and time-consuming process for counsel to explain the legal significance of the recording to a lay client, from its admissibility despite its surreptitious and non-consensual, through the meaning and options available with regard to its significantly unintelligible passages, to the legal impact of the clearly intelligible words which, for instance, established first-degree felony murder liability regardless of the identity of the actual killer.

Without any trust or adequate consultation concerning the heart of the state's case for guilt and death-eligibility, Mr. Morales was left without any competent assistance in assessing the plea offer for these reasons as well.

Setting aside the question of whether Mr. Rozenberg provided competent advice and assistance concerning the "likelihood that Mr. Morales would be *convicted*," it is clear that he was incapable of offering any competent advice concerning the penalty phase and its "probable outcome." For all the foregoing reasons and those set forth in the opening brief, Mr. Morales was deprived of the assistance of competent counsel, as measured by prevailing professional norms in capital cases, in understanding and weighing the risk of a death sentence in a capital murder trial if he rejected the prosecution's offer or in trusting the advice of a competent attorney to accept the offer. (AOB:210-212; see also AOB:160-163.)[9]

///

///

[9] Indeed, he was wholly incapable of understanding or advising Mr. Morales that the mere fact of a capital murder trial increased his chances of conviction in the guilt phase. (AOB:388-389, citing authorities.)

5. Because the state was at fault for Mr. Rozenberg's complete failure to function as the capitally competent counsel to which Mr. Morales was entitled during the critical pre-trial and plea-bargaining stages, prejudice must be presumed, and the matter remanded for reinstitution of the capital plea bargain proceedings

In the opening brief, Mr. Morales argued the superior court's violations of its duties under Rule 1413 and the constitution produced the very result those duties exist to avoid: representation by counsel who offered no capital case assistance. Under these circumstances, prejudice must be presumed. Respondent disagrees. (RB:72-77.) Respondent is wrong.

Respondent does assert that Mr. Morales appears to be relying on the first category under either standard – the actual or complete denial of counsel, or where counsel is "totally absent." (RB:73.) Having so framed the issue, respondent asserts the presumption is not warranted here because Mr. Rozenberg was not totally absent but rather was present and did provide *some* assistance (as discussed in Part 3, *ante*). (RB:72-77.)

Of course, Mr. Morales has never claimed an actual or "total absence" of counsel. Rather, his claim is clear that there are two interrelated categories of Sixth Amendment impairments at issue here that together trigger the presumption of prejudice. (AOB:115-119, 146-214.) The first is one that respondent has inexplicably omitted from its lists of categories triggering the presumption: where the state or government is responsible for the lack of

competent counsel measured under prevailing professional norms in capital cases. (AOB:115-119, 146-150, 163, 213-214, and authorities cited therein.)

As set forth in the opening brief yet ignored by respondent, when the High Court created the prejudice test of its two-prong test for ineffective assistance of counsel in *Strickland*, it qualified its application to situations where: (1) counsel otherwise has satisfied the minimum requirements for assistance at critical stages but for specific errors, the impact of which on the outcome can be readily measured (*Strickland*, *supra*, 466 U.S. at p. 693; accord, e.g., *Bell v. Cone* (2002) 535 U.S. 685, 697; *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 482-483); and (2) "[t]he government is not responsible for, and hence not able to prevent, [the] attorney errors," which therefore makes it reasonable to allocate the burden of proving prejudice on the defendant. (*Strickland, supra,* 466 U.S. at pp. 694-695; accord, e.g., *Hill v. Lockhart* (1985) 474 U.S. 52, 57.)

In contrast, the *Strickland* Court explained, when the government *is* responsible for the denial of competent counsel as measured under prevailing professional norms, it is not fair to place the burden of proving prejudice on the defendant. More specifically, when a potential "impairment[] of the Sixth Amendment right" is "easy to identify" by the state and "easy" or required by the state "to prevent," but the state fails to do so, the state is "directly responsible" for any resulting actual impairment, in which case it is fair and appropriate to require the state to shoulder the presumption of prejudice. (*Strickland, supra*, 466 U.S. at p. 692,

citing *United States v. Cronic* (1984) 466 U.S. 648, 659 & fn. 25; accord, *Bell v. Cone*, *supra*, 535 U.S. at p. 696, fn. 3.) Under this principle, the presumption of prejudice applies when: (1) the trial court is alerted to facts that could impair the defendant's Sixth Amendment rights but fails to respond appropriately and thereby discharge its duty "to protect the right of the accused to have the assistance of counsel" (*Glasser*, *supra,* 315 U.S. at p. 72) and "ensure that criminal defendants receive [representation that] does not contravene the Sixth Amendment" (*Wheat v. United States, supra*, 486 U.S. at p. 161); and (2) the defendant demonstrates the court's failure to do its duty resulted in the very actual impairment the duty is intended to avoid. (See, e.g., *Holloway v. Arkansas, supra*, 450 U.S. at pp. 488, 491; *Wood v. Georgia* (1981) 450 U.S. 261, 271-272 & fn. 18; *Cuyler v. Sullivan* (*Cuyler*) (1980) 446 U.S. 335, 347-349.)

For example, when the court knows (or reasonably should know) of a potential conflict of interest that potentially could adversely affect counsel's performance (or, put another way, of a potential impairment of the defendant's Sixth Amendment rights), the court's general constitutional duty to protect and safeguard the defendant's rights to a fair trial and the effective assistance of counsel imposes upon it a specific duty to inquire into the potential conflict and respond accordingly in order to prevent the conflict from being realized and adversely affecting counsel's performance. (*Wheat v. United States*, *supra*, 486 U.S. at pp. 160-161; *Wood v. Georgia, supra,* 450 U.S. a p. 272; *Holloway v. Arkansas*, *supra,* 435 U.S. at

pp. 485, 488; *Cuyler*, *supra,* 446 U.S. at p. 347; *Glasser, supra*, 315 U.S. at p. 76.) When the trial court fails in that duty, the defendant need only demonstrate that it produced the very result the breached duty is meant to avoid – i.e., the potential conflict became an actual one whereby it "adversely affected" counsel's performance. (See, e.g., *Mickens v. Taylor (*2002) 535 U.S. 162, 171; *Cuyler, supra,* 446 U.S. at pp. 346, 348-349.) "Adverse effect" is not a prejudice standard but rather a showing that establishes actual, "deficient performance." (See, e.g., *Mickens v. Taylor, supra,* 535 U.S at pp. 171, 173-174; *Cuyler, supra,* 466 U.S. at pp. 349-350.) Upon that showing of adversely affected – or deficient – performance, prejudice is presumed. (*Holloway v. Arkansas, supra*, 450 U.S. at pp. 488, 491; *Wood v. Georgia, supra*, 450 U.S. at pp. 271-272 & fn. 18; *Cuyler, supra*, 446 U.S. at pp. 348-49; cf. *Glasser, supra,* 315 U.S. at p. 76.) As the *Strickland* Court explained, this "fairly rigid rule of presumed prejudice" is reasonable given the duties of counsel to avoid, and the trial court to prevent, conflicts of interest that adversely affect counsel's performance. (*Strickland, supra*, 466 U.S. at p. 692; see AOB:115-118, 146-150, 163, 213-214.)

Here, as previously noted, respondent does not dispute the superior court violated its duty under Rule 1413 or that the manifest intent of that rule is to ensure that when the state alleges death qualifying special circumstances against a defendant, they are provided with the assistance of capitally competent counsel from the outset, even before the prosecution makes a final determination over whether to act on its election and actually seek the death penalty at

trial, in order to influence or prepare for that decision. (See AOB:147-148.) As the United States Supreme Court has stated, "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (*McMann v. Richardson* (1970) 397 U.S. 759, 771.) Recognizing the unique skills necessary to render competent assistance in capital cases not shared by the criminal defense bar in general, and that "the appointment of unqualified, inexperienced counsel can be very costly in terms of delay and expense," the ABA has issued extensive guidelines over the last 32 years for the adoption and implementation of procedures to ensure representation in capital cases by counsel qualified to meet prevailing professional norms in capital cases. (1989 ABA Capital Guidelines, Guidelines 3.1, 4.1, 5.1(I) & Commentaries; 2003 ABA Capital Guidelines, Guidelines 2.1, 3.1, 5.1, *supra,* at pp. 939-940, 944-946, 961-962.) Consistent with these guidelines and considering the "unique demands of . . . representation in capital cases," California has adopted extensive "procedures by which California recruits, screens, and appoints attorneys to represent capital defendants on appeal" and at trial in order "to ensure . . . competent representation." (*People v. Holt* (1997) 15 Cal.4th 619, 709; see also Cal. Rules of Court, rules 4.117 & 8.605 [minimum qualifications for trial counsel in capital cases]; §§ 987, subd. (d), 987.9.) Rule 1413 is one such procedure.

This case presents the quintessential result that Rule 1413 exists in order to prevent: impairment of the defendant's right to the assistance of capitally competent counsel due to the appointment of unqualified counsel. That impairment is ""easy to identify and, for that reason and because the [state] is directly responsible, easy for the [court] to prevent" simply by discharging its duty to follow Rule 1413. (*Strickland, supra*, 466 U.S. at p. 692.) Under these circumstances, it is unreasonable to place the burden of proving prejudice on Mr. Morales and therefore prejudice must be presumed. (*Ibid.)*

Similarly, Mr. Rozenberg alerted the superior court during the capital plea bargain proceeding to facts that could impair Mr. Morales's Sixth Amendment rights – his self-avowed incompetency to handle a capital case, with which the court agreed, and which obviously threatened the fairness of the plea bargain proceeding and Mr. Morales's right to the assistance of capitally competent counsel in that proceeding. As in other contexts, this information triggered the trial court's duty "to protect the right of the accused to have the assistance of counsel" (*Glasser*, *supra*, 315 U.S. at p. 72) and "ensure that criminal defendants receive [representation that] does not contravene the Sixth Amendment" (*Wheat v. United States, supra*, 486 U.S. at p. 161) by responding appropriately. The only appropriate response was to relieve Mr. Rozenberg *immediately*, *before* Mr. Morales was forced to accept or reject the offer that day and the plea bargain proceedings terminated with prejudice, in order to protect Mr. Morales's right to the assistance of competent

counsel in the plea bargain proceedings. (See *Missouri v. Frye* (2012) 566 U.S. 134, 140-141, 144-149; *Lafler v. Cooper*, *supra,* 566 U.S. at pp. 162-164; *Padilla v. Kentucky* (2010) 559 U.S. 356, 373.)

Indeed, even assuming *arguendo* that Mr. Rozenberg's statements were ambiguous on the question of his competency in fact to handle a capital case, at the very least they alerted the superior court to that possibility and should have triggered the court's duty to protect Mr. Morales's rights and respond appropriately. (See Part B-1, *ante*.) As in other contexts, the appropriate response in that instance (short of relieving Mr. Rozenberg immediately) would be inquiry into Mr. Rozenberg's qualifications and experience, whether he had provided any capital case assistance thus far, and whether he was capable of advising Mr. Morales about the "the risks and probable outcome" *of the penalty phase* of a capital murder trial. (*In re Alvernaz, supra*, 2 Cal.4th at p. 933, cited at AOB:158-162, citing additional authorities.) As the record of Mr. Rozenberg's actual performance demonstrates, he was incapable of giving such advice. (Part B-3, *ante*; AOB:165-212.) In other words, the court's failure to discharge its constitutional duty at least to inquire immediately into Mr. Rozenberg's declaration that he was unqualified and would need to withdraw if this were a capital case produced the very result that duty is intended to avoid – the impairment of Mr. Morales's right to the assistance of counsel competent to advise him of "the risks and probable outcome" of a penalty phase trial and assist him in making the irrevocable decision to reject the offer and risk forfeiting his life

or accept the offer and retain it. Hence, pursuant to the foregoing authorities, prejudice still must be presumed in this instance.

In his opening brief, Mr. Morales clearly and emphatically relied on the foregoing authorities in arguing the presumption of prejudice is warranted here where the state or government is responsible for the lack of *competent* counsel measured under prevailing professional norms in capital cases. (AOB:115-118, 146-150, 163, 213-214.) Respondent's failure even to include this category of cases in those it has identified as warranting the presumption of prejudice – much less to respond to Mr. Morales's argument in this regard – is telling of the fact that respondent simply has no grounds on which reasonably to dispute the presumption is warranted here.

Mr. Morales also relied on a second category of Sixth Amendment cases in his opening brief in which prejudice is presumed and argued that it, together with the court's errors under the foregoing principles, dictate application of the presumption here. (AOB:117-119, 212-213.) That is, when an attorney's errors are not specific and discrete lapses in a performance that otherwise comports with prevailing professional norms but rather "the performance of counsel is so inadequate that, in effect, no assistance of counsel is provided" (*Cronic*, *supra*, 466 U.S. at p. 654, fn. 11), there has been a complete "breakdown of the adversarial process," or counsel "fails to subject the prosecution's case to meaningful adversarial testing" at a critical stage (*id.* at p. 659), there has been a constructive denial of counsel warranting the presumption of

prejudice. (*Ibid.*, cited at AOB:117-119, 212-213, citing in accord, *Bell v. Cone, supra*, 535 U.S. at p. 697.) Respondent does identify this category of cases and argues that this case does not qualify for the presumption under any of the categories it has identified because Mr. Rozenberg was appointed, present and provided *some* assistance. (RB:72-77.) This is the same argument to which Mr. Morales has replied in Part B-3, *ante.* Some assistance simply is not the equivalent of *effective* assistance by *competent* counsel. As explained in the preceding sections and the opening brief, throughout Mr. Rozenberg's year-and-a-half tenure and through the critical plea bargain proceeding that resulted in a capital murder trial and death judgment, Mr. Rozenberg failed entirely to act as the prosecution's adversary against its *case for death* and an advocate *for Mr. Morales's life*, constructively denying Mr. Morales the assistance of competent counsel, as measured under prevailing professional norms in capital cases, in considering whether to face a capital murder trial and death sentence by rejecting the offer or saving his life by accepting it.

In the opening brief, Mr. Morales cited several decisions as illustrative of this kind of "constructive" denial of counsel at a critical stage under *Cronic*. (AOB:118-119, 213, citing authorities.) Respondent makes a conclusory assertion that these cases are inapposite because "all show a complete failure to act as counsel, unlike the record here," which it fails to support with argument or analysis apart from short parenthetical explanations of the holding of each case (RB:77.) Consequently, Mr. Morales is not entirely sure

what respondent means by "a complete failure to act as counsel." Mr. Morales suspects that respondent means "a complete failure" to offer any legal advice or assistance, in contrast to this case wherein Mr. Rozenberg provided some (negligible) noncapital assistance. If that is respondent's meaning, respondent is mistaken.

In *United States v. Morris* (6th Cir. 2006) 470 F.3d 596, for instance, the defendant was charged in state court with offenses that implicated not only state law but also federal law. (*Id.* at p. 598.) Per standard practice, the state court appointed counsel five days before a "pre-preliminary examination" wherein the defendant had to accept or reject a plea bargain offer by the close of the proceeding. (*Ibid.)* Although counsel had received and reviewed some discovery, she was unable to conduct further investigation and was only able to speak with the defendant briefly about the offer in the courtroom's "bullpen." (*Id.* at pp. 598-599.) Counsel informed the defendant of the offer and governing state law, as well as the federal sentencing guideline range "as she understood it." (*Id.* at p. 598.) However, counsel was inexperienced with federal sentencing guidelines and therefore obtained and relied on an estimate she had received third hand from a prosecuting attorney which proved to be incorrect. (*Id.* at pp. 598-599.) Immediately after this meeting with the defendant, the proceeding commenced and he rejected the offer and was referred to federal court. (*Id.* at p. 599.)

The Court of Appeals held that under these circumstances, the state had constructively deprived the defendant of his right to the assistance of competent counsel at a critical stage. (*United*

States v. Morris, supra, 470 F.3d at pp. 601-602.) Specifically, the Court ruled that an attorney who has not adequately investigated or consulted with the defendant before a plea bargain offer and who is unfamiliar with the law by which to assess the probable consequences of rejecting the offer simply cannot provide the competent assistance to which the defendant is entitled in deciding to accept or reject the offer. Furthermore, the state was directly responsible for this impairment through the combination of the late appointment and the "exploding" nature of the plea offer, requiring that the defendant accept or reject it immediately. Under this combination of circumstances, the Court found a constructive denial of counsel at a critical stage under the *Cronic* framework and reversed without inquiry into prejudice. (*Ibid.)* In reaching this holding, it is important to emphasize that – much like respondent argues here – the government argued there that the fact counsel "actually gave [the defendant] legal advice is simply inconsistent with a conclusion that counsel was not acting as a lawyer during the defendant's consideration of the state plea offer." (*Id.* at p. 602.) The Court of Appeals soundly rejected that argument, reasoning the critical inquiry for Sixth Amendment purposes is not whether counsel could or did provide *some* advice but whether counsel was able to provide the defendant with "*effective* advice." (*Ibid.*, italics added.)

Similarly, in *Mitchell v. Mason* (6th Cir. 2003) 325 F.3d 732, counsel represented the defendant at both the preliminary hearing, where he presented a witness and argued for bail, as well as at trial,

where he subjected the prosecution's witnesses to cross-examination, made a partially successful motion for a directed verdict, and presented closing argument on the defendant's behalf. (*Id.* at p. 735.) During the seven-month period between the preliminary hearing and the trial, counsel was suspended from practicing law for one month, never visited the defendant in custody and indeed made "no effort to consult with" the defendant apart from three brief "meetings" in the courtroom's "bullpen." (*Id.* at pp. 735, 741-742.) The defendant complained to the trial court, which determined that counsel's performance in this regard was not an adequate ground to relieve him. (Id, at pp. 735-736, 744.) Emphasizing both that: (1) client consultation is the linchpin to a competent investigation, which in turn is indispensable to competent trial representation; *and* (2) the trial court was on notice of the problem but failed to protect the defendant's right to competent assistance, the Court of Appeals held that counsel's failure to adequately consult with the defendant before trial amounted to a constructive denial of counsel at the critical pre-trial stage under *Cronic* that warranted the presumption of prejudice, notwithstanding that counsel provided "some" assistance at the preliminary hearing and trial. (*Id*. at pp. 743-744.)

These cases illustrate that where counsel completely fails to discharge a particular constitutional duty – such as to investigate or consult with the client – during a critical stage, even though otherwise they are present and otherwise providing *some* assistance, and the state is responsible for the lapse in that it was "easy to

identify" and "easy . . . to prevent," the defendant has suffered a constructive denial of counsel triggering the presumption of prejudice. (*Strickland, supra*, 466 U.S. at p. 692, citing *Cronic*, *supra*, 466 U.S. at p. 659 & fn. 25.) Hence, these decisions are on all fours with this case and provide compelling support for Mr. Morales's argument that he suffered a presumptively prejudicial constructive denial of the assistance of competent counsel, as measured by long-standing prevailing professional norms in *capital* cases. These cases also reveal the fallacy of respondent's counterargument that the provision of *some* assistance is enough to satisfy the Sixth Amendment demand for *competent*, effective assistance.

For these and all the other reasons set forth in the preceding sections and in the opening brief, the presumption of prejudice is warranted in this case because: (1) the state's failure to discharge its duties produced the very result those duties exist to prevent; and/or (2) Mr. Rozenberg failure even to understand that this was a capital case, much less to satisfy the highly specialized professional norms prevailing in *capital* cases, rendered his capital case assistance "so inadequate that, in effect, no assistance of [capitally competent] counsel [was] provided" in the capital pre-trial and plea bargain proceedings (*Cronic*, *supra*, 466 U.S. at p. 654, fn. 11) and there was a complete breakdown in the adversarial process as between the state's case for death and Mr. Morales's for life (*id.* at p. 659).

As respondent does not dispute the appropriate remedy for a violation of Mr. Morales's state and federal constitutional rights to

the effective assistance of competent counsel is remand for the plea bargain proceedings to begin anew with the prosecution's reinstatement of the plea bargain offer (AOB:163-165), no further discussion is necessary. Mr. Morales considers this issue to be fully joined by the briefs on file with the Court.

C. If this Court Determines that Mr. Morales Bears the Burden of Proving Prejudice from the Superior Court's Dereliction of its Duties to Provide him the Assistance of Competent Counsel Under *Strickland*'s Second Prong, the Matter Must be Remanded to the Trial Court with Directions to Hold a New *Strickland* Hearing that Comports with the Law and Fundamental Fairness that Was Lacking In its First Hearing

As Mr. Morales explained in the opening brief, if this Court determines the burden rests with him to prove "prejudice" from Mr. Rozenberg's deficient performance under the *Strickland* test for ineffective assistance of counsel, then it must remand this matter to the trial court with directions to conduct a new *Strickland* hearing. (AOB:217-249.) The hearing the trial court did hold after the verdicts was neither full nor fair because the court misapplied that test and denied Mr. Morales the opportunity to present his and Mr. Rozenberg's highly relevant, admissible testimony to support his claims and counter the trial court's speculative assumptions with actual evidence. (*Ibid.*)

Respondent does not dispute the trial court's hearing had to accord with due process and provide Mr. Morales with a meaningful opportunity to be heard and present evidence on his behalf. (See

AOB:233-235; compare RB:85.) Instead, respondent contends that Mr. Morales was afforded a full and fair hearing and meaningful opportunity to be heard and present evidence because the trial court did, in fact, hold hearings on Mr. Morales's claims and allowed him to present *some* documentary evidence in support of them. (RB:85.) Respondent is mistaken.

Much like some assistance is not the equivalent of effective assistance, the opportunity to present *some* evidence is not the equivalent of the opportunity to present highly relevant, non-cumulative, admissible evidence on one's behalf. While it is certainly true that the exclusion of or limitation on irrelevant or cumulative evidence does not offend Due Process, prohibiting a litigant from presenting probative, admissible, and non-cumulative oral testimony on his own behalf deprives him of his Due Process right to a meaningful opportunity to be heard and a full and fair hearing. (See, e.g., *Kaur v. Ashcroft* (9th Cir. 2004) 388 F.3d 734, 737; *Kerciku v. I.N.S.* (7th Cir. 2003) 314 F.3d 913, 917-918, and authorities cited therein.) As set forth in the opening brief and further below, this is just such a case.

People v. Dennis (1986) 177 Cal.App.3d 863, 876-877 [remand for purpose of holding hearing on new trial motion based on ineffective assistance of counsel and permitting parties opportunity to present relevant evidence thereon] and *People v. Moore* (2006) 39 Cal.4th 168, 176, 177.)

///

///

1. The trial court's rationale for excluding highly relevant testimony on the ground that it was relevant only to the first, presumed deficient performance prong and irrelevant to second, prejudice prong of the *Strickland* test at issue was inconsistent with its actual analysis, the law, and due process

a. Brief summary of the proceedings and the court's rationale for excluding the testimony

In order to offer a clear reply to the state's responses and aid in the Court's review, a brief summary of the procedural posture in which the hearings into the adequacy of Mr. Rozenberg's representation were held, the court made its findings, and ultimately made its ruling, will be helpful. (See AOB:217-231 [detailed summary of procedural history].) In a series of proceedings, or hearings, the trial court considered successor counsel deputy public defender's motions asserting (as Mr. Morales asserts on appeal) the superior court's violation of Rule 1413 operated to deprive Mr. Morales of his Sixth Amendment right to the assistance of counsel, without inquiry into *Strickland* prejudice. The court took documentary evidence offered with the motions and oral representations of counsel for both parties and made several factual findings concerning the quality of Mr. Rozenberg's representation that were favorable to Mr. Morales's claims. Reasoning there was potentially relevant evidence regarding Mr. Rozenberg's representation that had not been included in the evidence presented thus far, the court scheduled a testimonial hearing to hear Mr.

Rozenberg's testimony and additional evidence. (AOB:218-225; citing 13RT:2831-2832, 2834, 2837-2838, 2841, 2847-2848, 2852-2853, 3243-3247.)

On the eve of that scheduled hearing, the prosecution filed its first and only written response to the DPDs' motions in which it: (1) proffered Mr. Rozenberg's brief declaration concerning his representation; (2) asserted that Mr. Morales's claim was subject to the *Strickland* prejudice test, which the DPDs had failed to address in their motions, legal arguments and evidence – omitting, for instance, any proffer that Mr. Morales would have accepted the offer had he received assistance from competent counsel; and (3) contended the trial court could and should limit its inquiry at the scheduled hearing to *Strickland's* second, prejudice prong without resolving its first, deficient performance prong by assuming arguendo it had been satisfied. (AOB:225-226, citing 29CT:8236-8247.)

At the outset of the scheduled testimonial hearing, the trial court noted for the record that Mr. Rozenberg was present and stood ready to testify, and stated, "I'm going to allow the defense to call Mr. Rozenberg in regards to the type of relationship that he had with Mr. Morales, in terms of conversations he had with Mr. Morales, in regards to any offers, any suggestions, any advice in regards to any plea bargain agreement," which Mr. Rozenberg did not address in his declaration. (14RT:3248.) The DPDs also proffered Mr. Morales's testimony on the issue of prejudice by, inter

alia, swearing that he would have taken the plea offer had he been represented by competent counsel. (14RT:3251, 3253-3255.)

When the court responded by directing Mr. Rozenberg to take the stand, the prosecutor interrupted and persuaded the court: (1) not to reach and resolve the deficient performance prong of the *Strickland* test by assuming it was satisfied; (2) instead to limit its inquiry to the prejudice prong based on that assumption; and (3) therefore to decline to hear Mr. Rozenberg's testimony as irrelevant under that mode of analysis. In other words, the prosecutor persuaded the court that though counsel's testimony is generally relevant to the deficient performance prong, mooting that prong rendered Mr. Rozenberg's testimony irrelevant in this case, and otherwise testimony concerning deficient performance is irrelevant to the prejudice prong. (14RT:3248-3251, 3255, 3269-3270, 3272-3273; 29CT:8238-8239.) As to Mr. Morales's offered testimony, though relevant to the prejudice prong, the prosecutor persuaded the court to refuse to hear or consider it on the ground that it was "self-serving" and could not conceivably be corroborated with independent, objective evidence (without either the court or the prosecutor addressing what kind of evidence qualifies). (14RT:3251, 3255, 3262-3273.) With these limitations, the court proceeded to analyze the claim, make additional factual findings and rule that Mr. Morales had not demonstrated ineffective assistance of counsel under the *Strickland* test. (AOB:226-231.)

As a matter of law, the offered testimony concerning Mr. Rozenberg's actual advice and performance was relevant to *both*

prongs of the *Strickland* test. (AOB:239, and authorities cited therein.) Indeed, the trial court's actual analysis revealed that it understood as much, at least implicitly. Although the court represented that it would assume deficient performance rather than reach and resolve that prong – and excluded the testimony on that basis – the court's actual analysis did in fact reach and resolve that prong. Indeed, it ruled further that Mr. Morales could not possibly prove prejudice precisely *because* it found Mr. Rozenberg's performance and advice to be competent and reasonable. The court's analyses in both regards plainly reveals that its grounds for excluding the testimony cannot be defended. (AOB:238-239, 243-244.) Furthermore, the court erred in summarily concluding there could be no conceivable, independent evidence to corroborate Mr. Morales's proffered testimony that he would have accepted the offer had he received competent assistance without any acknowledgment of the factors recognized by law to be sources of independent, objective corroboration, the evidence that already existed, and additional relevant evidence that likely would exist from the offered testimony it excluded. (AOB:236-237.)

Furthermore, in resolving the claim in this way, the court made several factual determinations concerning Mr. Rozenberg's advice and performance: (1) despite its ruling that it would not hear testimony on that subject because it was relevant only to the deficient performance prong, which the court would not reach and resolve but instead assume; (2) based on speculation as opposed to relevant evidence, which would have been forthcoming on the issue

had the court not excluded it in its entirety; and (3) that were contrary to factual findings in previous hearings despite the absence of any new evidence or authority to explain or reconcile the inconsistencies. (AOB:238-244; see also AOB:219, 221, 224.)

Respondent broadly contends the trial court's findings and rulings were entirely appropriate. (RB:84-90.) Respondent is mistaken.

b. Respondent's agreement that the trial court's actual analysis reached and resolved the first, deficient performance prong of the *Strickland* test compels the conclusion that the court erred in refusing to hear the proffered testimony it recognized as relevant and necessary to resolve that prong

According to the state, Mr. Morales's "claim that the trial court 'assume(d) that Mr. Rozenberg performed deficiently' (AOB:238) is also inaccurate." (RB:88.) To the contrary, respondent firmly asserts, the trial court did reach and resolve the deficient performance prong and "found Mr. Rozenberg was 'competent counsel' and 'did what he had to do in terms of explaining to the defendant.' (14RT:3258, 3269.) The trial court further found, 'I honestly don't think Mr. Rozenberg was ineffective counsel in a sense that he had done murder cases. He knew of the potential. This was made very clear.' (14RT:3267.)" (RB:88.) Respondent's contention in this regard amounts to an affirmative concession to the foundation of Mr. Morales's argument.

As recounted above and discussed in greater detail in the opening brief, the prosecutor persuaded the court to assume the first deficient performance prong and limit its inquiry to the second prejudice prong of the *Strickland* test. (AOB:225-228.) Although the court recognized that the offered testimony concerning Mr. Rozenberg's actual advice and performance was relevant by law to the first prong of the test, the court ruled that it was irrelevant in fact to the court's analysis in this case *because* of its putative analytical assumption that the first prong had been satisfied. (AOB:227-230.) The problem, as Mr. Morales explained in the opening brief, is that the court's *actual* analysis did, in fact, reach and seemingly resolve the first deficient performance prong and hence the testimony was relevant and should not have been excluded. (AOB:240.) Significantly, respondent firmly agrees with that premise. (RB:88.) It necessarily follows from that conceded premise that the trial court erred by excluding testimony it otherwise recognized was relevant and necessary to resolving the first prong on the ground that it would not resolve the first prong when in fact it did – as respondent concedes – resolve that prong. The exclusion of testimony offered by the defendant on his behalf that is indisputably relevant and probative of a significant constitutional claim and necessary to fairly resolve it deprives the defendant of his Due Process rights. (See, e.g., *Kaur v. Ashcroft*, *supra,* 388 F.3d at p. 737; *Kerciku v. I.N.S.* , *supra,* 314 F.3d at pp. 917-918, and authorities cited therein.)

c. The trial court erred by excluding the testimony on the ground that it was irrelevant to the prejudice prong of the *Strickland* test

Mr. Morales further argued the trial court's rationale for excluding the testimony on the ground it was relevant only to the first, deficient performance prong and not the second prejudice prong to which the court (ostensibly) would limit its inquiry was contrary to law. (AOB 238-239.) Evidence of counsel's actual advice and assistance is highly relevant to the question of prejudice under the second prong of the *Strickland* test as applied in the plea-bargaining context. (AOB:239, citing *In re Alvernaz, supra*, 2 Cal.4th at pp. 938, 945-946 and *Lafler v. Cooper, supra,* 566 U.S. at pp. 163-164.) Similarly, the same evidence is highly relevant as independent objective evidence potentially corroborating a defendant's claim that he would have taken a plea offer had he been represented by different, competent counsel. (AOB:236-237, citing, inter alia, *In re Alvernaz, supra*, 2 Cal.4th at p. 938 [factors for court to consider in determining whether there exists independent, objective corroborating evidence include, inter alia, "whether counsel actually and accurately communicated the offer to the defendant (and) the advice, if any, given by counsel"].)

Respondent recognizes the relevance of such evidence to resolving the prejudice prong but recasts the court's ruling as: "the trial court found [Messrs. Rozenberg and Morales's] testimony was *unnecessary* to resolve the prejudice issue. (14RT:3255, 3268, 3269.)." (RB:85, italics added.) Respondent further asserts the trial

court did consider relevant evidence concerning Mr. Rozenberg's actual advice and performance – it simply did so based on the paper record. (RB:85-86.)

In truth, the trial court found just the opposite: the paper record was lacking with regard to Mr. Rozenberg's actual performance and therefore his testimony was not only relevant but necessary to determine the first, deficient performance prong. (14 RT:3248.) Specifically, at the outset of the final hearing – before the prosecutor persuaded the court to exclude Mr. Rozenberg's testimony – the court stated: "I'm going to allow the defense to call Mr. Rozenberg in regards to the type of relationship that he had with Mr. Morales, in terms of conversations he had with Mr. Morales, in regards to any offers, any suggestions, any advice in regards to any plea bargain agreement. The Court's desires is [sic] to get some information, *part of which* has been included in his declaration, but *some additional information* in regards to the relationship between Mr. Rozenberg and Mr. Morales . . . ." was missing. (14RT:3248, italics added.)

Indeed, the court was quite right in that Mr. Rozenberg's two-page declaration was a model of vagueness and ambiguity. (29CT:8245-8247.) But immediately following the court's remarks cited above, the prosecutor convinced the court to assume deficient performance, limit it analysis to prejudice, and on that basis exclude Mr. Rozenberg's testimony. In other words, the prosecutor persuaded the court that the testimony was not relevant to the prejudice prong. (14RT:3249-3251.) After the court's analysis and

ultimate ruling, it made this ruling even more explicit by explaining that if Mr. Morales could prove prejudice, the court would have heard Mr. Rozenberg's testimony to resolve the deficient performance prong; but since Mr. Morales could not possibly demonstrate prejudice, the deficient performance prong became moot and Mr. Rozenberg's testimony was irrelevant. (14RT:3272; see also 14RT:3248, 3250-3251, 3269-3270, 3272-3273.)[10] This record not only fails to support respondent's characterization of the court's grounds for exclusion but also affirmatively contradicts it.

The testimony concerning Mr. Rozenberg's advice and performance was also relevant to the question of prejudice because it provided a potential source of independent evidence corroborating Mr. Morales's proffered testimony that he would have taken the plea offer had he been assisted by capitally competent counsel. The trial court erred in excluding Mr. Morales's testimony on the ground that it was self-serving and could not be corroborated by any conceivable independent objective evidence. (See AOB:236-237, 244-249; 14RT:3255, 3262-3273.) While it is true that a defendant's claim he would have accepted or rejected a plea offer had he received different counsel, though relevant, is insufficient "in and of itself" to prove that fact in the absence of independent, corroborating evidence, it was not true that no such evidence conceivably existed

---

[10] Of course, as respondent and Mr. Morales agree, the trial court *did* reach and resolve the deficient performance prong, so the court's explanation in this regard is factually incorrect. Still, it reflects the court's flawed rational for excluding the testimony.

in this case. (AOB:236-237.) As a preliminary matter, the court failed to appreciate the legal criteria for such evidence, some of which already existed on the face of the record, inter alia, the significant disparity between the maximum sentence exposure of death in a capital murder trial and the 50-to-life sentence under the terms of the bargain and Mr. Morales's indicated amenability to plea bargaining. (AOB:244-249, and authorities cited therein.) Otherwise, one source that a court must look to for the existence of independent, corroborative evidence is evidence of counsel's actual performance and advice. (AOB:236-237, 243-244, and authorities cited therein.) Hence, the court was required to consider such evidence before rejecting Mr. Morales's proffered testimony out of hand. But as the trial court otherwise recognized, the paper record was inadequate to fully understand not only the "relationship" Mr. Rozenberg had with Mr. Morales about also "conversations he had with Mr. Morales, in regards to any offers, any suggestions, any advice in regards to any plea bargain agreement," making Mr. Rozenberg's testimony necessary. (14RT:3248.) For these reasons as well, the court erred in excluding Messrs. Rozenberg and Morales's testimony.

2. The trial court's factual findings were internally irreconcilable and based on speculation due to an evidentiary gap created by its exclusion of Messrs. Rozenberg and Morales's testimony

As set forth in greater detail in the opening brief, in the final hearing, the trial court found that "Mr. Morales was given

competent counsel" because Mr. Rozenberg explained "the strengths and the weaknesses of the case" to him, informed him the *probable* outcome of trial was that he "would be convicted," and both Mr. Rozenberg and the superior court advised him the consequence of rejecting the offer would be a capital trial and its "*possible*" outcome was a death sentence, and hence Mr. Morales was fully advised by Mr. Rozenberg and the superior court that "these are the risks these are the consequences" of rejecting the offer and made a "conscious, intelligent decision" to do so. (14RT:3257-3259; see also 14RT:3269-3260, 3264-3269; AOB:240-243.) As further set forth in the opening brief, these findings were flawed in many respects.

First, the court's repeated use of the term "the case," as in Mr. Rozenberg explained "the strengths and the weaknesses of the case" to Mr. Morales, was confusing and ambiguous with regard to whether it was referring to the "case" for guilt of murder – as suggested by its reliance on Mr. Rozenberg's advice that "convict[ion]" was the likely outcome of the a trial – or whether it referred to the *capital* murder "case" or the "case" for guilt *and* death. If the former, the findings are woefully inadequate to support the court's ultimate determination that Mr. Morales had not satisfied the *Strickland* test for ineffective assistance of counsel *in a capital case*. If the latter, the findings are equally flawed because they are based on nothing but pure speculation. In the absence of direct testimony from Messrs. Rozenberg and Morales about the specific advice Mr. Rozenberg did or did not give Mr. Morales, there was simply no evidence from which the court could find that Mr.

Rozenberg "explained the strengths and weaknesses of the" *capital murder* "case" or "risks" and "consequences" of rejecting the offer and being tried *capitally*. (AOB:240-244.) Furthermore, the court's findings in this regard were flatly inconsistent with several factual findings it made in previous hearings on the same subject. (*Ibid.)* The only evidence that arose between those prior findings and the final hearing was Mr. Rozenberg's paper declaration, but the trial court otherwise recognized that it was inadequate to ascertain the substance of the "advice" Mr. Rozenberg gave to Mr. Morales, the "conversations" they had, or their "relationship" without hearing his testimony on that subject. (14RT:3248.) For these reasons, as well, the court erred by excluding Messrs. Rozenberg and Morales's testimony. Finally, while some of the trial court's findings were supported by the record, the legal significance the court attached to those findings was not supported by the law. (AOB:242-243.)

Respondent contends the trial court's findings were not speculative or improperly made without hearing the excluded testimony but rather were based on reasonable inferences from the record. Respondent first summarizes some of the court's factual findings, most of which Mr. Morales agrees are adequately supported by the record. That is, Mr. Morales has no quarrel with the trial court's findings that Mr. Rozenberg and the superior court "accurately communicated the plea offer to" him and informed him that "the consequences of rejecting the plea offer would be . . . a *likely* conviction . . . and a *possible* death sentence" or a "potential[] . . . death sentence." (RB:86, italics added.) While Mr. Morales does

not take issue with the factual support for those findings, he does with the legal significance the court (and respondent) attributed to them. With respect to the trial court's repeated reliance on the superior court's admonition that death was a *possible* consequence of rejecting the offer or a *possible* outcome of a capital murder trial, Mr. Morales explained in the opening brief that this Court has consistently recognized that a judicial admonition about a potential consequence of accepting or rejecting a plea bargain is no substitute for counsel's "'independent evaluation of the charges, applicable law, and evidence, and of the risks and *probable* outcome'" of both alternatives (*In re Resendiz* (2001) 25 Cal.4th 230, 240, quoting from *In re Alvernaz*, *supra*, 2 Cal.4th at p. 933) and does not mean the defendant "received effective assistance of counsel in *evaluating or responding* to such advisement" (*In re Resendiz, supra,* 25 Cal.4th at pp. 240-241, italics added; accord, e.g., *People v. Patterson* (2017) 2 Cal.5th 885, 896). (AOB:126-128, 162, 242-243; AOB:126-128, 162, 242-243). Nor does counsel's bare admonition of the maximum sentence the defendant will face at trial amount to competent "assistance" without consulting with the defendant and conveying the "risks and *probable* outcome" of the trial based on counsel's investigation of the law and the facts and independent evaluation thereof. (AOB:126-128, 162, 242-243, citing, inter alia, *In re Vargas* (2000) 83 Cal.App.4th 1125, 1133, 1139-1140 ["the maximum potential sentence [is] but *one* factor" counsel must discuss with the defendant in advising him to accept or reject a plea offer], *Moore v. Bryant* (7th Cir. 2003) 348 F.3d 238, 241, and authorities cited

therein ["A reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis" to the client to make an informed decision over whether to plead guilty or go to trial], 1993 ABA Standards, Std. 4-5.1 & Commentary; accord, *People v. Lopez* (2020) 66 Cal.App.5th 561, 577-578.) At bottom, Mr. Rozenberg's admonition that a death sentence was a "possible" outcome of the capital murder trial if Mr. Morales rejected the offer, as the court found, was not the constitutionally compelled advice, based on an explanation of the relevant law and anticipated evidence, of the "*probable* outcome" of the trial. (*In re Alvernaz, supra*, 2 Cal.4th at p. 933, italics added.) In defending the evidentiary basis for the court's findings in this regard – which Mr. Morales does not challenge – respondent ignores that the court's determination based on these findings that Mr. Rozenberg's performance was consistent with prevailing professional norms in capital cases was not supported by law.

Mr. Morales also takes issue with the final factual finding respondent attributes to the court: according to respondent, when he rejected the offer, Mr. Morales "stated that he wanted to leave it in the jury's hands and take his chances at trial, specifically stating that it *was the same to him whether he received 50 years to life or the death penalty*, indicating he was not interested in the plea." (RB:86, italics added.) The record respondent cites in support of the italicized language as a trial court finding does not reflect that the

court ever made any such finding. Nor would the record support any such a finding.

To the contrary, Mr. Morales's actual remarks strongly suggest that he was uninformed or misinformed about the likelihood of a death sentence if he rejected the offer. In response to the superior court's pressing not to dismiss the plea offer lightly, Mr. Morales explained the result of either choice offered was "the same to me." (2RT:143.) *It was the superior court* who replied, "To you, sir, 50 years is the same as death?" Mr. Morales did not affirm that understanding but rather responded, "It's my *life in prison*" under either alternative. (*Ibid.*) The superior court agreed that he would go to prison under either alternative but explained his choice as: "Whether you will walk out after a long time or not walk out at all." (*Ibid.)* Mr. Morales finally responded that he would "leave it in the jurors' hands." (2RT:143.) As is clear from the record, Mr. Morales never said that "it was the same to him whether he received 50 years to life or the death penalty," as respondent asserts. (RB:86.) Nor did the trial court find that he had so stated. To the contrary, in his exchange with the court, Mr. Morales twice expressed his belief the result of either choice would be the same – "my life in prison." These are not the words of a man who appreciated the very real possibility a capital murder trial – with special circumstances allegations that then included an attempted rape felony murder special circumstance – would result in a death sentence. Rather, these are the words of a man laboring under the belief that there was *no* risk or possibility of a death sentence at all and the worst he

faced if he rejected the offer, went to trial, and lost, was a "life" in prison, which for him was in effect "the same" as the life sentence offered with the plea deal. In any event, the trial court never found that Mr. Morales made any statements reflecting his appreciation of the likelihood the capital murder trial would result in a death verdict, as respondent asserts.

Respondent further argues that other evidence in the record supported additional factual findings the court never made but which supported its ultimate ruling that Mr. Rozenberg provided "competent" assistance. (RB:89.) As a preliminary matter, even if that were the case, it does not mean the court properly excluded the offered testimony. Even if the record met the bare test for legal sufficiency, or substantiality, that does not mean the offered testimony could not have made a difference or that Mr. Morales had no right to present it. In any event, the record to which respondent points simply does not support a determination that Mr. Rozenberg provided competent *capital* case assistance in the pre-trial and plea-bargaining stages.

For the most part, the evidence on which respondent relies has no bearing on the capital nature of the case. (RB:89.) Respondent does assert that "Mr. Rozenberg had several discussions with Morales about *the* possible plea offer before it was made (29CT:8246; 2RT:138; 13RT:2812) . . . ." (RB:89, italics added.) The declaration to which respondent cites refers only to a single discussion about the critical *capital* plea bargain offer from Mr. Mazurek: the 30-minute "consultation" period Mr. Morales had with

Mr. Rozenberg in the middle of the "exploding" plea bargain proceeding. (29CT:8246; see AOB:175-176, 189-190.) Otherwise, the declaration to which respondent cites refers to "discussions" Mr. Rosenberg had with Mr. Morales about "what was happening," which Mr. Morales and respondent otherwise agree refers to the proposed plea deal Mr. Rozenberg was trying to broker with prosecutor *Young*. (See Part B-3-a, *ante;* RB:75; AOB:186-191.) While it is true that both plea deals contemplated guilty pleas carrying a 50-year-to-life sentence, they were not "the [*same*] "possible plea offer," as respondent clearly implies. (RB:89.) Unlike the plea offer from prosecutor Mazurek, there was absolutely no indication that a capital murder trial and possible death sentence would be the consequence of rejecting the deal with prosecutor Young. To the contrary, although Mr. Young never formally announced that he would *not* seek the death penalty (and therefore the death penalty was always a possibility), by all outward appearances it seemed he intended to try this case non-capitally, without regard to the outcome of plea negotiations. As described in the opening brief, the prosecution proceeded from arraignment in a courthouse *not* equipped to try death penalty cases and was assigned to a trial judge *not* authorized to try death penalty cases under local court practice (2RT:149-150; 13RT:2812-2813); the trial court found it was clear from the preliminary hearing that *neither* Mr. Young nor Mr. Rozenberg contemplated a potential penalty phase and death sentence (13RT:2829-2830); and Mr. Young never sought internal approval to seek the death penalty yet announced

ready for trial in the noncapital courthouse, before the non-capital judge, giving a trial estimate the trial court agreed was consistent with a noncapital, not a capital, trial (2RT:92-93, 104, 138; 13RT:2810). (AOB:197, 253-254.) Indeed, at page 2812 of the reporter's transcript, cited by respondent, the trial judge explicitly found that – although though this was always a capital case once the special circumstance allegations were filed and hence the death penalty was always a possibility – it clearly appeared from this record that "Mr. Young had absolutely no intent on pursuing a death penalty case in this matter." (13RT:2812, cited at RB:89.) At bottom, respondent's suggestion that Mr. Rozenberg did have several discussions with Mr. Morales about the *capital* plea offer is unsupported by the limited paper record, in the absence of the excluded testimony.

Also, with respect to the plea negotiations with Mr. Young, it is more than a little troubling that respondent next offers as proof of Mr. Rozenberg's competent assistance Mr. Morales's statement to "Mr. Rozenberg [that] he would take the deal after hearing his taped confession." (RB:89.) As discussed in detail in Part B-3-a, *ante,* and the opening brief, Mr. Morales's statement to Mr. Rozenberg in this regard and Mr. Rozenberg's response – or, more accurately, his nonresponse – are proof of Mr. Rozenberg's *failure* to assist, not the other way around. (AOB:187-190.) Otherwise, the other evidence respondent recites simply has no bearing on whether Mr. Rozenberg provided *capital* case assistance and hence no further reply to respondent's point is warranted.

Finally, although respondent recognizes the court never made any such findings, respondent asserts that two pieces of record evidence would have supported a reasonable inference that Mr. Rozenberg in fact *did* advise Mr. Morales there was a "strong likelihood" the outcome of a capital trial would be a death verdict. (RB:86-87.) First, respondent asserts, Mr. Rozenberg's declaration that he told Mr. Morales "'what the offer was, why he should accept that offer, and what would happen if he refused'" supported a reasonable inference that he had advised Mr. "Morales *the likely* sentence would be death . . . ." (RB:86-87, italics added.) An even stronger inference, respondent asserts, reasonably could be drawn from Mr. Rozenberg's remark "to the court that it would be in Morales's best interest to accept the offer (2RT:138), which would *only* be true if there was a *strong likelihood* of a death sentence." (RB:87, italics added.) The inferences respondent proposes are even more speculative than those the court drew.

To begin with, the record evidence that Mr. Rozenberg conducted no penalty phase investigation and was not familiar with the law governing capital cases precludes any such "reasonable" inference, for all of the reasons set forth in the preceding sections and the opening brief. Otherwise, while Mr. Morales does agree that Mr. Rozenberg's remark about Mr. Morales's "best interests" conveys his assessment that the outcome of the plea bargain would be better for Mr. Morales than the outcome he risked at a capital murder trial, he certainly does not agree that the "only" reasonable inference to be drawn therefrom is that Mr. Rozenberg made an

informed assessment there was a "strong likelihood" of a death verdict if he went to trial. The most obvious inference from Mr. Rozenberg's opinion about Mr. Morales's "best interests" is that he understood the very *best* result Mr. Morales could hope for at trial was a first-degree murder conviction and life with parole sentence was the same result from taking the plea. On the other hand, he *risked* much worse if he went to trial – true findings on the special circumstances allegations and life *without* parole at the least and death at the worst. In other words, the benefit of going to trial was nil while the potential risk was much more severe. That alone was enough to determine and convey the offer was in Mr. Morales's best interests. But that does not support any reasonable inference that Mr. Rozenberg could offer or did offer Mr. Morales his *informed* opinion – based on the applicable law that Mr. Rozenberg did not know and the anticipated evidence that he did not investigate – of the *probable* outcome of the penalty phase of a capital murder trial.

Finally, respondent ignores entirely Mr. Morales's argument that the factual findings the trial court did make at the final hearing in rejecting his ineffective assistance of counsel claim were irreconcilable with factual findings it made in previous hearings based on the paper record and the representations of substitute counsel and the prosecutor. Those previous findings included:

- this was always a capital case throughout Mr. Rozenberg's tenure (14RT:3262-3264, 3267-3268), yet the DPDs had "established" that Mr. Rozenberg did not consider or handle it

as a capital case (14RT:3269 and 28CT:7905; see also 28CT:7939-7940; 15RT:3331);

- "the fact that there was never any investigation" into mitigation or aggravation (13RT:2812);
- it was obvious from the "negligent" and "ridiculous" handling of the preliminary hearing that there had not been "any kind of thought process that this potentially could be a death penalty case . . . ." (13RT:2829-2830);
- "Mr. Rozenberg made very little effort in representing Mr. Morales and trying to have some type of relationship or rapport so that he could actually sit down and try to convey the importance of perhaps Mr. Morales accepting the plea bargain agreement" (13RT:2791; see also 13RT:2824-2826);
- "Mr. Rozenberg spent little or no time with Mr. Morales. He never even showed up to court 90 percent of the time . . . ." (13RT:2793-2794; see also 13RT:2824-2826);
- "the entire situation" precluded any degree of confidence that "Mr. Rozenberg spent any time or effort on this case, quite frankly" and instead showed that "he treated it very lightly . . . ." (13RT:2824-2825).

(AOB:219-223, 241-242.) It is impossible to reconcile the foregoing findings with the trial court's subsequent findings that Mr. Rozenberg competently explained the "strengths and weaknesses of the case" to Mr. Morales, adequately advised him of the "risk" of death "and consequences" of rejecting the offer by being tried capitally, and Mr. Morales made a "conscious intelligent decision" to

reject the offer. (14RT:3257-3259, 3270.) More specifically, the trial court's finding that Mr. Rozenberg conducted no penalty phase investigation necessarily meant that he was incapable of competently assisting Mr. Morales in understanding not merely an abstract "risk" or "possibility" of death, but rather the "*probable* outcome" of a capital murder trial based on investigation into the penalty phase law and facts that Mr. Rozenberg never made. (*In re Alvernaz, supra*, 2 Cal.4th at p. 933, italics added; see Part B-4, *ante*; AOB:183-184.) Similarly, the court's previous findings that "Mr. Rozenberg spent little or no time with Mr. Morales[,] . . . never even showed up to court 90 percent of the time" and "made very little effort in representing Mr. Morales and trying to have some type of relationship or rapport so that he could actually sit down and try to convey the importance of perhaps Mr. Morales accepting the plea bargain agreement" (13RT:2791, 2793-2794; see also 13RT:2824-2826) are difficult to square with its later findings that Mr. Rozenberg's consultation with Mr. Morales was adequate to convey the pros and cons of being tried capitally if he rejected the offer and enable Mr. Morales to make a "conscious intelligent decision" to reject the offer and face a potential death sentence at trial. (See Part B-a, *ante* AOB:122, 136-137, 177-178, 199, 208-209, 211-212, and authorities cited therein.) Certainly, the court's previous findings cannot be reconciled with its ultimate finding that there was no conceivable possibility that Mr. Morales could demonstrate that he would have taken the deal had he been represented by counsel who, unlike Mr. Rozenberg, conducted

penalty phase investigation, "spent . . . time with Mr. Morales" (13RT:2793-2794), showed up in court more than "90 percent of the time" (*ibid.*; see also 13RT:2824-2826), and made an "effort in representing Mr. Morales and trying to have some type of relationship or rapport so that he could actually sit down and try to convey the importance of perhaps Mr. Morales accepting the plea bargain agreement" (13RT:2791). (See Part B, *ante*; AOB:176-178, 211-212, and authorities cited therein.)

The only new evidence that arose between the court's previous factual findings and the final hearing was Mr. Rozenberg's declaration. But as previously mentioned, the court itself determined that his declaration – a testament to ambiguity and vagueness – did not provide enough information "in terms of conversations he had with Mr. Morales, in regards to any offers, any suggestions, any advice in regards to any plea bargain agreement" for it to evaluate the competency of Mr. Rozenberg's performance, and therefore the proffered testimony was necessary to fill those evidentiary gaps. (14RT:3248.) The court simply could not abandon its previous findings in favor of making contrary findings that Mr. Rozenberg provided competent "advice in regards to any plea bargain agreement" based on a declaration it deemed inadequate to make that determination while excluding the very testimony it otherwise recognized was necessary to do so. Respondent does not contend otherwise. Accordingly, Mr. Morales considers this issue to be fully joined by the briefs on file with the Court.

In sum, for all the foregoing reasons as well as those set forth in the opening brief, the trial court's exclusion of Messrs. Morales and Rozenberg's testimony, irreconcilable and speculative factual findings, and misapplication of the law denied Mr. Morales his right to a full and fair hearing and meaningful opportunity to present highly relevant evidence on the constitutional question of whether he was deprived of his right to the effective assistance of counsel at the pre-trial and plea-bargaining stages of this capital case. Under these circumstances, the parties agree the matter must be remanded to the trial court for a new hearing into that constitutional question. (AOB:235, and authorities cited therein.)

///

///

II.
THE DEATH JUDGMENT MUST BE VACATED BECAUSE THE PROSECUTION'S 11TH HOUR DECISION TO SEEK DEATH WAS ACTUALLY VINDICTIVE IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS

A. Introduction

Mr. Morales argued in the opening brief the death judgment must be vacated due to prosecutorial vindictiveness because the pursuit of the death penalty was a retaliatory measure linked to Mr. Morales's disinclination to plead guilty, and the sentence in this case violates the due process clause of the Fourteenth Amendment as well as the California Constitution. (AOB:250-296.) Respondent counters the record in this case does not support the assertion of prosecutorial vindictiveness, nor does the presumption of vindictiveness apply. (RB, 90-108.)

The facts underlying this claim are largely undisputed. At the time of the original complaint, the case was not considered a death penalty case. No special circumstance was even alleged. (3CT:591-595.) Later, special circumstance allegations were added, but the case was treated as a non-capital case. Attorneys in the public defender office, qualified to handle capital trials, were passed over and the court instead appointed Wayne Rozenberg, an attorney unqualified to handle a capital case, to represent Mr. Morales. (1RT:24; 29CT:8245, 28CT:7958.) The case was assigned to a department and a courthouse that were not used for death penalty trials. (2RT:149.) Despite the San Bernardino County District

Attorney's standard practice of notifying a defendant the death penalty was being pursued shortly after the preliminary hearing, no notice came. (28CT:7948-49.) From August of 2001 through October of 2003, a period of over two years, the prosecution also treated this as a non-capital case, the prosecutor even announcing that he was ready to try the case in noncapital department of the noncapital courthouse with a noncapital trial estimate. (2RT:92-93, 104, 13RT:2810-2812; AOB:197, 253-254.) On this record, the trial court later found that although the death penalty was always a possibility under the law, as a matter of fact it was clear the prosecution "had absolutely no intent on pursuing a death penalty case in this matter." (13RT:2812; see also 13RT:2845-2846; 14RT:3262-3264, 3267-3268.) Then something changed.

What changed was the acuteness of the prosecution's desire to settle the case without trial. In a candid explanation, the prosecution revealed that "in meeting with the victim's family and understanding that there are three young children that are witnesses in this case and who have to testify," he thought settlement for a guilty plea to murder and a life sentence "with a minimum term of 50 years" would be appropriate. (2RT:136-137.) Although the prosecutor personally viewed the case as a potential death penalty case, he asserted that "rather than have [the children] . . . take the witness stand and have them testify, the People would make this offer to avoid trial. And that would be the motivating factors behind making this offer." (2RT:137-138.) Thus, the prosecutor wanted to settle the case out of concern for the victim's

family members and the case appeared to be on the brink of a resolution. On October 3, 2003, the superior court judge announced in open court that she had "an in-chambers conversation and conference with counsel on this matter, and we were discussing the possibility of this matter being resolved without having to go to trial." (2RT:135.)

In order to pressure Mr. Morales into taking the offer, the prosecutor did two things. First, he pushed for a final settlement by stating the plea offer required an immediate answer: "if that offer is not accepted today . . . it will be taken off the table and Mr. Morales needs to accept that offer today or the opportunity to accept that offer will be gone." (2RT:136.) Second, the death penalty was added to the possible outcome if the case went to trial: the case would be submitted to the "Death Penalty Review Board," with the recommendation the case be a capital murder trial and "[t]here is very little reason to assume they would not make that decision. . . [and the] case will be pursued and prosecuted and tried as a death penalty case." (2RT:137.) The prosecutor raised the stakes, using the threat of the death penalty to seal the deal and get a guilty plea.

As discussed in Argument I, *ante,* Mr. Morales declined the offer. As threatened, the offer was withdrawn. And, as also threatened, on October 16, 2003, the prosecution announced that it would seek the death penalty at trial. (3CT:748.) The result, at the end of the trial, was the imposition of the death penalty.

The prosecutor was justified, within his discretion, in considering the situation of the young witnesses and deciding to

offer a plea deal to avoid trial. But the prosecutor was wrong to change what had by all accounts been treated as a noncapital prosecution into a death penalty case in retaliation for the decline of that plea deal. The question before this Court is whether what the prosecutor did – using the death penalty to pressure a defendant into pleading guilty without a trial and then pursuing an otherwise non-capital prosecution as a death penalty case because the defendant refused – is constitutional.

As Mr. Morales predicted in the opening brief, respondent's primary substantive argument regarding this issue is the prohibition of prosecutorial vindictiveness does not apply because this situation falls within the "plea bargain exception" set forth in *Bordenkircher v. Hayes* (1978) 434 U.S. 357 (*Bordenkircher*). (RB at pp. 98-105). In addition, in a footnote, respondent asserts a procedural bar, stating boldly the "claim is forfeited." (RB, 98 fn. 22.) As demonstrated below, respondent's positions are without merit.

B. The Claim is Not Forfeited.

As a preliminary matter, and as explained in Argument I, *supra*, respondent's perfunctory assertion of forfeiture in a footnote of its brief is not properly raised. (See, e.g., *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182; *People v. Williams* (1997) 16 Cal.4th 153, 206.) Hence, it should be disregarded by the Court. In any event, the claim is without merit.

At trial, after the guilt-phase verdicts were returned, the defense made a motion to prohibit the penalty trial, asserting prosecutorial vindictiveness and citing *Twiggs v. Superior Court* (1983) 34 Cal.3d 360; *Blackledge v. Perry* (1974) 417 U.S. 21 and *North Carolina v. Pearce* (1969) 395 U.S. 711. (28CT:7948-7951, 7983-7986.) The defense argued that "The death penalty is not to be used as a bargaining chip to force a client to plead guilty to a crime." (28CT:7951.) The assertion of prosecutorial vindictiveness was related to the assertion of ineffective assistance of counsel during the pretrial stage. The trial court heard argument and discussed these matters over the course of three court days between the guilt-phase trial and the penalty-phase trial, deciding the penalty-phase trial would go forward. (13RT:2790-2852.)

The timing of the defense motion was perfectly appropriate. A number of motions were made challenging the death sentencing procedures at the conclusion of the guilt-phase trial. Importantly, the prosecutorial vindictiveness assertion was not requesting a mistrial or a reduction of the charges but was specifically targeted at the prosecution's death penalty pursuit. Given that the guilt-phase proceedings might not have resulted in a guilty verdict and special circumstances finding that supported a penalty phase, these motions might well have been premature had they been filed sooner.

Neither the trial court nor the prosecutor at trial asserted that there was anything amiss with the timing of the defense motion. Rather, the prosecution directly addressed the substance of the motion and the factual circumstances underlying the failed plea

offer. (13RT:2800-2806.) By not objecting to the timing of the motion at trial, or arguing the motion should be denied on such a ground, the prosecution waived any supposed procedural defect. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

Respondent nonetheless now asserts (in a footnote) that this claim is "forfeited" because defendant's trial counsel did not "challenge the prosecution's decision to seek the death penalty pretrial." (RB:98, fn. 22.) In support, respondent cites *People v. Lucas* (1995) 12 Cal.4th 415, 477 and *People v. Edwards* (1991) 54 Cal.3d 787, 827. In those two instances, however, the defendants raised no objection and made no motion whatsoever regarding prosecutorial misconduct or vindictiveness in the trial court. Here, in obvious contrast, the defense raised the issue, presented the factual and procedural basis, and asked the trial court to stop the imposition of the death penalty. (28CT:7948-7952, 7985-7986.) The request was timely made before the penalty-phase portion of the trial began. The trial court was fairly informed of the grounds for the motion and the analysis it was asked to undertake. (*People v. Partida* (2005) 37 Cal.4th 428, 437.)

No forfeiture exists on this record and this claim is properly presented to this Court.

C. The Prosecutor's Use of the Death Penalty to Force Mr. Morales to Accept a Plea Deal was Improper and Unconstitutional

Justice Thurgood Marshall observed, in his concurrence in *Furman v. Georgia* (1972) 408 U.S. 238, 355-56, that "If the death

penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional."

The Due Process clauses of the state and federal constitutions "forbid the prosecution from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights." (*People v. Jurado* (2006) 38 Cal.4th 72, 98.) Respondent recognizes that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." (*Bordenkircher*, *supra*, 434 U.S. at p. 363; RB:95.) However, respondent asserts the "*Bordenkircher* exception for plea bargaining" applies to this situation. (RB at 95-96.)

As explained in the opening brief, *Bordenkircher* was not a capital case. (AOB:268-270, 283-287.) Nor was *United States v. Goodwin* (1982) 457 U.S. 368. In fact, the United States Supreme Court has never expressly stated the *Bordenkircher* exception includes threats to use the death penalty in a plea-bargaining negotiation.[11] This Court has, however, accepted the proposition that a prosecutor can use the threat of a death sentence in plea

---

[11] Prior to the change of landscape caused by *Furman v. Georgia*, *supra*, 2 Cal.5th 885, the United States Supreme Court did address the question of voluntariness in pleas and the use of the death penalty in that context, finding that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." (*Brady v. United States* (1970) 371 U.S. 742, 751.)

negotiations in *People v. Grimes* (2016) 1 Cal.5th 698 (*Grimes*). (See AOB:294-295.)

In *Grimes*, during the pretrial period, "after the district attorney's office notified defendant that it would not seek the death penalty, a new district attorney was appointed." The new district attorney "reconsidered that decision and decided to seek the death penalty, but gave defendant the opportunity to plead guilty. . . ." (*Grimes, supra*, 1 Cal.5th at p. 736.) The decision to pursue the case as a death penalty case in *Grimes*, after previously viewing the case as noncapital, was unrelated to the plea negotiations. The trial court held a hearing and "concluded that the decision was not arbitrary or capricious and that there was no element of retaliation in the decision." (*Ibid.*) No prosecutorial vindictiveness was present: "the record establishes nothing more than that a plea bargain was offered and refused." (*Ibid.*)

Here, the situation is factually different. Unlike *Grimes*, where the change in the nature of the prosecution was independent of the plea negotiation, the prosecutor here specifically linked the death penalty to the defendant's choice to plead guilty. Up until the point where the offer was rejected, the prosecution treated the case as a noncapital one. The prosecutor advised the defendant the refusal of the plea offer would trigger the pursuit of the death penalty at trial. And the prosecutor retaliated, as he said he would, when Mr. Morales balked at pleading guilty. Whereas, in *Grimes*,

"there was no element of retaliation," here there manifestly was retaliation of the most pointed kind.[12] (See also AOB:294-295.)

Both this Court and the United States Supreme Court have stated unequivocally the death penalty is significantly distinct and qualitatively different than other penalties. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 ["the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 ["this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposer."]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572; *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 428.) The death penalty is treated as unique "in both its severity and its finality." (*Monge v. California* (1998) 524 U.S. 721, 732.)

At the very least, this difference should trigger scrutiny of a higher order. To be sure, in a death penalty case, a prosecutor is allowed to offer leniency in plea negotiations. (*People v. Jurado, supra,* 38 Cal.4th at p. 98 ["It is not a constitutional violation . . . for

---

[12] As noted in the AOB, the trial court initially announced that it intended to conduct a hearing into the circumstances surrounding the prosecution's change of mind, then opted not to explore the factual background further. (See 13RT:2831, 2846-2847.) If there is any question or dispute regarding the factual circumstances, the matter should be remanded for an evidentiary hearing on the question of vindictiveness. (AOB 296.)

a prosecutor to offer benefits, in the form of reduced charges, in exchange for a defendant's guilty pleas, or to threaten to increase the charges if the defendant does not plead guilty."].) But directly tying the death penalty to an invocation of trial rights is inconsistent with the special reliability requirements necessary in capital cases. This situation involved a threat of capital punishment in what was treated as a noncapital prosecution, not a promise of leniency in a death penalty case.

Even if the *Bordenkircher* plea negotiation "exception" is deemed generally applicable here, it cannot cure the harm because it is based upon the premise the plea bargaining was fully informed with the advice of competent counsel. (See *Twiggs v. Superior Court*, *supra*, 34 Cal.3d at pp. 369-371.) The entire episode took place under the shadow of pretrial representation by an unqualified lawyer who was unprepared and ineffective. (See also AOB:275-278; Argument I, *ante*.) Mr. Morales had no competent, qualified advice. Without the "fully informed" situation underlying the *Bordenkircher* exception, the exception cannot shield the retaliation here. (*Bordenkircher*, *supra*, 434 U.S. at p. 360; *United States v. Meyer* (D.C. Cir. 1987) 810 F.2d 1242, 1245-46.)

The record demonstrates the prosecutor pursued the death sentence in retaliation for Mr. Morales' rejection of the plea offer, changing a noncapital prosecution into a capital prosecution for the improper and unconstitutional reason of coercing a plea. Reversal of the death sentence, or remand for a hearing on vindictiveness, is required.

III.
THE PROSECUTOR'S MISCONDUCT FIRST IN MISLEADING THE TRIAL COURT INTO ADMITTING OTHERWISE IRRELEVANT AND INFLAMMATORY SEXUAL ASSAULT EVIDENCE AND THEN IN URGING THE JURORS TO INFER FROM IT THAT MR. MORALES COMMITTED AN UNCHARGED ATTEMPTED RAPE OF THE VICTIM BEFORE SHE WAS KILLED, TOGETHER WITH THE TRIAL COURT AND TRIAL COUNSEL'S FAILURE TO PREVENT AND MITIGATE THAT MISCONDUCT, UNDERMINE CONFIDENCE IN THE TRUE FINDING ON THE DEATH-QUALIFYING SPECIAL CIRCUMSTANCE ALLEGATION IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS

A. Introduction

In his opening brief, Mr. Morales argued the combination of a series of errors on the part of the prosecutor, the trial court, and his own counsel in admitting and using evidence and speculation for the purpose of proving that he committed an irrelevant, inflammatory, and uncharged attempted rape of the victim deprived him of a fundamentally fair trial on the issue of his death-eligibility in violation of state law and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (AOB:297-443.)

The only sexual offense the prosecution ever charged or alleged was an attempted rape special circumstance, but the trial court dismissed that allegation due to insufficient evidence to try Mr. Morales for it. (AOB:300-302 [Argument III-B-1].) Nevertheless, with false offers of additional proof and a false promise to submit an attempted rape felony-murder theory of first-degree murder to the jury, the prosecutor misled the court into making two rulings

permitting him to proceed on that theory and present sexual assault evidence solely for the purpose of proving it – evidence the court otherwise would have excluded as irrelevant and unduly prejudicial to the properly charged offenses and allegations. (AOB:347-361; see also AOB:303-312.)

The evidence actually presented in the prosecution's case-in-chief contradicted his pretrial offers of proof and, just as the preliminary hearing evidence did not support the attempted rape felony murder special circumstance, did not support the same theory of first-degree murder at trial. (AOB:347-361; see also AOB:312-317.) The prosecutor recognized as much and ultimately abandoned the spurious theory at the close of his case-in-chief. He conceded at that time the question of whether Mr. Morales committed an uncharged attempted rape of the victim was no longer relevant; similarly, the court ruled, and the parties understood the evidence he had introduced for the ostensible purpose of proving it was no longer relevant and could not be considered for any purpose in the guilt phase. (AOB:361-372; see also AOB:317-320.)

However, the prosecutor's concessions and the court's ruling came too late: the jurors had already been exposed – repeatedly – to inadmissible evidence and insinuations that Mr. Morales had attempted to rape the victim before she was killed. (AOB:361-372; see also AOB:317-320.) Furthermore, in patent disregard of his assurances to the court and counsel, as well as the trial court's rulings and the law, the prosecutor urged the jurors in his guilt phase summation to infer that Mr. Morales had attempted to rape

and otherwise sexually assault the victim. (AOB:372-378; see also AOB:320-322.) The prosecutor's misconduct was compounded by errors on the part of the trial court and Mr. Morales's own counsel. (AOB:378-404.)

The errors had the effect of encouraging the jurors to speculate that Mr. Morales was responsible for extraordinarily inflammatory and irrelevant uncharged sexual crimes against the victim before she was killed and infer therefrom that he – and not one of his five or more confederates – was the burglar who shot her and hence automatically death-eligible. Given the closeness of the case to prove Mr. Morales's identity as the actual killer, the cumulative effect of the errors deprived him of his right to a fundamentally fair trial on the issue of death-eligibility, and a constitutionally reliable death-eligibility verdict, in violation of the Sixth, Eighth and Fourteenth Amendments and resulted in a miscarriage of justice in violation of the California Constitution. The true findings on the special circumstance and personal gun use enhancement allegations, based on the jurors' finding that Mr. Morales was the actual killer, must be set aside and the death judgment reversed.

Respondent, of course, disagrees. (RB:108-147.) At the outset, it is important to correct respondent's misapprehension of the record and Mr. Morales's claim on appeal. The state opens its response by asserting not only is there no dispute that Mr. Morales was *one* of the intruders who burglarized the victim's home, *but in addition*, "[g]iven Morales's recorded confession, *there is also no dispute* that

he was the person that shot" and killed the victim. (RB:108, italics added.) Respondent is certainly correct that there was no real dispute below that Mr. Morales was one of the six or more men who burgled the victim's home. But respondent is decidedly incorrect in asserting "there is also no dispute" that Mr. Morales – and not one of his five or more confederates – was the burglar who shot and killed the victim. As mentioned above and the trial record and Mr. Morales's opening brief make abundantly clear, the *central* guilt phase dispute was over the state's theory that Mr. Morales was the actual killer and, hence, automatically death eligible (under the felony murder special circumstances). (See, e.g., AOB:77, 245, 288-289, 299, 408-443.) Indeed, it is the closeness of that disputed issue that constitutes the very foundation of Mr. Morales's serious constitutional claims. (See AOB:404-443.) Having clarified the central dispute, Mr. Morales will address the merits of respondent's specific arguments in the sections below.

B. The State's Dispute Over the Legal Principles Governing the Trial Court's Rulings Permitting the Prosecution to Proceed on the Attempted Rape Felony Murder Theory Is Without Basis in the Law

In the opening brief, Mr. Morales summarized the legal principles governing the prosecutor's conduct in this case and the trial court's rulings permitting the prosecutor to proceed on the attempted rape felony murder theory. (AOB:321-346 [Argument III, Parts C-E].) Respondent only takes issue with Mr. Morales's statement of the legal issues governing the court's rulings. (RB:114-

118; compare AOB:322-340 [Argument III-D].) Respondent agrees the trial court has a duty to screen out factually unsupported theories of liability. (RB:117; see also AOB:327, 332, 337, citing, inter alia, *People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) Respondent disagrees, however, with the legal principles governing how the court discharges those duties under circumstances like those in this case.

Mr. Morales first argued that when a trial court is confronted with a prosecutor who wants to proceed on an uncharged felony murder theory based on an uncharged felony – particularly an inflammatory uncharged felony like attempted rape – the general rules and principles governing uncharged crimes evidence apply. Most importantly, the trial court has a duty to scrutinize with great care the proffered theory by, inter alia, demanding a legally adequate offer of proof and ensuring there is sufficient evidence to support jury findings that the specific predicate felony was committed and that it was the defendant who committed it. (AOB:322-329, and authorities cited therein.)

Respondent disagrees, reasoning "[w]hile it is true that unrelated, uncharged crimes are generally inadmissible (Evid. Code, § 1101), the same is not true for uncharged crimes that bear directly on the charged crimes." (RB:117.) The only authority respondent cites in support of that proposition is this Court's decision in *People v. Davis* (*Davis*) (1995) 10 Cal.4th 463. (RB:117.) *Davis* did not address or resolve any issue concerning whether "uncharged crimes that bear directly on the charged crimes" are subject to the legal

principles governing the admission of uncharged crimes evidence. The essential premise of the entirety of respondent's argument in this regard is that none of the principles Mr. Morales cited in the opening brief applied here because the *Davis* opinion does not require their application. Given that *Davis* is the foundation of respondent's argument, it is curious that respondent ignores the considerable attention Mr. Morales paid to that case in his opening brief. (AOB:323, 330-332, 335, 338-340.) At the risk of repetition, Mr. Morales will very briefly make those points about *Davis* most relevant to respondent's arguments here.

Respondent is certainly correct that the facts of *Davis* are identical to the relevant facts here – i.e., a proffered felony murder theory at trial where the predicate felony is not only uncharged but has been dismissed by the trial court. (*Davis, supra,* 10 Cal.4th at pp. 513-514.) Where respondent stumbles is in its assumption that whenever any issue arises from those set of facts, it is controlled not only by *Davis*'s resolution of the issues raised but also by *Davis*'s silence on other issues. As Mr. Morales explained in the opening brief, the defendant raised, and this Court resolved the issue of whether the state has *jurisdiction* to try a defendant for murder based on a felony murder theory that is the same as the predicate for a special circumstance the trial court dismissed and this Court answered that issue in the affirmative. (AOB:331-332, 335; *Davis*, *supra*, 10 Cal.4th at pp. 513-514.) But the defendant did *not* raise, and this Court did *not* resolve, any issues concerning the trial court's determination of whether the theory is supported by sufficient

evidence to proceed and present to the jury. "'It is axiomatic that cases are not authority for propositions not considered.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [issue that "never was raised or considered"]; accord, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 566, and authorities cited therein.) Hence, the *Davis* Court's silence on a matter unrelated to the legal issues raised and resolved in that case, even if arising from identical facts, is not a determination that the matter is irrelevant or unnecessary or disapproved.

Respondent further asserts the duty carefully to scrutinize uncharged crimes evidence did not apply here because "the prosecution did not introduce evidence of prior uncharged rapes or attempted rapes *to establish propensity*, but instead introduced evidence of the attempted rape of the murder victim in this case; this evidence was *directly relevant* to the murder charge, which could be proved under a felony murder theory." (RB:116-117, italics added.) This assertion is nonsensical. First, the rules governing the admission of uncharged crimes evidence are not limited to evidence offered "to establish propensity"; to the contrary those rules exist in order to *prevent* jurors from considering uncharged crimes evidence for that improper purpose (absent specific statutory exception). (See AOB:323-326, and authorities cited therein.) Second, those rules are not lifted when the uncharged crimes evidence is "directly relevant" to the charged crimes; to the contrary, by definition all (properly admitted) uncharged crimes evidence is "directly relevant" to the charged crimes inasmuch as relevance to an important, disputed

issue concerning the charged crimes is the first threshold for admissibility. (*Ibid.*)

Mr. Morales further argued the court's duty to scrutinize with care a felony murder theory predicated on an uncharged felony is heightened in capital cases and where, as here, the predicate felony is uncharged because the trial court has dismissed it (or a corresponding felony-murder special circumstance allegation) due to insufficient preliminary hearing evidence to try the defendant. (AOB:333-340.) The state's only response to Mr. Morales's points and authorities in this regard is that *Davis* did not impose any such duty and therefore there is none. (RB:116-117.) As already explained, this issue "never was raised or considered" in *Davis* and " 'cases are not authority for propositions not considered.' [Citation.]" (*People v. Jennings*, *supra,* 50 Cal.4th at p. 684.)

Respondent raises no other challenge to the legal principles Mr. Morales advanced in the opening brief and makes no other discussion of them. Nor does respondent offer any framework that is appropriate or necessary for the trial court to discharge the duty respondent concedes to "screen out" factually invalid theories of conviction. The omissions are telling. The analytical framework Mr. Morales proposes is nothing novel or earth-shattering: based on long standing legal principles in related contexts, he simply asserts that when: (1) the prosecutor proffers a felony murder theory predicated on an uncharged (and inflammatory) felony; (2) that predicate felony is uncharged because it was dismissed by the court after the preliminary hearing for want of sufficient evidence to try the

defendant; and (3) the prosecution is seeking the death penalty, the trial court must scrutinize the proffer with care and caution by demanding legally adequate offers of proof and ensuring the prosecution will present sufficient, admissible evidence to support jury findings beyond a reasonable doubt that the specific predicate felony was actually committed and the defendant was the person who committed it. Respondent concedes the trial court does have a duty to screen out factually invalid theories of liability yet offers no reasoned argument or analysis to demonstrate why the framework Mr. Morales proposes is not appropriate or necessary to discharge that duty under the circumstances and offers no suggestion of its own. In the absence of such argument or analysis, this Court should take its lead from its own precedents and hold this framework is both appropriate and necessary to avoid results like this case.

Finally, respondent argues, the court discharged its duties to screen out invalid theories because it based its rulings on offers of proof from the prosecutor. (RB 115-117.) This argument is a nonsequitur and in any event premature. Mr. Morales's claim is that the trial court did not discharge its duties to carefully scrutinize the prosecutor's offers of proof when it failed to act on their patent inadequacies and obvious questions over their veracity. (AOB:355-361.) Respondent cannot defend the court's rulings on the ground they were based on offers of proof without first analyzing those offers and addressing Mr. Morales's challenges to them. Respondent does so in a separate, later argument and Mr. Morales will reply

accordingly to the impact of respondent's arguments on the trial court's rulings in the next section.

Before doing so, however, it is important to emphasize at the outset that Mr. Morales and respondent agree the trial court rendered two rulings that are before this Court on review. The first is the court's original ruling permitting the prosecutor to proceed on the attempted rape felony murder theory based on the prosecutor's original offers of proof. (AOB:300-306, 347-361; RB:110-111, 120-129.) Following the original offers and ruling, the court and the parties had pretrial discussions that amplified and clarified the original offers, after which defense counsel moved the court to reconsider its original ruling and the court did so, only to reaffirm the original ruling immediately before opening statements. (AOB:306-312, 347-361; RB:111-112, 120-129.) Respondent asserts – and Mr. Morales agrees – that when the court reconsidered its original ruling, it reaffirmed it based not only on the original offers of proof but also on the subsequent discussions relating the original offers. RB:120-129, 137-138.) Hence, the court's second ruling again permitting the prosecution to proceed on the sham attempted rape felony murder theory based on the entire record before it to that point is also on review. (RB:120-129, 137-138.)

///

///

C. The Prosecutor's Offers of Evidence were False, Misleading, and Otherwise Inadequate and the Trial Court and Defense Counsel Failed to Discharge their Duties to Check the Prosecutor and Avoid the Introduction of Irrelevant and Highly Inflammatory Evidence for the Ostensible Purpose of Proving a Sham Attempted Rape Felony-Murder Theory

1. The prosecutor's first offer of proof was false and resulted in the trial court's erroneous evidentiary rulings

As set forth in the opening brief, the prosecutor made two critical offers of proof on which the court based its rulings permitting him to proceed on the attempted rape felony murder theory of first-degree murder, after having dismissed the attempted rape felony murder special circumstance allegation for want of sufficient evidence. The first was that the victim's young son, Joe, would testify in accord with prior statements "that in the bedroom when the children were present, one of the people grabbed mom's shirt, pulled it down [and t]he Defendant walked up and grabbed the victim's breasts . . . ." (7RT:1336; see also 7RT:1373-1375.) This representation was an outright falsehood that the prosecutor persisted in repeating in subsequent proceedings, even in the face of questioning by the court and objections by trial counsel that corresponded with the truth, until he finally was forced to admit the truth in the middle of Joe's actual testimony: Joe had never identified Mr. Morales at all, much less as one of the men who grabbed his mother in the bedroom. (7RT:1373-1375, 1391-1392; 8RT:1656-1658; AOB:303, 306-310, 312-316, 354-357.) The

prosecutor's false representations to persuade the court to allow him to proceed on an unfounded and inflammatory attempted rape felony-murder theory was error and "'incompatible with "rudimentary demands of justice."' [Citation.]" (*Giglio v. United States* (1972) 405 U.S. 150, 153-154, and authorities cited therein, cited at AOB:341-342, 354-355, also citing in accord, inter alia, *People v. Hill* (1998) 17 Cal.4th 800, 822-823.) And that "misleading offer of proof," in turn, "virtually forced the court to error" in permitting the prosecutor to proceed on and present evidence in ostensible support of that theory. (*United States v. Luna* (9th Cir. 1994) 21 F.3d 874, 882-883, cited at AOB:342-344, 349, 355, also citing in accord, *United States v. Whimpy* (5th Cir. 1976) 531 F.2d 768, 771-772.) Furthermore, the trial court would have discovered the falsity had it done its duty to hold the prosecutor to the requisite degree of specificity for offers of proof and resolve the disputes and concerns voiced over its veracity before making its final ruling. (AOB:355-357, citing, inter alia, *Stickel v. San Diego Elec. Ry. Co.*, (1948) 32 Cal.2d 157, 163 ["mere general offer of proof" without identifying "the witness or stating the evidence whereby the fact in issue is to be proved . . . is not correct trial procedure"] and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176 [offer of proof my consist of admissible matter and specifically identify the name of the witness and describe the content of his or her testimony].)

Respondent does not dispute, and hence implicitly concedes, there was no evidence to support the prosecution's offer that Joe (or anyone else, for that matter) would testify that Mr. Morales grabbed

the victim's breasts before she was killed nor was there any basis for a reasonable belief the prosecution could produce competent evidence in conformity with that offer. (See RB:120-123.) Instead, respondent's argument is that the repeated false offer was not the product of intentional deception but rather an honest "belief" that Joe "might" testify in conformity to it. (RB:120-123.) Specifically, according to respondent, the prosecutor "apparently believed that Morales was the man who groped [the victim] and may have thought that because some time had passed since the traumatic events, Joe might now be able to identify Morales as the man who grabbed Elia's breasts." (RB:121.)

While Mr. Morales does maintain the prosecutor's *repeated* misrepresentations of Joe's prior statements and anticipated testimony can be reconciled only with deliberate deception, ultimately the point is an academic one. (See, e.g., AOB:341-342, citing authorities.) As Mr. Morales explained in the opening brief, both this Court and the United States Supreme Court have long recognized that a prosecutor's misrepresentations to the court or jurors constitute misconduct regardless of his or her good faith or bad faith. (AOB:341-342, 355 citing, inter alia, *People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823 and *Giglio v. United States*, *supra,* 405 U.S. at pp. 153-154; see also AOB:354-355.)[13]

---

[13] As Mr. Morales explained in the opening brief, since a prosecutor's subjective good faith or bad faith is irrelevant to whether they violated their duties in this and other regards, this Court has clarified that "the term prosecutorial 'misconduct' is

The state's only response to Mr. Morales's legal argument in this regard is that it "relies heavily" on *United States v. Luna*, *supra,* 21 F.3d 874 and *United States v. Whimpy*, *supra*, 531 F.2d 768, both of which can be distinguished on their facts. (RB:123-124.) But as the foregoing makes clear, Mr. Morales relied in his opening brief on bedrock precedents of this Court and the United States Supreme Court for the settled legal principle that a prosecutor's subjective good faith is irrelevant to the impropriety of their misrepresentations to the court and/or jury. (AOB:341-342, 354-355, citing authorities.) That principle is not dependent on *Luna* or *Whimpy,* both of which Mr. Morales cited as illustrative of the different though related principle that a prosecutor's misrepresentations of offered evidence to the court can mislead the court into error. (AOB:342-344, 349-250, 355.)

Furthermore, respondent makes no attempt to argue the prosecutor's supposed "belief" that Joe "might" change his story at trial and identify Mr. Morales as the perpetrator of the sexual battery he witnessed was a *reasonable* one. (See, e.g., *People v. Bolton* (1979) 23 Cal.3d 208, 213-214 & fn. 2 [misconduct to mispresent facts based on "belief" when there is no "reasonable" basis for belief].) To the contrary, respondent's equivocation that the

---

somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1, cited at AOB:342, fn. 42, also citing in accord, *People v. Centeno* (2014) 60 Cal.4th 659, 666.)

prosecutor "*apparently believed*" or "*may have thought*" Joe "*might*" testify in accord with his offer does not even afford a basis for finding the prosecutor in fact believed what he represented, much less that his belief was a reasonable one. (RB:121, italics added.) The omission is not surprising because any such belief would have been unreasonable given that Joe had been unable to identify Mr. Morales as *any* of the perpetrators on at least two previous occasions and his consistent description of the groping perpetrator was irreconcilable with Mr. Morales's appearance at the time of the crime, as the trial court emphasized below (8RT:1656-1657) and Mr. Morales argued in the opening brief (AOB:313-314, 353), but respondent ignores in this regard.

Nor was the trial court under the impression that the prosecutor's offer was simply a statement of uncertain belief. In this regard, respondent contends, "[n]otably, [the prosecutor,] Mr. Mazurek never said that Joe specifically identified Morales as the man who grabbed Elia's [the victim's] breasts, as opposed to one of the other intruders." (RB:121.) This is simply untrue. The prosecutor's original offer, on which the court based its original ruling, was made with unwavering certainty that "there's going to be testimony" to that effect. (7RT:1336.) Although the prosecutor (deficiently) failed to identify the source of that putative testimony at that time, respondent otherwise recognizes that it became clear from subsequent discussions he was referring to Joe. (See RB:120-122; AOB:303-311, 352-357.) When the matter again arose, the prosecutor *again* represented with unwavering certainty that Joe

(and only Joe) "saw" and would testify that "Mr. Morales came over and groped [the victim's] chest." (7RT:1374.)

It was only after those *certain*, affirmative representations that Joe had reported and would testify that Mr. Morales had committed a sexual battery on his mother in the bedroom that the prosecutor made his first and only reference to his "belief" in the following exchange:

> The court: And he [Joe] is going to be able to identify Mr. Morales? Because on prior occasions he did not.
>
> The prosecutor: *He was able to identify* Mr. Morales not in a six-pack photographic lineup because he looked different in the six-pack than he did, but I believe he was shown a party – and maybe Detective Toms can help me out. But I believe he identified him from a clip from a video at a party. I believe.

(7RT:1374, italics added.) This record makes clear that the prosecutor's use of the term "I believe" – to which respondent attributes such importance – in this exchange (and only in this exchange) was simply an expression of some uncertainty over the *source* from which Joe allegedly had identified Mr. Morales, *not* over the identification itself, which the prosecutor otherwise insisted had been made. Indeed, immediately after the above-quoted exchange, defense counsel reiterated that their discovery indicated Joe had never identified Mr. Morales at all, but the prosecutor never wavered in his false certainty that Joe had and would do so again at trial. (7RT:1374-1375.) After this exchange, the court reconsidered

and reaffirmed its original ruling based on these same affirmative misrepresentations that Joe had identified Mr. Morales and would testify to that effect. (7RT:1401-1403.) Hence, regardless of the prosecutor's good faith or bad faith, the prosecutor misrepresented the evidence to the court and thereby misled the court into twice ruling the prosecutor could present opening statement and evidence in support of a sham attempted rape felony murder theory that was never, and could never have been, actually submitted to the jury.

Indeed, had the court understood the prosecutor's offer to be only the uncertain hope or belief about what Joe "might" testify that respondent speculates, it is clear from the record as a whole the court would have rejected it – quite appropriately – as a basis to support the sham theory. It must be presumed the court knew that a proper offer of proof must be based on *actual,* admissible *evidence* and would have followed that law had the prosecutor made it clear, as respondent suggests, that his offer was none of those things. (AOB:337, 355, 358, citing, inter alia, *People v. Rodrigues, supra,* 8 Cal.4th at p. 1176; *Stickel v. San Diego Elec. Ry. Co., supra*, 32 Cal.2d at p. 163 and *People v. Carlin* (2007) 150 Cal.App.4th 322, 334.) A mere unreasonable hope that a witness "might" testify in a certain way, without any evidence or reasonable basis to believe the witness will so testify, is not enough as a matter of law and would not have been enough for this court. The proof is in the pudding: when the prosecutor did try to elicit Joe's first-time identification of Mr. Morales in the middle of trial, the court prohibited him from doing so precisely because Joe had been unable to identify Mr.

Morales on previous occasions and his description of the groping perpetrator could not be reconciled with Mr. Morales's appearance at the time. (8RT:1656-1658; AOB:313-314, 353.) If only the court had discharged its duties, pressed the prosecutor for a more specific offer, and resolved the disputes over its veracity, it would have made the same realization before it made its evidentiary rulings and prevented the sham from infecting the proceedings, from opening statements through closing arguments.

In sum, as a matter of fact, it is clear from the record that the prosecutor's offer Joe had identified Mr. Morales as the sexual assailant in the bedroom and would do so at trial was not a statement of uncertain belief at all, much less a reasonable though mistaken belief. The prosecutor's offer was an outright lie, which he only repeated when confronted with the truth. In any event, as a matter of law, the prosecutor's bad faith or good faith is irrelevant. His misrepresentations were improper and led the court to make critical evidentiary rulings to Mr. Morales's considerable detriment that it otherwise would not have made.

2. The prosecutor had no competent evidence, and did not reasonably anticipate producing competent evidence, to support his second offer of proof and the trial court erred in basing its evidentiary rulings on it

The prosecutor's second critical offer of proof on which the trial court based its rulings was: "There's also a statement made to Jorge Morales that the Defendant supposedly makes where the victim – where the defendant related that the victim said, 'Johnny,

why are you raping me,' before he shot her." (7RT:1336.) As set forth in the opening brief, this offer was deficient on its face at the time it was originally made because it lacked specificity as to whether it was based on competent, admissible evidence and how the evidence would be presented at trial. (AOB:357-361, citing, inter alia, *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1176 and *People v. Schmies* (1996) 44 Cal.App.4th 38, 53 [offer of proof must set forth actual evidence to be produced].) The prosecutor did not identify the source of his alleged information about the "supposed[]" "statement to Jorge" – i.e., whether Jorge had reported the described statement to law enforcement or some other third party or whether someone overheard Mr. Morales make that statement to Jorge – or represent whether he anticipated that Jorge would testify to that statement or that it would be presented through otherwise admissible evidence and, if so, what and how. (AOB:357-359, citing, inter alia, *People v. Carlin, supra,* 150 Cal.App.4th at p. 334 [offer of proof that named witness would provide testimony was inadequate in absence of witness's statements to police or investigator to the same effect].) And in fact, it became clear after subsequent discussions that the offer was misleading because it was *not* based on admissible matter but rather incompetent "hearsay on hearsay"; Jorge Morales had never reported any such statement to law enforcement; the prosecutor later admitted that he had no basis on which to anticipate that Jorge would testify to that alleged statement, and indeed neither Jorge nor anyone else ever testified to any such

statement. (AOB:357-361, and authorities cited therein; see also AOB:306-311, 316-318.)

Respondent counters the offer was sufficiently specific because the prosecutor specifically identified Mr. Morales as the person who made the statement to Jorge. (RB:124-125.) Respondent misses the point. An offer of proof demands specificity regarding the witness who will testify, the content of their testimony, and the evidentiary basis for anticipating the witness will so testify; or, if not presented through witness testimony, specify what evidence will be admitted and how, as in the theory of admissibility. (AOB:356-359, citing, inter alia, *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1176 and *People v. Schmies*, *supra*, 44 Cal.App.4th at p. 53.) Mr. Morales obviously would not be testifying to that statement; hence, the prosecutor's offer had to specify who would be testifying to it and how that testimony would be admissible. By the prosecutor's own admission, he could not provide such specificity because the only information he had about information Jorge might and might not possess was "hearsay on hearsay." (7RT:1360-1361.)

Respondent further contends the discussions between the court and the parties, following the prosecutor's original offer and the court's original ruling, filled any gaps in the original offer with the requisite degree of specificity and showed the offer was proper. (RB:124.) According to respondent, it was clear from those discussions that the evidentiary basis for the prosecutor's offer was Mr. Morales's mother's report to police that her son, Angel Ivan, had told her that Jorge had told Angel Ivan "about statements" Mr.

Morales had allegedly made to Jorge. (RB:124-125.) But even if this explanation was specific in that it made clear the basis for the prosecutor's offer was this "hearsay on hearsay," it was nevertheless deficient because it was not based on admissible, competent evidence and did not explain how that statement would be admitted and presented to the jury. (7RT:1360-1361.) The prosecutor could not represent that he had evidence he could present that Mr. Morales told Jorge that the victim cried out, "Johnny, why are you raping me?" without having or reasonably anticipating *admissible,* competent evidence to that effect. Clearly, he had neither.

Respondent seems to suggest that this triple hearsay, together with the prosecutor's intention to call Jorge and ask him if Mr. Morales made any statements to him about the crimes, was an appropriate basis on which to offer, or reasonably anticipate, Jorge's testimony that Mr. Morales reported the victim asked him why he was "raping" her. (RB:124-125.) Indeed, respondent contends, ultimately "evidence was produced that Morales told Angel that Elia said, "Johnny, why are you doing this to me?" (11RT:2237.) Although the evidence came out differently at trial, that does not mean the prosecutor had no reasonable basis for believing the evidence would show that Elia said, "Johnny, why are you raping me?" (RB:125-126.) Respondent's contentions are flawed in both law and fact.

Respondent cites no authority to support the proposition that an offer of proof can be based on hearsay and a prayer. This is no doubt because the law – which respondent so assiduously avoids –

holds to the contrary. (AOB:337-338, 359, citing authorities.) Indeed, respondent overlooks that the prosecutor acknowledged that the "hearsay on hearsay" nature of his only "evidence" left him unable to reasonably anticipate how Jorge would answer his questions. (7RT:1360-1362.) Finally, like the state's characterization of the evidence at trial, the state's characterization on appeal of the offered evidence versus the evidence ultimately presented is more than a little misleading.

The evidence ultimately introduced was significantly different from the prosecutor's offer that Mr. Morales told Jorge the victim cried out, "Johnny, why are you *raping* me?" Defense counsel elicited from Detective Wolf that Angel told him (Wolf) that Jorge had told Angel Ivan that Mr. Morales told Jorge that at *some unidentified point* during the robbery and burglary, the victim asked, "Johnny, why are you *doing* this to me?" (10RT:2214-2215, italics added; see also 11RT:2237.) Just as the state did at trial before the jurors, the state equates these statements on appeal. While Mr. Morales certainly agrees that the lay jurors would have equated them given the context in which all the evidence was presented and argued to them, there was no actual *evidence* that "doing" meant "raping." To the contrary, respondent inexplicably chooses to ignore the undisputed fact that the victim *was not raped at all*. Nor was there any evidence of the context in which that putative statement was allegedly made. Under the circumstances, it is unreasonable to assume that "doing" referred to an uncharged and *nonexistent* crime as opposed to the charged crimes of robbery

and burglary. (See AOB:360.)[14] In addition, respondent ignores that the evidence ultimately introduced was hearsay – Detective Wolf testified that Angel had reported to him that Jorge told Angel that Mr. Morales had told Jorge about that statement. (10RT:2214-2215; 11RT:2237.) While it is true that defense counsel's decision to elicit that hearsay transformed it into competent evidence *at trial,* that does not change the fact that the prosecutor had no basis at all on which to anticipate, or represent to the court, that he could present *competent* and admissible testimony regarding *any* statement Mr. Morales allegedly made to Jorge, much less the statement about "raping" the prosecutor promised but for which no actual evidence existed.

For these and the other reasons set forth in the opening brief, the prosecutor's second critical offer of proof was misleading and deficient. The trial court erred by accepting as a basis for its ruling

---

[14] As explained in Argument IV-D-3, *post*, in defending the prosecutor's penalty phase argument equating the actual evidence of the victim's statement to that described in his offer of proof, respondent asserts it was reasonable to infer that "doing" meant "raping" since the victim did not make that statement earlier "while the group ransacked the house" but rather made it in the kitchen where she was disrobed and "shortly before she was shot." (RB:159-160.) As Mr. Morales explains in Argument IV-D-3, *post*, just as the state misrepresented this evidence at trial, the state continues to do so on appeal: the record contains no direct or circumstantial evidence of the timing or circumstances of the victim's statement beyond the fact that it was allegedly made at some unidentified point "during the course of this incident." (11RT:2237, italics added; see also 10RT:2214-2215.)

allowing the prosecutor's sham attempted rape felony murder theory to proceed. Had the court discharged its obligations to carefully scrutinize the offers and hold the prosecution to the legal requirements of a proper offer of proof, the farce would have been realized before the otherwise inadmissible and improper sexual assault evidence and inferences presented in service of that sham unfairly infected the proceedings.

3. The true evidence contradicted the two most critical offers of proof and had no tendency in reason to prove that Mr. Morales attempted to rape the victim, as the state recognized below

Finally, respondent contends, "other than Joe's inability to identify Morales as the person who touched his mother's chest, most of the evidence Mr. Mazurek [the prosecutor] identified pretrial was presented to the jury and Mr. Mazurek's pretrial statements were not intentionally false or misleading." (RB:123.) Respondent points specifically to the children's accounts that the men following the family in the grocery store were "blowing kisses," Joe's account that *someone else* committed a sexual battery on his mother in the bedroom, and the victim's statement, "Johnny, why are you *doing* this to me?" (RB:122-123.) Mr. Morales is puzzled by respondent's argument. Two of the three pieces of true evidence respondent cites – Joe's account and the victim's statement – actually contradicted the prosecutor's offers of proof and hence prove the prosecutor's offers were false and misleading, not the other way round. While Mr. Morales agrees that the offer of the children's accounts of the

men "blowing kisses" in the store corresponded with the true evidence, that had absolutely no bearing on the facts that the prosecutor's other, far more critical offers were false and hence amounted to misconduct. Further, none of the actual evidence had any tendency in reason to prove that Mr. Morales attempted to rape the victim, as the state implicitly recognized when it withdrew the sham theory at the close of evidence. Hence, if respondent's obscure point is that the true evidence would have resulted in the same evidentiary rulings, it is utterly without merit.

4. Defense counsel did not forfeit Mr. Morales's right to raise his constitutional claim on appeal, which respondent ultimately, albeit unwittingly, recognizes

While the prosecutor's deception and improper argument are the foundation for Mr. Morales's constitutional claims on appeal, his claim is not one of prosecutorial misconduct. Rather, it is one of fundamental unfairness and constitutional unreliability based on the combined acts and omissions of the prosecutor, the trial court, and Mr. Morales's own counsel, which resulted in the jurors' exposure to irrelevant and highly inflammatory sexual assault evidence and argument. (AOB:350-352, 377, 405, 410, citing, inter alia, *Taylor v. Kentucky* (1978) 436 U.S. 478, 484-490 [combined impact of acts and omissions by trial court, prosecutor, and trial counsel resulted in fundamental unfairness, without apportioning blame to each party or even determining that any individual act or omission was erroneous] and *People v. Milner* (1988) 45 Cal.3d 227,

254-258 [combined impact of acts and omissions of prosecutor, defense counsel, and trial court resulted in fundamental unfairness].) In this regard, Mr. Morales argued that to the extent additional or different objections were necessary to prevent or mitigate the effect of the uncharged sexual crimes evidence and argument, defense counsel's failure to make them fell below an objective standard of reasonably competent assistance in a capital murder trial. (AOB:378-404.)

Against this background, in this section of its argument, the state contends that additional trial objections to the prosecutor's offers "on the same grounds [Mr. Morales] argues here" were necessary and therefore defense counsel's failure to make them forfeited Mr. Morales's right to raise a prosecutorial misconduct claim on appeal. (RB:118-119 [Argument III-D].) Of course, this is no answer to Mr. Morales's claim at all. Even assuming arguendo that respondent is correct: (1) it is irrelevant because Mr. Morales's claim on appeal is not one of prosecutorial misconduct but rather one of fundamental unfairness resulting from the combined acts and omissions of all trial actors; and (2) only proves Mr. Morales's point that his counsel's failure to lodge those objections fell below objective standards of reasonable competence that contributed to the fundamental unfairness of the trial on death-eligibility and the constitutional unreliability of the death-eligibility verdict. (See AOB:350-352, 378-404.)

Yet, in a rather astonishing about-face, in another section of its brief, respondent disputes Mr. Morales's claim that defense

counsel's failure to make any necessary objections was constitutionally deficient performance by asserting that additional objections to the prosecutor's offers of proof were *unnecessary* and would have been futile. (RB:137-138 [Argument III-F-2].) The state's internally inconsistent arguments on appeal smack of the same gamesmanship it employed throughout the trial. In any event, whether additional objections were necessary or not ultimately makes no difference to Mr. Morales's constitutional claim.

As explained in the opening brief, Mr. Morales's fundamental unfairness claim focuses on the result, which was that the jurors were exposed to extraordinarily inflammatory and otherwise impermissible evidence, opening statements, and closing argument in service of a sham attempted rape felony murder theory that should never had made it past the prosecutor's deceptive pretrial offers. (See AOB:350-352, and authorities cited therein.) As Mr. Morales explained in the opening brief, that result was attributable to the acts and omissions of all or any of the trial actors. While defense counsel was at fault if additional objections were necessary to prevent and/or mitigate the prosecutor's misconduct and the trial court was at fault if additional objections were not, ultimately "it is unnecessary for [this Court] to attempt to divide the blame between lawyer and judge.... Instead, [its] constitutional focus is on the defendant . . . and he lost regardless" of the more blameworthy trial actor. (*Tejada v. Dubois* (1st Cir. 1998) 142 F.3d 18, 24-25; AOB:351-352, citing authorities in accord.)

D. The Errors Resulted in the Jury's Erroneous Reception of Evidence and Remarks That Mr. Morales Had Committed Uncharged Sexual Crimes Against the Victim, Which Were Irrelevant, Highly Inflammatory, and Immune from Fair Adversarial Testing

In his opening brief, Mr. Morales explained how the prosecutor's false and misleading offers of proof combined with his 11th hour abandonment of the sham attempted rape felony murder theory at the close of his case-in-chief resulted in the jurors' erroneous reception of evidence inviting speculation that Mr. Morales had attempted to rape (or committed some other sexual crime against) the victim before she was killed. (AOB:361-372.) Respondent disagrees. As demonstrated below, respondent's disagreement is built on false premises.[15]

---

[15] To assist this Court in reviewing the respective briefs of appellant and respondent, it should be noted that they have different organizational approaches to this issue. In his opening brief, Mr. Morales addressed the evidence put before the jurors that would not have been admitted but for the prosecutor's erroneously misleading offers or proof and sham attempted rape felony murder theory immediately after addressing those errors and before addressing the prosecutor's use of that evidence in summation. (AOB:361-371 [Argument III-G].) And he addressed the prejudicial impact of all of the combined errors of the prosecutor, the trial court, and his own counsel at the end of this argument. (AOB:404-443 [Argument III-J].) Respondent, on the other hand, discusses the admitted evidence in its argument the evidentiary rulings and prosecutorial argument were harmless. (RB:129-135 [Argument III-E].) Mr. Morales addresses here those parts of respondent's harmless error argument relevant to this part of the issue as he framed it in the opening brief.

1. Absent the misleading offers of proof and sham attempted rape felony murder theory, the sexual assault evidence was irrelevant and neither admitted nor admissible to bolster Angel Ivan's credibility

Respondent disputes that the sexual assault evidence would never have been admitted in the absence of the prosecutor's misleading offers of proof and sham attempted rape felony murder theory. First, respondent reasons, the trial court admitted the evidence and "at no point did the trial court rule that the attempted rape evidence was inadmissible or order that it be stricken." (RB:130.) Next, respondent disputes Mr. Morales's argument that the prosecutor acknowledged the attempted rape evidence was irrelevant after he abandoned his sham theory. (RB:129-130.) Finally, respondent perfunctorily asserts – without supporting legal authority or argument –the evidence was still relevant and properly admitted to corroborate Angel Ivan's police statement that Jorge had told him that his brother told Jorge that he had been "involved in a robbery and a rape" and thereby bolster Angel's credibility. (RB:126-127; see, e.g., *People v. Stanley* (1995) 10 Cal.4th 764 793 [reviewing court may pass without consideration "argument" made without citation to supporting authority]; *People v. Barnett*, *supra,* 17 Cal.4th at p. 1182 [same – claim presented without adequate supporting legal argument].) Respondent is wrong on all counts.

As to the court's original ruling admitting the evidence, the prosecutor first offered it in limine to bolster Joe's credibility. (12RT:1337-1338.) The court rejected that theory and indicated it

would exclude the evidence "unless you can think of another theory of relevance . . . ." (12RT:1338-1339.) The prosecutor then claimed that he would rely on the attempted rape felony murder theory; the trial court agreed that it was relevant and admissible, but *only* "under that theory" and "in that situation." (7RT:1339-1339.) Hence, the evidence was admitted *solely* to prove the sham attempted rape felony murder theory and would have been excluded absent that theory. As Mr. Morales explained in the opening brief but respondent inexplicably ignores, when the trial court admits evidence of an uncharged crime as relevant to a limited, permissible issue, by definition its use must be limited to that issue. (AOB:345, citing, inter alia, *People v. Love* (1961) 56 Cal.2d 720, 731.) As Mr. Morales further explained in the opening brief, where – as here – that issue is later "removed from the case," the general proscription against its use applies. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157-1158, 1161-1162, cited at AOB:345-348, also citing, inter alia, *Armenta v. Churchill* (1954) 42 Cal.2d 448, 456-457.) In other words, the evidence again becomes presumptively irrelevant and inadmissible or unusable unless the proponent moves to use it for another purpose, satisfying applicable foundation requirements, and the trial court rules that it may be used for that new purpose after carefully analyzing the matter and discharging its gatekeeping function. (AOB:325-327, citing, inter alia, *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-404.)

Indeed, when the prosecutor abandoned the theory here, the parties addressed the admissibility of the only remaining

prosecution evidence that had not already been admitted – the exhibits. Defense counsel objected the photographic exhibits suggestive of sexual assault were "now irrelevant" given the prosecutor's abandonment of his theory – just as the trial court had ruled in limine that evidence and inferences of uncharged sexual crimes were irrelevant in the absence of a valid attempted rape felony murder theory (whether as a special circumstance or theory of first-degree murder). (12RT:2530.) Exhibit 24 was a graphic, close-up photograph of the victim's naked genital area in a pool of blood. Defense counsel informed the court the photograph "was now irrelevant, and the district attorney agreed to withdraw it for this portion of the trial." (*Ibid.*) The prosecutor *agreed* with defense counsel: "As to the guilt phase, that is correct." (*Ibid.*) The trial court also agreed that it was no longer relevant at the guilt phase (though noting that it might "become relevant" at penalty). (*Ibid.)* The trial court similarly ruled at the guilt phase – without objection from the prosecutor – that Exhibit 65, a photograph of the victim on a gurney naked from the waist down, like Exhibit 24, was now irrelevant or more prejudicial than probative. (12RT:2530-2531, 2561-2562.) The trial court reiterated these rulings at the penalty phase when it noted for the record that it had excluded those photographs because any uncharged sexual crimes became irrelevant at the guilt phase once the prosecution withdrew the attempted rape felony murder theory. (13RT:2868.)

Exhibit 25 was a photograph of the victim's exposed breast. Unlike the other exhibits, the prosecutor argued that Exhibit 25 was

relevant to corroborate Joe's testimony about one of the men groping his mother and hence bolster his credibility. (12RT:2562-2563.) Hence, consistent with the law, he offered the sexual assault evidence for a new and different prosecution-witness-credibility purpose. But just as it had rejected the prosecutor's credibility-based relevancy theory in limine, the court rejected the same theory after the felony murder theory was no longer in issue, ruling that it would be more prejudicial than probative. (12 RT:2563-2564.)

As the foregoing record makes clear, the trial court ruled both in limine and at the close of the prosecution's case-in-chief, and the parties agreed, that the issue of whether Mr. Morales attempted to rape the victim, and hence evidence to prove that putative crime, was irrelevant. Respondent asserts the prosecutor merely agreed to withdraw Exhibit 24 and neither agreed that it, nor any of the other sexual assault evidence that had already been admitted, was now irrelevant. (RB:129.) It is telling that respondent does not support this assertion with any analysis of the record. An analysis of the record contradicts it.

In response to defense counsel's representation to the court that Exhibit 24 was "now irrelevant and the district attorney agreed to withdraw it for this portion of the trial," the prosecutor replied *without qualification,* "that is correct." (12 RT:2530.) The only logical interpretation of this exchange is that the prosecutor agreed to withdraw Exhibit 24 – which had previously been offered (and admitted) to prove the putative attempted rape – *because* the question of whether Mr. Morales attempted to rape the victim, and

hence the evidence offered to prove that uncharged crime, was – as defense counsel put it – "now irrelevant." In other words, there would be no other reason for the prosecutor to agree to withdraw that exhibit, or to withhold any objection to excluding Exhibit 65 on the ground it was more prejudicial than probative. It was *only* with respect to the evidence of a putative *sexual battery* in the bedroom (by groping the victim's breast) that the prosecutor voiced *any* theory of relevance and admissibility – i.e., to bolster Joe's credibility. Reading the record as a whole, the prosecutor clearly acquiesced that, in the absence of the sham attempted rape felony murder theory, the issue of whether Mr. Morales had attempted to rape the victim, and the evidence he had persuaded the court to admit to prove that uncharged crime, was no longer relevant. Respondent is splitting hairs by asserting because the parties did not discuss any of the other sexual assault evidence during this discussion, the prosecutor could not have admitted it was no longer relevant. (RB:129.) The discussion about the relevancy of the exhibits suggestive of sexual assault applied equally to all of the evidence that had been admitted to prove a sexual assault. The only reason the discussion centered on the exhibits and not the other evidence was that the other evidence – due to the prosecution's delayed abandonment of the theory – had already been admitted and hence there was no discussion to be had concerning *admissibility*. Nevertheless, it was clear from the discussion about *relevance* that it applied to equally all of the evidence that had been admitted to prove the "now irrelevant" attempted rape felony

murder theory. At bottom, the prosecutor did agree that the issue of whether Mr. Morales attempted to rape the victim was no longer relevant. By definition, all evidence that had been admitted for that limited purpose was necessarily irrelevant, too. And the trial court did pass on whether Joe's credibility offered an alternate purpose at least for the putative sexual battery evidence and rejected it as more prejudicial than probative. Absent the prosecutor's false offers of proof, this record leaves no doubt that none of the sexual assault evidence would have been admitted and the prosecutor would have been precluded from highlighting it in his opening statement.

As to the state's assertion on appeal the attempted rape evidence was relevant and admissible to bolster *Angel Ivan's* credibility, the state never offered the evidence for that purpose at trial, either in limine or after he withdrew the sham theory when he unsuccessfully argued relevance to Joe's credibility. As previously stated, the prosecution cannot unilaterally decide that uncharged crimes evidence which was admitted for a limited purpose is relevant and usable for a different purpose never presented to the court-as-gatekeeper. (AOB:345-347, citing authorities.) As a matter of law, the issue of whether Mr. Morales attempted to rape the victim was no longer relevant when the attempted rape felony murder theory was "removed from the case" and the evidence that had been admitted solely for the limited purpose of proving that "now irrelevant" issue became equally irrelevant. (*Diaz v. Carcamo, supra,* 51 Cal.4th at pp. 1157-1158, 1161-1162; accord, *Armenta v. Churchill, supra,* 42 Cal.2d at pp. 456-457.) If the state believed it

was relevant and proper to bolster Angel's credibility, then it was incumbent on the state to present that theory to the court. Having failed to do so, the state cannot be heard to argue now that the sexual assault evidence was properly before the jurors for that purpose (or that the prosecutor could argue the evidence for that purpose in summation, as discussed in Part F, *post*.) In any event, had the prosecution offered it for that purpose, it is more than reasonably probable based on the record and the law that the trial court would have rejected that theory.

The prosecutor offered all of the sexual assault evidence in limine to bolster Joe's credibility and later urged at least the sexual battery evidence was relevant and proper for that purpose, but the trial court disagreed on both occasions. (12RT:2562-2564.) Importantly, the court's rulings were consistent with the long and well-settled general rule that inflammatory uncharged crimes evidence "is not admissible solely to corroborate or bolster a [prosecution] witness' credibility." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 835 and authorities cited therein; accord, e.g., *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396-1397; *People v. Scott* (1987) 194 Cal.App.3d 550, 552; *People v. Key* (1984) 153 Cal.App.3d 888, 894; *People v. Thompson* (1979) 98 Cal.App.3d 467, 481; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1294, 1321-1322.) Indeed, as a purely factual matter, the state's new and different theory on appeal that the attempted rape evidence was relevant to prove the truth of Angel Ivan's police statement about his brother being "involved in a robbery and a rape of a woman" is a

nonsequitur. (10RT:2179.) As discussed in the opening brief and undisputed at trial and on appeal, the victim was not, in fact, raped and none of the sexual assault evidence indicated otherwise. (AOB:483-484.) In other words, while Mr. Morales certainly agrees the *lay jurors* would have been misled by the evidence that Mr. Morales allegedly told Jorge (who, in turn, told Angel Ivan) that he had been "involved in . . . a rape of a woman," it was indisputably untrue and hence evidence suggesting a sexual assault short of rape did not corroborate that statement, as respondent now asserts, but rather contradicted it. Based on the record, the law, and simple logic, the possibility that the trial court would not have rendered the same ruling it made with respect to Joe's credibility had the prosecutor offered the evidence to corroborate Angel Ivan's credibility is so remote as to be meaningless.

At bottom and viewing the rulings and discussions of the evidence both in limine and at the close of the prosecution's case, it is clear the jurors would never have heard the sexual assault/attempted rape evidence (and argument) absent the prosecutor's sham offers of proof and attempted rape felony murder theory. The prosecutor's "misleading offer[s] of proof" and bogus felony murder theory "virtually forced . . . the court to error" by admitting evidence that, in truth, was inadmissible and should never have been allowed to influence the jurors. (*United States v. Luna*, *supra,* 21 F.3d at pp. 882-883; accord, *United States v. Whimpy*, *supra*, 531 F.2d at pp. 771-772.) And to the extent the court did not act on patent deficiencies and questions over their

veracity, the trial court failed to discharge its duties to carefully scrutinize a proffered felony murder theory based on the same felony murder it dismissed as the predicate for a felony murder special circumstance in a capital case and screen out factually invalid theories of liability. (AOB:322-340, 355-361, and authorities cited therein.)

2. The Improper Inference that Mr. Morales Allegedly Attempted to Rape the Victim Before She was Killed Permeated the State's Case-in-Chief and The Prosecutor's Tactics Effectively Immunized the Inference from Fair Adversarial Testing

Respondent further asserts that Mr. Morales has "exaggerated" the importance of the sexual assault evidence and innuendo the jurors heard by characterizing it as "minimal," followed by a bullet point list of various items of admitted evidence. (RB:131-133; compare AOB:361-372.) Respondent's assertion is unsupported by analysis or legal authority and does not address the heart of Mr. Morales's extended analysis of the context in which the evidence was presented and the way in which it was used, which gave it meaning. (Compare AOB:361-375; see, e.g., *People v. Barnett*, *supra,* 17 Cal.4th at p. 1182 [argument unsupported by adequate analysis is not properly raised].) Hence, an extended reply to respondent's argument is unnecessary here.

It is, however, important to point out that the state takes markedly different positions on appeal about the evidence from the positions it took at trial. For instance, with respect to Joe's account

that one of the men groped his mother (or, as the prosecutor put it to the trial court below, "grabbed her breasts"), the state now suggests the jurors did not consider it against Mr. Morales because Joe's description of that man was inconsistent with Mr. Morales. (RB:133.) Mr. Morales certainly agrees that Joe's description was irreconcilable with Mr. Morales, as he argued throughout the opening brief and as the trial court recognized below. (See, e.g., AOB:314, 353.) But the temerity in the state's assertion on appeal lies in its stark contrast to its *repeated* misrepresentations at trial that Joe had identified Mr. Morales as that man, in the pretrial proceedings, as well as in opening statements and closing arguments. (7RT:1336, 1374-1375, 1391-1392, 1417, 3145-3185; see also AOB:306-309; 312-316.)[16] Of course, as discussed in Part C-1, *ante,* the state argues elsewhere in its appellate brief that those trial representations were not erroneous or deceptive but rather simply reflected that the state "apparently believed that Morales was the man who groped [the victim] and may have thought that because some time had passed since the traumatic events, Joe might now be able to identify Morales as the man who grabbed Elia's breasts." (RB:121.) But if – as the state otherwise contends on appeal – the state held fast to this honest belief throughout the trial, then it is

---

[16] The prosecutor similarly argued that Mr. Morales was deserving of death because he had "grope[d]" the victim "in front of" her children in the bedroom, then dragged her into the kitchen where he stripped her naked and "sexually assault[ed]" her again before killing her. (14RT:3145, 3183, 3185-3186.)

more than a little disingenuous for the state to assert here that the *lay jurors* would have divined the truth when the trained prosecutor – far more familiar with the actual evidence – could not. (Cf. *People v. Fletcher* (1996) 13 Cal.4th 451, 471 ["if the legally trained prosecutor" was misled or incorrect, then a reviewing court "safely can infer that this was true of the lay jurors as well"].) The state having repeatedly misrepresented to the trial court that Joe had identified Mr. Morales as the man who groped his mother in the bedroom and twice argued to the jury that Mr. Morales was the perpetrator of that putative sexual battery, its startling assertion on appeal that the jurors would have disregarded that sexual crime as irrelevant to Mr. Morales's own culpability again smacks of unfair gamesmanship and should be rejected out of hand.

The state similarly asserts the victim's nudity from the waist down was viewed by the jurors as "simply a fact of the case" and not evidence of "sexual assault." (RB:133.) If that evidence stood alone, unaccompanied by the other evidence and argument suggestive of sexual assault, Mr. Morales would agree. But of course, that evidence did not stand alone. Furthermore, respondent's new position on appeal that the jurors would have drawn no nefarious inference from the victim's partial nudity flies in the face of the state's insistence at trial that this evidence alone was proof of "something untoward," being "a rape, or something non-consensual" (7RT:1330-1332), as well as its *repeated* emphasis on this evidence throughout the trial as proof of a sexual assault, from opening statements, through the state's case in chief, to its closing argument

(8RT:1448-1450, 1463-1466, 1552-1553; 9RT:1699, 1723, 1743-1745, 1760-1762, 1769-1771, 1800-1803, 1900; 10RT:1977-1982; 12RT:2467, 2651.) (AOB:365, 373-374.)

Respondent further asserts the jurors would have disregarded Angel Ivan's police statement that his brother had been "involved in a robbery and a rape of a woman" because it was hearsay. (RB:133.) Of course, it was respondent who elicited that hearsay into evidence without objection; respondent is undoubtedly aware of the well-settled rule that hearsay admitted without objection becomes competent evidence. (See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 476, and authorities cited therein.) Indeed, for this reason, *the jurors were never told that this was hearsay, much less to disregard it*. Respondent offers no theory of logic or law to supports its startling position the lay jurors would have divined the evidence was hearsay and disregarded it as such on their own. Certainly, it is impossible to conceive of such a scenario in the face of the prosecutor's summation arguing the truth of that statement as proof that Mr. Morales tried to rape the victim. (12RT:2651; AOB:365, 373-374.) Indeed, respondent's argument here that the evidence would have been disregarded by the jurors as meaningless hearsay is irreconcilable with its argument elsewhere that the attempted evidence was relevant, properly considered by the jury, and properly utilized by the prosecutor in argument *in order to prove the truth* of Angel Ivan's police statement about the "rape." (RB:126.) The state's repetitious presentation of internally inconsistent arguments on appeal only reinforces the gamesmanship it employed at trial.

More fundamentally, the state's efforts on appeal to minimize the importance of the sexual assault evidence is irreconcilable with its single-minded determination at trial to get the evidence before the jury and throughout the prosecutor's case-in-chief no matter the ethical cost and argue it as proof that Mr. Morales attempted to rape the victim when he did not charge that crime or tie it to any legitimate issue in the case. As this Court has aptly put it under like circumstances, the prosecutor's tactics demonstrate "how important" the sexual assault inference was "to the People's case and 'there is no reason why [the Court] should treat this evidence as any less crucial than the prosecutor – and so presumably the jury – treated it.' [Citation.]" (*People v. Powell* (1967) 67 Cal.2d 32, 56-57, and authorities cited therein.)

Finally, respondent briefly asserts the prosecutor's tactics did not hamper defense counsel's ability to counter the inference of attempted rape. (RB:130-131; compare AOB:362-363, 368-372.) According to respondent, defense counsel were free to call any witness (such as the analyst who performed the sexual assault "kit"), request any instructions (such as an admonition that the absence of physical evidence of a sexual crime is itself "strong evidence" that no such crime occurred), or present any argument they liked to test or answer that inference. (RB:130-131.) Although respondent acknowledges that any such testimony, evidence, or instruction would have been irrelevant after the prosecutor withdrew the bogus attempted rape felony-murder theory, respondent asserts "it seems doubtful" the court would have

prevented defense counsel from litigating that legally irrelevant matter. (RB:130.) Hence, respondent reasons, whether to test or respond to the attempted rape accusation was a tactical decision within defense counsel's control and uninfluenced by the prosecution's own tactics. (*Ibid.)* Not so.

Respondent's assertion that "it seems doubtful" the court would have precluded defense counsel from litigating legally irrelevant matters is not only speculative but runs counter to the presumption that the court would follow the law prohibiting the presentation of evidence and argument on irrelevant (particularly inflammatory) matters. (See, e.g., Evid. Code, § 350; *People v. Fosselman* (1983) 33 Cal.3d 572, 578-581; *People v. Bell* (1989) 49 Cal.3d 502, 548; see also *Walton v. Arizona* (1990) 497 U.S. 639, 653 ["judges are presumed to know the law and to apply it in making their decisions"].) Furthermore, as set forth in the opening brief, a defense attorney simply cannot make a reasonable tactical decision to respond to a prosecutorial impropriety – like introducing and/or arguing irrelevant matter – by engaging in the same impropriety. (AOB:362-363, citing *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 708; see also, e.g., *People v. Bain* (1971) 5 Cal.3d 839, 849 [counsel's impropriety does not entitle opposing counsel to engage in the same impropriety].) Not surprisingly, respondent cites no authority in support of its assertion to the contrary. Even setting aside that point of law, as a point of fact no *reasonable* defense attorney in a capital case would make a tactical decision to engage in a trial within a trial on an irrelevant yet highly inflammatory

matter that is all but assured to influence the jury in both its guilt and penalty determinations, such as an allegation their client tried to rape the victim of the charged crimes. At bottom, a defense attorney should never be put into that position and the law seeks to avoid it by demanding honesty from the prosecution in its representations to the court to enable the court to reliably discharge its gatekeeping duties to exclude irrelevant and inflammatory evidence in the first place. That system failed here due to the prosecutor's dishonesty.

While respondent agrees the sexual assault kit analyst, if called as a witness, would have testified that no physical evidence suggestive of a sexual assault had been discovered on or near the victim's body (such as abrasions, bruising, or DNA under her nails), respondent asserts that such testimony was unimportant because "no physical evidence is required to prove attempted rape." (RB:130.) Respondent misses the point: as Mr. Morales argued in the opening brief and this Court has recognized, the *absence* of physical evidence that would normally be forthcoming is not only relevant but "strong evidence the perpetrator did not have *or intend to have* sexual contact with the victim . . . ." (*People v. Rundle* (2008) 43 Cal.4th 76, 139, cited at AOB:367, also citing other authorities in accord; see also AOB:301-302, 468-462, and authorities cited therein.) But the prosecutor's tactic of waiting until the close of his case-in-chief to withdraw the sham theory, which he had used to deceive a resistant judge into getting the evidence before the jurors, was a neat and highly effective trick that painted counsel into a

corner and precluded them from calling the analyst or otherwise challenging the sexual crime inference, thereby conveying to the jurors that Mr. Morales did not dispute it.

Finally, aside from its 11th hour theory of relevance to Angel Ivan's credibility raised for the first time on appeal, respondent does not dispute the issue of whether Mr. Morales attempted to rape the victim was irrelevant, and evidence to prove that uncharged crime, equally irrelevant. In this regard, respondent does not address and hence does not dispute Mr. Morales's argument that the paramount function of that highly inflammatory but irrelevant evidence and inference was two-fold: to distract the jurors from the critical disputed issue over the identity of the actual killer and the weaknesses in the prosecution's *properly presented evidence* to prove it was Mr. Morales; and to provoke the jurors' sympathy for the victim and animus against Mr. Morales and thereby encourage them to find him death-eligible (and indeed death-worthy) based on improper considerations. (AOB:328-329, 372, 375-376, and authorities cited therein.) Accordingly, no further discussion of this aspect of the issue is necessary.

E. The Prosecutor Improperly Exploited the Errors It Created in His Guilt Phase Summation to the Jurors

As set forth in the preceding section and the opening brief, the parties went into closing arguments understanding and agreeing that the issue of whether Mr. Morales attempted to rape, or otherwise sexually assault, the victim was irrelevant and hence the evidence that had been admitted for the limited purpose of proving

it was equally irrelevant and more prejudicial than probative. (AOB:317-319, 361-362, 372-374; see also Part D, *ante*.) Nevertheless, the prosecutor proceeded to argue the evidence in summation and urge the jurors to infer Mr. Morales had tried to rape the victim before she was killed – an argument that was improper for several reasons. (AOB:372-376.)

Respondent acknowledges the prosecutor argued Mr. Morales attempted to rape the victim before killing her, but contends the argument was proper because it was based on evidence the court admitted and the attempted rape inference was proper and relevant to bolster Angel Ivan's credibility. (RB:126.) Respondent's argument is built on the same premises as those Mr. Morales has already addressed and refuted in Part D-1, *ante* and hence an extended discussion of respondent's argument in this regard is unnecessary here. Briefly, however, respondent asserts that because the court "never altered its initial ruling," the sexual assault evidence was fair game. (RB:126.) Mr. Morales wholeheartedly agrees with respondent's premise that the court "never altered its initial ruling" but respondent's conclusion does not follow from that premise. As discussed above and in the opening brief, the court's initial ruling was not merely that the evidence was admissible but rather that it was admissible solely for the *limited* purpose of proving the attempted rape felony murder theory. As set forth in Part D, *ante*, the court's in limine ruling that the evidence was solely relevant and admissible for that purpose and inadmissible for the purposing of bolstering Joe's credibility was only reaffirmed after the prosecutor

abandoned his theory. But that does not mean the admitted evidence was fair game, as respondent asserts; to the contrary the subject was irrelevant and the evidence now equally irrelevant and unusable for any other purpose.

Indeed, because the court never ruled the putative attempted rape was relevant and could be used to prove Angel's credibility or *any* legitimate issue other than the abandoned attempted rape felony murder theory, the jurors never received any instructions guiding their consideration of the evidence for any purpose at all. (See AOB:371-372.) Instead, the jurors heard the prosecutor's opening statement that the victim was sexually assaulted during the charged crimes, first in the bedroom where her breasts were forcibly exposed and groped in front of her "kids" and later in the kitchen where she was stripped naked in order to rape her, without tying that evidence to any particular issue in the case, including Angel's credibility. (7 RT:1417-1418.) And, after the presentation of the evidence, the jurors heard the prosecutor's closing argument emphasizing the sexual assault evidence as proof that Mr. Morales had attempted to rape the victim before killing her. (12RT:2650-2651.) While it is true that the prosecutor pointed to the other attempted rape evidence as proof that Angel Ivan's police statement about Mr. Morales being "involved in a robbery and a rape" was true, the prosecutor never explicitly argued that the truth of that statement bolstered the credibility of his others and certainly never suggested that the evidence could *only* be considered for that purpose. To the contrary, as discussed in Part D-2, *ante,* because it

was undisputed that the victim was not "raped" at all, there was no legitimate question that Angel Ivan's statement in this regard was *not* true and hence it tended to undermine rather than corroborate the other parts of his police statement.

Indeed, it is precisely because the attempted rape inference was untethered to any legitimate issue in either the prosecutor's arguments or the jury instructions, the jurors' "natural and inevitable" inclination (*People v. Guerrero* (1976) 16 Cal.3d 719, 725, cited at AOB:375-376) would have been to consider its obvious factual – though legally prohibited – relevance as proof of: (1) "excessive weight" (*ibid.*) that Mr. Morales was a person of uniquely abhorrent character, who had already committed a violent and heinous crime against the victim much more serious than burglary and robbery and therefore was much more likely than his confederates to have been the person who actually killed her, rendering him automatically eligible for the death penalty (AOB:375-376, citing, inter alia, *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230, and authorities cited therein [where there are "'no permissible inferences'" to draw from uncharged crimes evidence, reviewing court infers jurors must have used it for "'improper purpose'"] and *McKinney v. Rees* (1993) 993 F.2d 1378, 1384-1385); and (2) the heightened trauma the victim and her family endured, which appeals to jurors' passions and tends to provoke their sympathy for the victim and animus against the accused – powerful, but improper considerations at the guilt phase. (AOB:376, citing *People v. Vance* (2010) 188 Cal.App.4th 1182, 1206

and *Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1114-1116; see also AOB:328-329, 345-347, 371-372, and authorities cited therein.)

For these and all the reasons set forth in Part D-1, *ante*, and the opening brief, by exploiting the evidentiary error he misled the court into committing and improperly arguing that evidence and inference of attempted rape in summation, the prosecutor committed gross misconduct from the beginning of the trial on the death-qualifying special circumstances to the end.

F. Defense Counsel Failed to Perform in Accord with Objective Standards of Reasonable Assistance Demanded in a Capital Murder Trial with Respect to the Admission of Evidence and Prosecutor's Argument that Mr. Morales Attempted to Rape the Victim Before She Was Killed

As mentioned in the preceding sections and set forth in the opening brief, the admission of the attempted rape evidence and the prosecutor's use thereof in argument certainly began with the prosecutor's misconduct, but both the trial court and trial counsel also failed in their respective duties to prevent and/or mitigate the effect of that misconduct. As to defense counsel, given the objections and motions they did make, there was no conceivable trial tactic to justify: (1) pretrial counsel Rozenberg's failure to move to dismiss the attempted rape felony-murder special circumstance allegation and allow the prosecution to consider it in making its decision actually to seek the death penalty and successor trial counsel's failure to obtain a ruling on their fully briefed motion before voir dire; (2) trial counsel's failure to make clear objections to the

prosecutor's offers of evidence at the most appropriate time and place; and/or (3) their failure to move to strike the erroneously admitted evidence and admonish the jurors to disregard any evidence or suggestion of uncharged sexual crimes for any purpose after the sexual assault evidence was rendered irrelevant but the prosecutor nevertheless argued it and the inference of attempted rape in his closing argument. (AOB:378-404.) Respondent disagrees. (RB:135-141.) Respondent is wrong.

1. Whether due to defense counsel error, state error, or some combination thereof, the jurors should never have been exposed to, or subjected to voir dire on, an inflammatory attempted rape felony-murder special circumstance that was unsupported by sufficient evidence and not in issue in the case

In the opening brief, Mr. Morales argued that defense counsel's failure to obtain a ruling on their fully briefed Penal Code section 995 motion to dismiss the attempted rape felony murder special circumstance allegation before jury selection proceedings commenced – and hence before the jurors were voir dired at length about it and counsel centered their selection strategy on it – fell below objective standards of reasonably competent assistance in a capital case. (AOB:382-395.) Respondent disagrees based on the hypothesis that it is conceivable counsel might have made a reasonable tactical decision to delay ruling on the section 995 motion in order to voir dire the jurors on the impact of an attempted rape felony murder charge because, regardless of

whether that allegation was dismissed, the prosecution could still proceed on an attempted rape felony murder theory and attempted rape evidence could still be admitted in support of that theory. (RB:136-137.) This tactic proved prescient, according to respondent, because that is in fact what happened here. (*Ibid.*)

Of course, Mr. Morales already predicted and refuted this very argument in the opening brief as follows:

> Finally, it may be said that under the facts of this unique case, even if the trial court had dismissed the special circumstance allegation before voir dire, defense counsel would still have been faced with the court's ruling permitting the prosecutor to proceed on an attempted rape felony-murder theory of first degree murder. Under that hypothetical scenario, it is conceivable that a competent attorney might decide to voir dire the jurors on that theory given its tendency to affect their ability to be impartial. However, that hypothetical decision under that hypothetical scenario would not have been a reasonably informed one in this case because it would have been based on a false premise created by the state that attempted rape felony-murder liability would actually be in issue. (See *People v. Frierson* (1979) 25 Cal.3d 142, 163 [tactical choice made in absence of "factual framework within which to make a competent, informed tactical decision" is not reasonable]; accord, *Rompilla v. Beard* (2005) 545 U.S. 374, 387; see also *Strickland, supra*, 466 U.S. at p. 686 [the "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense"]; *United States v. Bagley* (1985) 473 U.S. 667, 682-683 [prosecutor may prevent effective assistance of counsel where, "'[i]n reliance on [a prosecutor's] misleading representation, the defense might abandon . . . trial strategies that it otherwise

> would have pursued"']; *Banks v. Dretke* [2004] 540 U.S. [668,] 691 [defense counsel's action or inaction made in reliance on prosecutor's misrepresentations cannot be grounds for procedural default].) Thus, even under that hypothetical scenario, state error would have produced the same intolerable result: conducting voir dire on an inherently inflammatory topic that was not a legitimate issue in the case.

(AOB:394.) Inexplicably, respondent does not even acknowledge much less rebut Mr. Morales's points in making the very argument he predicted. Nor does respondent otherwise dispute or address the rest of Mr. Morales's contentions that, whether due to state error, defense counsel error, or some combination thereof, the jurors should never have been exposed to, or voir dired about, an inflammatory attempted rape allegation that was unsupported by sufficient evidence and irrelevant to any legitimate issue in the case. (AOB:382-395.) Hence, Mr. Morales considers this issue to be fully joined by the briefs on file with the Court and makes no further discussion of it here.

2. Mr. Morales accepts respondent's concession that additional objections to the prosecutor's offers of proof and the evidentiary rulings based thereon were unnecessary to alert the trial court to the errors raised on appeal and preserve them for appellate review

In the opening brief, Mr. Morales argued that, to the extent they were necessary to alert the trial court to the deficiencies in the prosecutor's offers of proof as the foundation for admission of the evidence, defense counsel's failure to make more focused or

additional objections fell below an objective standard of reasonableness. (AOB:395-397.) In stark contrast to its earlier argument (RB:118-119), respondent here asserts that defense counsel's performance was not unreasonable because additional objections were unnecessary (RB:137-138). The objections and motions defense counsel did make to the offers throughout the in limine proceedings, respondent argues, were sufficient to alert the court to the problems raised on appeal, the court fully considered all those objections and disputes in reconsidering and reiterating its evidentiary ruling before opening statements commenced, and hence any additional objections would have been futile and unnecessary. (RB:137-138, citing *People v. Anderson* (2001) 25 Cal.4th 543, 587 [objection requirement excused where it would be futile].) Mr. Morales accepts respondent's concession that the objections defense counsel did make were sufficient to bring the errors to the attention of the trial court and correct them in making its second ruling and hence sufficient to preserve the errors for appeal. Accordingly, no further discussion of this aspect of the issue is necessary here.

3. Defense counsel's failure to object to the prosecutor's misconduct in summation and move to strike the attempted rape evidence and admonish the jurors accordingly was incompatible with prevailing professional norms in capital cases

As set forth in the opening brief, after the prosecutor's withdrawal of the sham attempted rape felony murder theory,

defense counsel did not move to strike the evidence that had been admitted to prove that theory and admonish the jurors to disregard the evidence and any inference of sexual assault for any purpose. (AOB 397-399.) However, because the court and the parties agreed the putative sexual assault(s) was no longer relevant, defense counsel reasonably could presume that it would not be mentioned in argument and therefore a motion to strike risked highlighting the evidence when otherwise it would not be used or commented on. (*Ibid.*) In other words, at that time and under those circumstances, Mr. Morales acknowledged that it is conceivable defense counsel made a reasonable tactical decision to withhold a motion to strike and admonish because it risked backfiring and causing more harm than good. (*Ibid.)* But the tactical basis of that decision was obliterated when the prosecutor *did* emphasize the evidence in summation and urge the jurors to infer from it that Mr. Morales tried to rape the victim. (*Ibid.*) Defense counsel, who otherwise objected to the sexual assault evidence in both the guilt and penalty phases, neither objected to the prosecutor's argument nor moved to strike the evidence he utilized and admonish the jurors accordingly. At that point, the perceived benefit of withholding the motion to strike was lost and there was no longer any tactical benefit to be gained from it. Furthermore, by not moving to strike, the evidence would be part of the admitted guilt phase evidence that the jurors would be instructed to consider at the penalty phase when otherwise it was not admissible. (AOB:402-403.) Under these circumstances, objective standards of reasonable competence in a capital case

demanded that counsel seek to mitigate the effect of the prosecutor's misconduct and the admission of otherwise inadmissible, highly inflammatory evidence by both objecting to the prosecutor's argument and moving to strike the evidence and admonish the jurors accordingly. (AOB:397-403.) No conceivable, reasonable tactic could justify the omissions.

The state's response to Mr. Morales's argument in this regard is a puzzling one. Respondent first makes much of defending a decision Mr. Morales has not challenged: defense counsel's *initial* decision – after the prosecutor withdrew the attempted rape felony murder theory but before the prosecutor's argument – to withhold a motion to strike the evidence and admonish the jurors accordingly. (RB:138-139.) At the same time, respondent simply ignores the challenge Mr. Morales has made to his counsel's failure to bring that motion *after* the prosecutor's argument. (See RB:138-140.) Similarly, respondent rebuts another claim that Mr. Morales never made by defending "[t]rial counsel's decision not to . . . respond to that evidence in counsel's own closing [as a] . . . reasonable, tactical choice[.]" (RB:139.) Not only did Mr. Morales ever claim otherwise; he argued to the contrary that defense counsel could *not* effectively rebut the admission and use of the evidence in their own argument for several reasons. (AOB:401-402, citing authorities.)

The only substantive response the state offers to the claims Mr. Morales actually has made is a brief one that defense counsel's failure to object to the prosecutor's argument was objectively reasonable either because: (1) the argument was not improper or

objectionable for the reasons already stated in respondent's preceding arguments; or (2) if improper, the prosecutor's argument was "brief." (RB:140.) As to (1), Mr. Morales has already addressed and refuted this argument in Parts D-1 and E, *ante*, and hence no further discussion is necessary here. As to (2), respondent's assertion that counsel's failure to object to the improper argument was reasonable due to its brevity is unsupported by any argument, analysis, or citation to authority. (RB:140.) Hence, this Court should pass that assertion without consideration. (See, e.g., *People v. Stanley*, *supra,* 10 Cal.4th at p. 793; *People v. Barnett*, *supra,* 17 Cal.4th at p. 1182.) Certainly, respondent has offered nothing in this regard to which Mr. Morales can reply.

For all the reasons set forth in the opening brief and ignored by respondent, defense counsel's performance fell below objective standards of reasonably competent assistance in a capital case by failing to object to the prosecutor's improper argument and move to strike the evidence the prosecutor deceived the court into admitting and to admonish the jurors accordingly.

G. The Cumulative Effect of the Errors Committed by The Prosecutor, The Trial Court, And Mr. Morales's Own Counsel Deprived Mr. Morales Of a Fundamentally Fair Trial and Constitutionally Reliable Verdict on The Death-Qualifying Special Circumstance Allegations

In the opening brief, Mr. Morales argued the errors committed by the prosecutor, the trial court, and/or his own counsel, or any combination thereof, resulted in a fundamentally unfair trial

and constitutionally unreliable verdict on the death-qualifying special circumstance allegations, in violation of the Sixth, Eighth, and Fourteenth Amendments and state law. (AOB:404-443.) That is, absent the cumulative effect of those errors, there is a "reasonable probability" – or a "reasonable chance" – the jurors' verdict on the death-qualifying special circumstance allegations would have been different. (AOB:406-408, quoting *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, and citing in accord, inter alia, *Strickland*, *supra*, 466 U.S. at pp. 693-694 and *Kyles v. Whitley* (1995) 514 U.S. 419, 434.)

From its silence on the matter, it appears that respondent takes no issue with the well-settled principle that the combined effect of missteps on the part of any or all trial actors – be it prosecutor, the trial court, defense counsel, or any combination thereof – may produce a fundamentally unfair trial and constitutionally unreliable result. (See AOB:404-406, citing authorities.)[17] Nor does respondent have any quarrel with the legal standard for measuring fundamental unfairness and constitutional unreliability. (AOB:406-408, citing authorities.) Finally, respondent agrees the jurors found true the special circumstance allegations based on their finding that Mr. Morales was the actual killer and does not dispute the jurors never reached or resolved the additional

---

[17] Respondent curiously includes two separate sections addressing prejudice from the errors in its brief. (RB:129-135 [Argument III-E], 141-148 [Argument III-G.] Mr. Morales here addresses respondent's harmless error arguments as one.

elements necessary to hold an aider and abettor liable for a felony murder special circumstance. (AOB:408-411; see RB:144.)

Respondent's only dispute is with Mr. Morales's position that the cumulative effect of the errors actually satisfied the standard for fundamental unfairness and constitutional unreliability. (AOB:411-433; RB:141-148; see also RB:129-135.) In other words, respondent's implicit premise is that there is no "reasonable chance" that the sexual assault evidence and argument influenced the jurors' unanimous findings that Mr. Morales was the actual killer or that even a single juror would have had reasonable doubt over that critical issue in the absence of the errors. That premise is flawed.

At the outset, is important to bring the arguments concerning prejudice into focus on the relevant issue before the Court. In making its oft-repeated argument that the prosecution's case was so strong that there is no reasonable chance of a different result, respondent belabors the strength of the evidence to prove that Mr. Morales participated in the underlying felonies and hence was guilty of first-degree felony murder. (RB:133-135.) But as Mr. Morales made clear in the opening brief (and conceded below), there was no real dispute over that issue (under the law extant at the time of trial) and hence Mr. Morales makes no claim of prejudice with respect to that issue. (AOB:408-411.) Instead, the critical disputed issue was the death-eligibility special circumstance allegations and the critical question for the jurors to resolve in that regard was whether Mr. Morales – and not one of the six or more other men with whom he committed the burglary – was the actual killer. If so,

the death-eligibility special circumstance was automatically true, without need to resolve any additional elements on proof beyond a reasonable doubt. (*Ibid.)* Mr. Morales's argument is that the cumulative effect of the errors undermines confidence in *this* finding and *this* result to a constitutionally intolerable degree. Hence, respondent's focus on the state's case to prove other, undisputed issues is irrelevant and should not distract the Court from the critical question before it: "whether [it] can be confident" that the death-eligibility verdicts actually rendered – i.e., that Mr. Morales was the actual killer and hence automatically death eligible – "would have been the same" had the jurors never been exposed to the extraordinarily inflammatory evidence and argument that Mr. Morales attempted to rape the victim before she was killed. (*Kyles v. Whitley, supra*, 514 U.S. at p. 453; accord, *Strickland*, *supra,* 466 U.S. at pp. 687-689, 694-695.)

In insisting that the answer to this question is yes, respondent makes the assertions already discussed in Part D-2, *ante*, that the attempted rape evidence was "minimal" and the jurors: (1) did not consider against Mr. Morales Joe's account of the putative sexual battery in the bedroom; (2) did not draw any nefarious sexual inference from the victim's partial nudity; and (3) disregarded Angel Ivan's police statement that Mr. Morales allegedly said he had been "involved in a robbery and a rape of a woman" as hearsay, even though never informed as much and even though the prosecutor argued to the contrary that the jurors should consider the truth of that statement. (RB:133, 142-143.) As already

discussed in Part D-2, *ante*, the state's assertions in this regard on appeal are starkly inconsistent with the state's arguments and representations below and indeed with its own other arguments on appeal. In any event, as already explained, the assertions are simply nonsense and ignore the overall context in which the evidence was presented and argued to the jurors.

As discussed in the opening brief yet ignored by respondent, because the attempted rape felony murder special circumstance was not dismissed until *after* the jury was selected, the jurors were voir dired extensively on it and hence they were primed to hear evidence that Mr. Morales had tried to rape the victim even before opening statements. (See AOB:363-370.) Respondent also ignores that the prosecutor met their expectations in opening statement in which he promised to present evidence that Mr. Morales sexually assaulted the victim. (7RT:1417-1418.) And when the evidence was presented, it was accompanied by the prosecutor's suggestive questioning and repeated emphasis on the victim's partial nudity when her body was found, starkly illustrated by graphic photographic exhibits displayed to the jurors. (AOB:363-370.) And, of course, the prosecutor emphasized the evidence and inference of attempted rape in his guilt phase closing argument.

Respondent attempts to dismiss the import of the prosecutor's argument based on its length, but that approach ignores the atmosphere in which the argument was given. (RB:133, 140.) The prosecutor's summation was the last of the thousand cuts the prosecutor delivered from opening statements and throughout the

guilt phase. In other words, contrary to the implicit premise of respondent's contentions, the evidence and summation were not disparate events presented in sterile atmospheres, untethered to anything else. For the jurors, the specter that Mr. Morales (and only Mr. Morales) had tried to rape the victim before she was killed was woven into the very fabric of the entire trial, from the jurors' first exposure to the case on voir dire, throughout opening statements and the evidentiary phase, and to the final words they heard from the prosecutor before they deliberated the issue of Mr. Morales's death eligibility. The words of this Court bear repeating: "We have seen how important" the attempted rape evidence and inference "were to the People's case and 'there is no reason why we should treat this evidence as any less crucial than the prosecutor – and so presumably the jury – treated it.' [Citation.]" (*People v. Powell, supra,* 67 Cal.2d 32, 56-57, and authorities cited therein.)

With respect to the inherently inflammatory nature of uncharged sexual crimes, respondent contends that the cases Mr. Morales has cited for that proposition are inapposite because all involved "unrelated" uncharged crimes against different victims while the uncharged attempted rape here was against the same victim of, and therefore "related" to, the charged crimes. (RB:143; compare AOB:412, citing authorities.) Respondent does not explain why this distinction is relevant, but Mr. Morales assumes respondent's point is that the former are more inflammatory than the latter. Mr. Morales has no quarrel with the distinction respondent draws but its conclusion does not flow from that

premise. It is telling that respondent does not even attempt to explain or argue its conclusion because logic dictates just the opposite.

As Mr. Morales explained at length in the opening brief but respondent inexplicably ignores, the fact that the uncharged attempted rape (or other sexual offense) in this case was allegedly committed against the same victim as the charged murder significantly *increased* the inflammatory nature that otherwise inheres in uncharged sex crimes alleged against different victims. (AOB:412-414.) The latter suggests a general propensity for violent crime while the former suggests a specific propensity for violent crime *against the charged victim*. Indeed, studies consistently indicate that death-qualifying murder convictions and death sentences are much more likely to result in the face of allegations the defendant sexually assaulted the victim than they are in other cases. (AOB:413-414, citing authorities.) Similarly, unlike "unrelated" uncharged sex crimes against other, nameless victims, uncharged sex crimes against the charged victim tend to provoke in the jurors feelings of sympathy for the victim and animus against the defendant and thereby "shift[] the jury's attention from the evidence to the all too natural response of empathizing with the victim's suffering and [her] family's resulting torment." (*People v. Vance, supra,* 188 Cal.App.4th at p. 1206, cited at AOB:414.) "Once such emotions are unbridled, they are hard to reign in." (*People v. Vance, supra,* 188 Cal.App.4th at p. 1206; see also, *People v. Scott* (2011) 52 Cal.4th 452, 491.)

Respondent disputes Mr. Morales's argument that the *percipient witness* testimony indicating that Mr. Morales was in the bedroom with the children when the victim was shot left considerable room for doubt that it was Mr. Morales, and not one of the five or more other burglars, who shot and killed the victim. (See AOB:415-417.) Respondent asserts that this argument is "undermined by his confessions and Brianda's consistent identification of Morales as one of the men in her house and the man that pulled [the victim] by her hair out of the bedroom and to the kitchen right before she was shot." (RB:144.) This bare assertion unaccompanied by a direct quotation to the record or any analysis of the actual evidence is a gross misrepresentation of the record.

Brianda never reported at all – much less "consistent[ly]" – that Mr. Morales removed the victim from the bedroom to the kitchen "right before she was shot," from which it could be inferred that Mr. Morales was the person who shot her. (RB:144.) An examination of the record to which respondent cites reveals the prosecutor *attempted* to elicit testimony to that effect *and failed without success.* (*Ibid.*) In fact, Brianda "consistent[ly]" reported that she never heard the shot at all. (9RT:1811-1812; 3SCT:717.) What she *did* witness and report was that after Mr. Morales removed her mother from the bedroom, *he returned to the bedroom alone to continue searching for loot.* (9RT:1796, 1799-1800, 1863-1864, 1868, 1876-1877; 3SCT:717-718.) She further reported the ponytailed perpetrator then left the room and went into the kitchen, leaving Mr. Morales behind with the children, immediately after which she

heard her mother scream. (3SCT:717.) While she never heard the shot, the other children reported their mother screamed right before they heard the shot. (9RT:1721-1722; 10RT:2007-2008; 3SCT:719.) Hence, as Mr. Morales explained and respondent ignores, even by Brianda's reporting, Mr. Morales was in the bedroom with the children when the victim was assaulted and shot in the other room and therefore could not have been the actual killer. (AOB:416-417.) The other children's accounts corroborated that view. All three of the children reported that one of the burglars wielded a knife and had an almost bald or closely shaved head and a light complexion. (8RT:1643, 1687-1688; 3SCT:719, 721; 3SCT:719, 721.) While the other children were never able to identify Mr. Morales at all, Brianda consistently identified him as that knife-wielding burglar (and video images proved that Mr. Morales had a light complexion and "really close-shaved head" at the time of the crime). (8RT:1657; 9RT:1836, 1846, 1863, 1866, 1913; 10RT:2023, 2056, 2434, 2454; 3SCT:718; see also 10RT:2009, 2038.) Like Brianda, Jennifer reported the knife-wielding perpetrator (Mr. Morales) was in the bedroom with the children searching for loot when she heard the scream followed by a gunshot coming from the direction of the kitchen. (10RT:1993-1994; 3SCT:719.)[18] While Joe's account

---

[18] Indeed, by Jennifer's account, Mr. Morales never left the bedroom at all. While she and Joe gave conflicting descriptions of the man or men who removed their mother from the bedroom, both consistently reported that Mr. Morales (or the knife-wielding burglar) was *not* one of them: he remained behind in the bedroom when *someone else* removed the victim toward the direction of the

differed somewhat from Brianda and Jennifer's in that he reported *all* the burglars had left the bedroom by the time he heard that shot, it still left considerable room for reasonable doubt that any one burglar was a better candidate for the shooting than any of the others. (9RT:1697; 3SCT:721; see also 8RT:1650; AOB:416-417.) Respondent cannot avoid these innocent inferences from the actual evidence by misrepresenting some evidence and ignoring the rest.

Respondent similarly argues there is no reasonable chance the percipient witness accounts would have left even a single juror with reasonable doubt over Mr. Morales's identity as the actual killer absent the errors because "Morales confessed to shooting Elia in the heart with an AK-47. (29CT:8311, 8318, 8322, 8326.) He even explained that he shot her because she recognized him, providing a motive for the murder. (29CT:8310, 8320 8325.)" (RB:134; see also RB:144-145.) Respondent is referring, of course, to the incomplete transcript of the largely unintelligible tape recording of the phone conversation between Mr. Morales and his mother. (See AOB:421-441.) But respondent does not address Mr. Morales's detailed analysis of that document other than to blithely declare that his "attempts to poke holes at individual portions of his statements fall short." (RB:145.)

In fact, contrary to respondent's assertion, that transcript contained no clear and ambiguous admission of personal liability

---

kitchen. (8RT:1648; 9RT:1695-1696, 1721, 1742; 10RT:1968-1971, 1993; 3SCT:719.)

like "I shot" or "I killed" the victim. (See AOB:424-438.) The questions and answers recorded and transcribed were far more ambiguous. While it is certainly true that *one* plausible inference the jurors could have drawn from the transcript is that Mr. Morales admitted to shooting the victim, that was by no means the *only* plausible inference it could support. And, of course, as the jurors were instructed, when circumstantial or ambiguous evidence is susceptible of more than one reasonable inference, the jurors in a criminal case must adopt the inference consistent with innocence. (AOB:427-428, citing, inter alia, *People v. Bean* (1988) 46 Cal.3d 919, 932-933 and *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 549.)

Respondent's assertion that Mr. Morales confessed to the shooting is based on cherry-picked statements from the transcript unaccompanied by any analysis of the context in which they were made. (RB:145.) But as explained in the opening brief, Mr. Morales's statements were answers to his mother's questions about the crimes and hence can only be understood if read in the context of those questions. For example, his mother consistently inquired into what Mr. Morales's *group* did as a whole, referring to "you guys (29CT:8311:15, 8318:1, 8322: 22, 8323:20, 8324:13, 8325:3-5) and frequently used the terms "you guys" and "you" interchangeably. (AOB:424-437.) Hence, it was not clear whether Mr. Morales was conveying what his group had done or what he had personally done. Indeed, throughout the discussion of the crimes, he never attributed any particular act to any particular person. Similarly, she asked

compound questions in the disjunctive, leaving it unclear to what question Mr. Morales was responding. (*Ibid.)* Similarly, it cannot be ignored that many of the exchanges occurred in the context of unintelligible material, leaving it unclear to what Mr. Morales and his mother were referring. (AOB:424-438.) Against this background, respondent's approach of cherry-picking statements out of context as proof so strong that it eliminated any possibility of doubt in this case is fundamentally flawed.

As to the centerpiece of the state's case, for example, respondent asserts: "[c]onfirming that he shot [the victim], Morales told his mother, "Well yes it was me" and "Even if it hadn't been it's still the same. (29CT:8310-8311.)" (RB:145.) But respondent ignores the question that Mr. Morales was answering – his mother asked, "you did that ***or*** where you there at the time or what. What." (29CT:8310; AOB:426-428.) Respondent also ignores that due to the unintelligible matter preceding this exchange, it was not clear to what she was referring – whether it was to the entire episode, which they had mentioned preceding the exchange, or whether it was to the actual shooting (as respondent asserts). (AOB:426-428.) Respondent also ignores Mr. Morales's mother's follow-up question, "What things did you guys do and who was with you?" (29CT:8311.) As explained at length in the opening brief but ignored by respondent, reading this exchange in context renders it susceptible of any number of plausible interpretations: Mr. Morales admitted that he and his confederates had committed the felonies resulting in the victim's death; he and his confederates were responsible for the

shooting; or even – as respondent asserts – that Mr. Morales was admitting that he killed the victim. But proof beyond a reasonable doubt demands "more than simply one of several plausible explanations for an ambiguous event." (*People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7.) While it is true that Mr. Morales told his mother the victim mentioned his name and explained nothing would have happened to her had she kept quiet, and that certainly provided a motive for the shooting, that motive was not exclusive to Mr. Morales. (29CT:8310, 8325; AOB:411.) As explained in the opening brief but ignored by respondent, it could apply equally to all the men since all would reasonably deduce that if the victim identified Mr. Morales to police, it was only a matter of time and resolve before all the police would learn the identities of his confederates. (AOB:411.)

Respondent's remaining argument rests on similarly cherry-picked statements taken out of context of the incomplete transcript of the unintelligible recording and suffers from the same flaws. (RB:145.) Inasmuch as Mr. Morales, has extensively analyzed and addressed those statements in the context in which they were made and respondent has chosen to ignore it, no further reply to respondent's argument in this regard is necessary. (AOB:424-438.) The incomplete transcript of the significantly unintelligible tape recording was simply too ambiguous to melt away the doubt left by the accounts of Brianda and Jennifer that Mr. Morales was in the bedroom with them when their mother was assaulted and shot in

the kitchen or the account of Joe, by which *any* of the burglars could have been the killer.

Importantly, the trial judge agreed. As Mr. Morales emphasized in the opening brief, after the trial judge heard all the prosecution's guilt phase evidence, including the transcript, she determined that it left room for reasonable doubt that Mr. Morales was the actual killer and therefore instructed the jurors sua sponte on aiding and abetting liability – even over defense objection. (12RT:2574-2575; 27CT:7698-7699.) It is well-settled that a trial judge's factual determinations – such as the sufficiency of the evidence to support a particular instruction – are entitled to great weight on appeal. To paraphrase one court, the "trial judge's superior ability to evaluate the evidence renders it highly inappropriate for [respondent] to lightly question his determination to submit an issue to the jury." (See, e.g., *People v. McKelvy* (1987) 194 Cal.App.3d 694, 705; accord, e.g., *People v. Baker* (1954) 42 Cal.2d 550, 573; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.)[19] In asserting the evidence of Mr. Morales's identity as the actual killer was so powerful as to preclude any reasonable chance or possibility of reasonable doubt over the question, respondent

---

[19] With respect to the prosecutor's remaining evidence on the critical disputed issue, respondent does not dispute that there were serious credibility problems with Angel Ivan and Xiomara's police statements and testimony, hence there was ample room for the jurors to have reasonable doubt over their truth. (See RB:144; compare AOB:418-421.)

simply ignores that the trial judge disagreed. Here, as in much of its brief, respondent ignores too much.

Finally, respondent disputes the reasonableness of Mr. Morales's argued inference from the jurors' acquittal on the Count 7 robbery charge that the jurors reasonable doubt over the reliability of the same transcript, which was a key component of the prosecutor's Count 7 case. (AOB:422-424.) Respondent counters the transcribed exchange on which the state relied in prosecuting the Count 7 robbery was "not clear" and therefore the jurors' acquittal on that count has no bearing on their view of the transcript as a whole. (RB:146-147.) Of course, the transcript *as a whole* was "not clear." That is the point: just as it was "not clear" concerning the Count 7 robbery charge, it was "not clear" concerning the identity of the actual killer for purposes of the special circumstance allegations. And if that lack of clarity raised reasonable doubt in the minds of the jurors over the reliability of the transcript to prove Mr. Morales's guilt of the Count 7 robbery charge, it follows there is at least a "reasonable chance" one or more of the jurors would have had the same doubts about its reliability to prove Mr. Morales's identity as the actual killer and death-eligibility, absent the cumulative effect of the evidence and argument painting him as a violent rapist who tried to commit a horrific crime of violence against the victim and therefore who was much more likely to be the man who committed the violent crime of shooting and killing her than his burglar-accomplices. (See, e.g., *People v. Robinson* (1954) 42 Cal.2d 741, 745 [jury's failure to convict on all counts shows close case].) Respondent

having presented no rational basis to conclude otherwise, no further discussion of this aspect of the issue is necessary.

For these and all the other reasons set forth in the opening brief, absent the erroneously admitted evidence and presented argument, there was considerable room for reasonable doubt to determine which of the six or more burglars was the better candidate as the actual killer. But the effect of the errors was to make Mr. Morales the much more likely candidate than the others, serving to eliminate the reasonable doubt a dispassionate and rational juror could otherwise entertain. Absent the cumulative effect of the errors and in the face of the prosecution evidence affirmatively pointing to Mr. Morales's innocence, there is certainly a "reasonable chance – more than an abstract possibility" that at least one juror would have had reasonable doubt over the identity of the actual killer and hence the special circumstance verdicts would be different. (*Richardson v. Superior* Court, *supra,* 43 Cal.4th at p. 1050; accord, *Strickland*, *supra*, 466 U.S. at p. 693.) The true findings on the death-qualifying special circumstances, as well as the personal firearm use findings, must be vacated and the death judgment reversed.

///

///

IV.
THE CUMULATIVE EFFECT OF ERRORS COMMITTED IN BOTH THE GUILT AND THE PENALTY PHASES VIOLATED STATE LAW AS WELL AS MR. MORALES'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FUNDAMENTALLY FAIR PENALTY TRIAL AND A HIGHLY RELIABLE DEATH VERDICT

A. Introduction

As set forth in the opening brief, the guilt phase errors centering on the attempted rape accusation carried over into the penalty phase, where the jurors were instructed to consider all guilt phase evidence and the prosecutor once again argued the attempted rape accusation in his summation as an aggravating factor weighing heavily in favor of death. (AOB:464-494.) Just as at the guilt phase, the prosecutor was able to reap the aggravating benefits of this evidence and argument without the burden of ever having to prove beyond a reasonable doubt that Mr. Morales committed *any* sexual crime.

Mr. Morales argued the guilt phase errors were prejudicial at penalty in part because, in their absence, the jurors would never have been exposed to the attempted rape accusation at penalty. Specifically, as unadjudicated violent criminal activity, Penal Code section 190.3(b) (factor (b)) imposed on the prosecution the burden of proving beyond a reasonable that Mr. Morales himself committed a specific sexual crime before the jurors could consider it in aggravation, as the prosecution urged them to do. (AOB:447-468 [Argument IV-B & C].) The prosecutor could not avoid that burden at penalty (as he did at the guilt phase) simply because the alleged

unadjudicated crime shared a proximity of time and place with the crimes of conviction. (Pen. Code, § 190.3(c) [circumstances of the crimes]; AOB:453-468 [Argument IV-B & C].) But the guilt phase evidence was insufficient as a matter of law for the prosecution to sustain that burden. (AOB:468-486 [Argument IV-D].) Hence, absent the guilt phase errors, the jurors would never have been exposed to the sexual assault evidence.

As independent errors that cumulated with the guilt phase and other penalty phase errors, the prosecutor argued the putative attempted rape – or, as he put it as the penalty phase, "sexual assault" – by, inter alia, misstating the evidence, urging the jurors to draw inflammatory inferences that simply were not supported by the evidence, and disregarding the court's rulings sustaining defense counsel's objections thereto. (AOB:487-495 [Argument IV-E].) After refusing defense counsel's request for an admonition to disregard the prosecutor's remarks, the trial court instructed the jurors that they could consider unadjudicated violent criminal activity in aggravation under factor (b) – when the putative unadjudicated sex crimes constituted the *only* such evidence – without instructing them that before they could do so, the prosecution bore the burden of proving beyond a reasonable doubt Mr. Morales's commission of a specific sex crime. (AOB:495-502 [Argument IV-F].) And defense counsel failed to make meritorious objections and bring meritorious motions to protect Mr. Morales from the extraordinarily damaging effects of the foregoing errors. (AOB:502-518 [Argument IV-G].)

Finally, the cumulative effect of the errors committed at both the guilt and penalty phases on this subject, undermines confidence in the death verdict to a constitutionally intolerable degree, deprived Mr. Morales of a fundamentally fair penalty phase trial, and demands reversal of the death judgment. (AOB:518-531 [Argument IV-H].)

Respondent ignores Mr. Morales's challenge to the sufficiency of the evidence to prove beyond a reasonable doubt his commission of a sexual crime as defined in the penal code. (Compare AOB:468-486 [Argument IV-D].) Mr. Morales takes this as a reaffirmation of its tacit concession at trial. Otherwise, respondent disagrees on all counts. (RB:148-171.) As set forth below, the bases of respondent's disagreements are flawed and hence its argument for sustaining the death judgment must be rejected.

B. The Putative Unadjudicated Sex Crimes Based on the Guilt Phase Evidence Were Subject to the Proof Beyond a Reasonable Doubt Standard Under Factor (b)

In his opening brief, Mr. Morales argued the putative unadjudicated attempted rape (or other sexual crime) allegation based on the guilt phase evidence was subject to factor (b)'s requirement that the prosecution bear the burden of proving the defendant's commission of a specific penal code violation beyond a reasonable doubt before it may be considered in aggravation. The mere proximity in time and place of those putative unadjudicated crimes to the crimes of conviction did not eliminate that burden of

proof through the simple expedient of labeling them factor (a) rather than factor (b) evidence. This is so due to the two-fold rationale for requiring unadjudicated violent criminal activity be proved beyond a reasonable doubt at the penalty phase, regardless of whether the evidence was presented at the guilt or the penalty phase: (1) the "overriding importance" to which jurors tend to attach such evidence (regardless of its label) as aggravating evidence weighing on death's side of the scale (*People v. Robertson* (1982) 33 Cal.3d 21, 54); and (2) the "reliability concerns" arising from "the lack of conviction," which are incompatible with the heightened reliability demanded in penalty phase determinations and which can only be resolved by proof beyond a reasonable doubt (*People v. Bacon* (2010) 50 Cal.4th 1082, 1123). (AOB:455-461, citing authorities). As Mr. Morales argued in his opening brief, these concerns were magnified in this case given both the inflammatory nature of the evidence and the dubious evidentiary support to prove that Mr. Morales committed a specific violation of the penal code governing "sexual assault." (AOB:466-468.) While this Court has recognized exceptions to the rule subjecting unadjudicated criminal activity to the proof beyond a reasonable doubt standard, regardless of whether the evidence was presented at the guilt or the penalty phase, this case does not fall within them. (AOB:461-464, and authorities cited therein.)

Respondent acknowledges the evidence was presented at the guilt phase to prove an unadjudicated "attempted rape," that it was suggestive more broadly of a "sexual assault," and indeed that the prosecutor argued that uncharged and unadjudicated "sexual

assault" in aggravation at penalty. (RB:152-154; see also RB:159-161.) However, respondent contends the putative unadjudicated "sexual assault" was a circumstance of the charged crimes under factor (a) and therefore not subject to the reliability screening mechanism of proof beyond a reasonable doubt. (RB:152-154.) Respondent supports this assertion with citations to three cases, followed by conclusory statements unadorned by any meaningful analysis or response to Mr. Morales's argument.

First, following its citation to the broad proposition, "'Factor (a) permits the jury to consider the circumstances of the charged offenses, and factor (b) permits the jury to consider a defendant's violent crimes other than the crime(s) at issue in the proceeding before it.' (*People v. Russell* (2010) 50 Cal.4th 1228, 1271)," respondent make the conclusory assertion, "the evidence introduced during the guilt phase to support the prosecution's felony murder theory based on attempted rape constitutes factor (a) evidence since it involves circumstances of the charged offenses at issue in the current proceedings. (*Ibid.*)" (RB:152-153.) The first problem with respondent's cursory assertion, of course, is that: "the prosecution's felony murder theory based on attempted rape" (RB:152-153) *was a sham, never submitted to or resolved by the jurors*, and therefore the evidence admitted to prove that putative crime was *not* a "circumstance" of the crimes of *conviction*. Rather, the alleged attempted rape – or the more vague "sexual assault," as the prosecutor argued at penalty – was an *unadjudicated* (putative) violent sexual crime and hence subject to proof beyond a reasonable

doubt. As this Court has explained, where, as here, the "'evidence discloses a [violent] crime in addition to the one of which the defendant was convicted'" and the prosecution relies on it in aggravation, it must be subjected to the proof beyond a reasonable doubt standard. (*People v. Bacon*, *supra*, 50 Cal.4th at pp. 1123-1124, and authorities cited therein, cited at AOB:459, citing other authorities in accord.) Respondent ignores the decades of precedent Mr. Morales cited and analyzed in the opening brief in support of this proposition. (AOB:453-464.) To avoid unnecessary repetition, Mr. Morales adopts and incorporates that analysis here by this reference. (*Ibid.*)

Second, respondent recites the familiar principle that circumstances of the crimes of conviction under factor (a) "'extend to that which surrounds the crime materially, morally, or logically.' [Citation.]" (RB:153.) This principle does not aid respondent's cause. It generally refers to victim impact evidence – i.e., evidence of the impact on the victim from the *crimes of conviction* – or events preceding or following the commission of the crimes of conviction that bear directly on them, such as the degree of premeditation or intent to torture or the like. Tellingly, in the paucity of cases respondent does cite, none even address – much less hold – that unadjudicated criminal activity on which the prosecution relies in aggravation is never subject to the proof beyond a reasonable doubt standard if it shares a proximity in time and/or place to the crimes of conviction. The authorities cited in the opening brief yet ignored by respondent support just the opposite proposition. (AOB:459-461.)

Respondent's decision to ignore those authorities and instead cite a single irrelevant case does not make the relevant precedent go away.

Third and finally, respondent attempts to analogize unadjudicated violent criminal activity evidence with graphic photographs of a victim's body to illustrate the circumstances of murder conviction. (RB:153.) Specifically, respondent seizes on Mr. Morales's acknowledgment the photos depicting the victim's partially disrobed body as it was found were admissible for purposes of illustrating the crime of conviction and argues the "the same [logic] is true for the other evidence admitted at the guilt phase in support of the prosecution's felony murder theory based on attempted rape . . . ." (RB:154; compare AOB:507-509.) The analogy is inapt and respondent misapprehends Mr. Morales's position about the photographs. The condition of the victim's body when it was found is certainly a circumstance of the *crime of conviction* – murder – and if used *solely* for that purpose, here simply is no alleged unadjudicated criminal activity at issue to be proved. On the other hand, if the photographs are offered, and the prosecutor utilizes them, for the purpose of proving an unadjudicated violent crime in addition to the crimes of conviction, that crime would then be subject to proof beyond a reasonable doubt under factor (b). It is only for the former purpose that Mr. Morales concedes the condition of the victim's body is factor (a) evidence, not for the purpose of proving the latter, which falls under factor (b).

The problem with respondent's logic concerning factor (a) versus factor (b) evidence is that it is overly focused on labels. Respondent's logic rests on the premise that anything connected to, sharing an identity of time, place and conviction with the crimes of conviction can be labeled a circumstance of the crime of conviction under factor (a) and anything to which the factor (a) label can be affixed is necessarily admissible without the nuisance of satisfying any burden of proof and without regard to the nature of the evidence and concerns over its reliability and influence on the jurors. But that premise flies in the face of the *raison d'etre* for the factor (b) standard and decades of this Court's penalty phase jurisprudence. The rationale for factor (b)'s burden of proof requirement is not concerned with labels or the proximity of the alleged unadjudicated crime to the crimes of conviction. Rather, as set forth in the opening brief but completely ignored by respondent, this Court has articulated a two-fold rationale for the rule: (1) the "overriding importance" to which jurors tend to attach unadjudicated criminal activity (regardless of its label,) as aggravating evidence weighing on death's side of the scale (*People v. Robertson, supra,* 33 Cal.3d at p. 54,); and (2) the "reliability concerns" arising from "the lack of conviction," which are incompatible with the heightened reliability demanded in penalty phase determination and which can only be resolved by proof beyond a reasonable doubt (*People v. Bacon, supra,* 50 Cal.4th at p. 1123.) (AOB:454-456, citing other authorities in accord.) Those concerns do not cease to exist simply because an unadjudicated violent crime allegedly was committed near in time

and place to the crimes of conviction or against the same victim or even when it is so closely related in time to the crimes of conviction that it could be considered a "circumstance" of the crimes of conviction. The fact that an unadjudicated violent crime can be considered a "circumstance" of the crimes of conviction under factor (a) does not foreclose the possibility that it can *also* be considered unadjudicated violent criminal activity under factor (b). To the contrary, when the jurors are presented with unadjudicated violent criminal activity that the prosecution argues in aggravation of penalty, it is its *substantive nature* and not the label the prosecution chooses to affix to it that is dispositive of whether it is subject to factor (b)'s proof beyond a reasonable doubt standard. Were the law otherwise, prosecutors could neatly avoid the heavy burden of proof in a considerable number of cases by the simple expedient of affixing a factor (a) label to what is in substance unadjudicated violent criminal activity that poses the same concerns over reliability and influence on the jurors it poses under the factor (b) label.

This case well illustrates these points, wherein those concerns were not assuaged because the unadjudicated violent sexual crimes were allegedly committed at the same time and place as the crimes of conviction and against the same victim, but to the contrary were heightened. Above and beyond its nature as an unadjudicated violent crime to which jurors tend to attach "overriding importance" in aggravation, the uniquely inflammatory nature of the putative attempted rape (or whatever violent sexual crime the prosecutor chose to call it at penalty) heightened the likelihood and the degree

of importance the jurors would attach to it as an aggravating factor weighing in favor of death. (AOB:466-469, 527-528, and authorities cited therein.) As Mr. Morales demonstrated in the opening brief but respondent ignores, studies show that when capital murder charges are accompanied by allegations that the defendant committed a violent sexual crime against the murder victim, the likelihood of conviction and a death verdict increases considerably. (AOB:527-528, citing, inter alia, Crocker, *Is the Death Penalty Good for Women?* (2001) 4 Buffalo Crim. L. Rev. 917, 929-933, 939-942, 956; Shatz, *The Meaning of Meaningful Appellate Review in Capital Cases: Lessons from California* (Winter 2016) 56 Santa Clara L. Rev. 79, 113-114.) Furthermore, the prosecutor's use of the putative sexual crimes throughout the guilt phase and in his penalty phase summation was deliberately intended for the jurors to attach "overriding importance" to that activity in aggravation and likely had its intended effect. Also heightened were the "reliability concerns" otherwise inherent in the "lack of conviction" because the evidence of the putative unadjudicated attempted rape or sexual assault already proved to be too unreliable to either try Mr. Morales for an attempted rape felony murder special circumstance allegation or ultimately for the prosecution to try him on an attempted rape felony murder theory of first-degree murder liability, as evidenced by the prosecutor's decision not to submit it to the jury through instructions. In short, the concerns animating the factor (b) reliability requirement were not alleviated in this case due to the identity of time, place, and victim between the crimes of conviction

and unadjudicated violent sexual crimes but to the contrary were in high relief. This case is a prime example of the rationale for the factor (b) reliability rules and standard and for these and all the other reasons stated in the opening brief, Mr. Morales was entitled to factor (b)'s protections. (AOB:466-468.)

C. Respondent Tacitly Concedes the Condition of the Victim's Clothing and Erroneously Admitted Guilt Phase Evidence Were Insufficient to Prove Beyond a Reasonable Doubt that Mr. Morales was Criminally Liable for Attempting to Rape or Commit any Other Specific Sexual Crime Against the Victim

In the opening brief, Mr. Morales argued the evidence was insufficient to prove beyond a reasonable doubt that he was liable for attempting to rape or committing any other *specific* sexual crime against the victim, supported by a detailed analysis of the evidence. (AOB:468-486.) Indeed, the trial court found the evidence was insufficient to try Mr. Morales for attempted rape as the foundation for a special circumstance allegation, as well as for any other specific sexual crime that could support a felony murder special circumstance, in dismissing that special circumstance allegation and nothing presented after those findings affected them. (*Ibid.*) Without explanation, respondent ignores this argument in its entirety. Mr. Morales can only take respondent's silence as a tacit concession that, if the evidence were subject to factor (b), it was insufficient to prove beyond a reasonable doubt Mr. Morales's liability for any specific sexual crime and hence the sexual assault evidence should never have been presented to the penalty phase

jurors or argued by the prosecution in aggravation. Accordingly, Mr. Morales considers this issue to be fully joined by the briefs on file with the Court.

D. The Prosecutor's Argument Urging the Jurors to Consider the Putative Unadjudicated Sexual Criminal Activity in Aggravation Was Replete with Errors on the Part of Both the Prosecutor and the Trial Court

In the opening brief, Mr. Morales demonstrated the prosecutor argued the putative unadjudicated sexual criminal activity as an aggravating factor weighing on death's side of the scale, which both: (1) exacerbated the prejudicial effect of the guilt phase errors resulting in the introduction of that evidence; and (2) was an important factor triggering the factor (b) protections to which he was entitled. (AOB:465-466, 487-494, and authorities cited therein; see also AOB:459-461.) In making his argument, the prosecutor committed misconduct by repeatedly misstating the evidence, ignoring the court's rulings sustaining counsel's objections thereto, and arguing unadjudicated criminal activity when there was insufficient evidence to prove criminal liability for a specific sexual crime. (AOB:487-494.) Finally, the trial court erred by refusing defense counsel's request to admonish the jurors after the prosecutor ignored the court's mid-argument rulings sustaining the defense counsel's objection. (AOB:493-494.)

Respondent disagrees on all counts. (RB:154-161.) Respondent's disagreement is without factual or legal support.

1. The prosecutor argued in aggravation the uncharged sexual crimes evidence, which was one factor bringing that unadjudicated criminal activity within the purview of the proof beyond a reasonable doubt requirement under factor (b)

Respondent contends Mr. Morales's argument that the prosecutor's use of the alleged unadjudicated sex crimes as aggravation in his penalty phase summation was an important factor triggering factor (b) protections is foreclosed by this Court's decisions in *People v. Tully* (2012) 54 Cal.4th 952 and *People v. Malone* (1988) 47 Cal.3d 1. (RB:155-156.) Not so.

The question of whether unadjudicated criminal activity evidence is subject to factor (b) depends in substantial part on the particular circumstances of the case, such as whether the evidence was admitted and used solely for a limited purpose at the guilt phase. (See AOB:461-464, and authorities cited therein.) The Court's analyses of the issue in both *Tully* and *Malone* are remarkably brief and omit some important facts to put the decisions into context.

The entirety of the *Tully* Court's analysis reads as follows:

> We also reject defendant's claim that the prosecutor misled the jury, and thus lowered the prosecution's burden of proof, by suggesting that defendant's uncharged rape of the victim was a section 190.3, factor (b) consideration rather than a factor (a) consideration. Indeed, the prosecutor explained to the jury that the rape was to be considered a circumstance of the crime and not uncharged criminal activity: "We don't double dip. We're talking about something else, other acts beyond . . . what he did to Sandy Olsson, other acts of

> violence, and then whether or not he had any felony convictions."

(People v. Tully, *supra,* 54 Cal. 4th at p. 1048.) While the evidence the prosecutor argued had been admitted at the guilt phase, the opinion is silent about how and for what purpose it was admitted. Nevertheless, it seems safe to assume that it was admitted and used at the guilt phase for the limited purpose of proving motive and intent for the charged crimes given: (1) the charged crimes included assault with intent to rape and burglary based on the intended target offense of rape; (2) the strictures on the admission and use of uncharged crimes evidence at the guilt phase; and (3) the absence of any claim on appeal the evidence was improperly admitted or utilized beyond its permissible, limited purpose. As Mr. Morales acknowledged in the opening brief, when unadjudicated criminal activity evidence is admitted and used at the guilt phase *solely* for a limited purpose bearing directly on the crimes of conviction – like motive or intent to commit the charged crimes – it may not be subject to factor (b) depending on whether and how the prosecutor relies on it at penalty and whether and how the jurors are instructed. (AOB:461-464, citing authorities.) The *Tully* opinion also offers little in the way of describing the prosecutor's penalty phase summation. What the opinion does describe certainly does not suggest the prosecutor argued the aggravating nature of the uncharged crime but rather briefly referred to it as a circumstance of the crime.

As Mr. Morales argued at length in the opening brief, unadjudicated criminal activity evidence is governed by factor (b) principles where – as here and unlike in *Tully*: inflammatory uncharged crimes evidence is *not* admitted or utilized at the guilt phase solely for a legitimate, limited purpose bearing directly on the crimes of conviction (AOB:462-464, citing authorities); the evidence should not have been admitted at the guilt phase at all (AOB:455, citing authorities); it is the kind of uncharged crimes evidence for which factor (b)'s burden of proof requirement was created (AOB:455, citing authorities); the prosecution emphasizes its particularly aggravating nature as a reason to impose death in its penalty phase summation (AOB:459, 462-464, citing authorities); and the trial court instructs the jurors they may consider the unadjudicated violent criminal activity in aggravation of penalty (AOB:495-496).[20] Given the presence of all these features here and their apparent absence in *Tully, Tully* does not foreclose Mr. Morales's points and authorities to the effect that the prosecutor's penalty phase summation arguing Mr. Morales's alleged commission of unadjudicated "sexual assaults" as aggravation weighing heavily on death's side of the scale was one factor that triggered the proof beyond a reasonable doubt standard.

---

[20] Indeed, this Court has held that unadjudicated criminal activity is subject to factor (b) in the face of far fewer factors than are present here. (See AOB:463-464, citing authorities.)

The *Malone* Court's analysis is similarly abbreviated and omits information vital to determine the reach of the opinion. The opinion reads that after special circumstance allegations of rape and sodomy felony murder were dismissed, the prosecutor's penalty phase argument "described Benham as having been 'sexually assaulted.'" (*People v. Malone, supra*, 47 Cal.3d at p. 36.) This Court rejected the defendant's contention the prosecutor's argument "improperly submitted the rape and sodomy offenses to the jury as aggravating 'other crimes' (see § 190.3, factor (b)) when there was insufficient evidence to permit the offenses to be considered." (*Ibid.)* The Court reasoned the jurors were effectively precluded from considering the "sexual assault" as factor (b) aggravation by an instruction that listed various unadjudicated violent crimes they could consider in aggravation under factor (b) but omitted "sexual assault." Finally, the Court reasoned the sexual assault was not subject to factor (b) but constituted only factor (a) evidence based on the evidence that the defendant was on top of the victim, both of whom were naked from the waist down, and "[t]he prosecutor's references to the sexual assault were made not in the context of defendant's other criminal activity, but rather, in the context of the circumstances of the crime and defendant's capacity to conform his behavior to the law. As such, they were not improper." (*Ibid.*)

It cannot be determined from the *Malone* opinion when or how the "sexual assault" evidence was admitted – i.e., whether it was at the guilt phase or the penalty phase and, if at the guilt phase, whether it was admitted and used solely for a limited

purpose bearing directly on the charged crimes. Once again, these are important factors to consider in determining whether unadjudicated criminal activity is subject to factor (b)'s proof beyond a reasonable doubt requirement. (See AOB:461-464, citing authorities.) The only prosecution penalty phase summation recited in the *Malone* opinion is a bare reference to the victim's "sexual assault" which did not urge the jurors to consider that unadjudicated crime in aggravation of penalty. That argument stands in stark contrast to the prosecutor's argument(s) here. Also in contrast to this case, the *Malone* trial court effectively instructed the jurors, under the maxim *expressio unius est exclusio alturius*, that they could *not* consider the alleged "sexual assault" in aggravation. (*People v. Malone, supra*, 47 Cal.3d at p. 36.) No such instruction was given in this case; to the contrary, the trial court's instruction that the jurors could consider unspecified unadjudicated criminal activity as factor (b) aggravation when the *only* such activity was the alleged unadjudicated sexual crimes amounted to an affirmative direction to consider the alleged unadjudicated sexual crimes in aggravation of Mr. Morales's penalty. (28CT:8028-8029; AOB:495-496.) In these respects, *Malone* is distinguishable from the case at bar. Otherwise, the *Malone* opinion simply does not provide enough information for Mr. Morales or this Court to determine whether it is distinguishable – or similar enough to be controlling – in other respects. Absent any indicia the facts in *Malone* parallel those here, there is no basis on which to conclude that *Malone* is

inconsistent with the arguments Mr. Morales has made or the supporting authorities he has cited in the opening brief.

With respect to the ample body of authority Mr. Morales cited in support of his position in the opening brief, it is noteworthy that respondent has not acknowledged or addressed any of those authorities or attempted to reconcile them with its reading of *Tully* and *Malone*. As respondent has done with so many other unpleasant truths, it simply ignores those authorities. Ignoring the law will not make it go away. For these and all the other reasons set forth in the opening brief, the prosecutor's penalty phase arguing urging the jurors to consider the putative unadjudicated "sexual assaults" as significant factors weighing heavily in favor of death is one factor that triggered factor (b) in this case. (AOB:444-502.)

2. The prosecutor misstated the evidence and improperly encouraged the jurors to consider a crime someone else committed as a factor aggravating Mr. Morales's personal culpability and weighing in favor of his death

Mr. Morales further argued the prosecutor committed misconduct in his penalty summation in various ways. For example, he misstated the evidence by arguing the victim made the statement, "Johnny, why are you doing this to me?" *while she was being "stripped,"* which proved it was Mr. Morales who removed the victim's clothing in order to sexually assault her. (14RT:3145, 3183, 3185-3186.) There was absolutely no direct or circumstantial evidence that the victim made that statement while her clothing was removed. (AOB:492; see also AOB:375.) On appeal, the state

defends its argument in this regard by doubling down on its misstatements of the evidence.

According to respondent, the prosecutor properly argued a reasonable inference from the evidence of the "timing and circumstances" under which the victim made that statement. (RB:159-160.) Specifically, respondent asserts, the victim did not make that statement "while the group ransacked the house" but rather made it "shortly before she was shot," from which it can be inferred that she was referring to the forcible removal of her clothing. (*Ibid.)* It is telling that respondent does not support this assertion with any citation to the record: *there is nothing in the record to support it*. While respondent elsewhere cites to the record where the testimony about the statement was given, that testimony was explicitly vague about its "timing and the circumstances": it was only that the victim made the statement at some unidentified point "*during the course of this incident*." (11RT:2237, italics added; see also 10RT:2214-2215.) Hence, respondent's bald assertion, unsupported by citation to the record, that the victim did not make that statement while the group of men were burglarizing the house and before the she was removed to the kitchen but rather made it in the kitchen where she was disrobed "shortly" before she was shot is no more and no less than a patent misrepresentation of the record. The state's consistent misrepresentations of the true facts – first at trial to the trial court, later to the jurors, and finally on appeal to this Court – are "incompatible with 'rudimentary demands of justice.'"

(*Giglio v. United States* (1972) 405 U.S. 150, 153-154, and authorities cited therein.)

Respondent next counters a claim Mr. Morales never made by defending the propriety of a prosecutor asking the jurors to empathize with the victim's suffering. (RB:160.) Mr. Morales never argued otherwise: so long as the prosecutor is urging the jurors to consider the impact of the *crimes of conviction* on the victim, such argument is entirely appropriate. And so long as the prosecutor is urging the jurors to consider the impact on the victim of unadjudicated violent crimes that they have found *proved beyond a reasonable doubt* (and does not misstate the evidence), such argument is equally appropriate. What is *not* appropriate, however, is for a prosecutor to urge the jurors to consider the impact on the victim of unadjudicated criminal activity that the evidence does not support and for which the defendant is *not* proved criminally liable beyond a reasonable doubt. That is the argument the prosecutor made in this case and that is the argument Mr. Morales challenges. (AOB:487-494.)

As to the prosecutor's argument attributing to Mr. Morales the sexual battery, or "groping" incident, in the bedroom, the state concedes it misstated the evidence but argues it did not matter because the prosecutor later corrected the error by attributing that alleged crime to "one of the defendants" (the only "defendant," of course, being Mr. Morales). (14RT:3185; RB:160-161.) The record refutes that the prosecutor ever corrected his misstatement attributing the sexual battery to Mr. Morales, a

point on which he refers the Court to his analysis in the opening brief. (AOB:490-492.) Respondent similarly argues the misstatement was meaningless since the jurors had heard Joe's testimony and knew what the true evidence was. Among the many problems with respondent's argument in this regard is that it ignores Mr. Morales's points and authorities to the effect that two months had passed since the jurors heard the guilt phase evidence and hence the jurors were far more likely to take their cue about the evidence from the prosecutor and not their faded memories. (AOB:494, citing, e.g., *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 705, 708 [prosecutor's improper characterization of witness's testimony in argument was prejudicial because, inter alia, it had been a month since the jurors had heard the witness testimony].)

Far more troubling is respondent's further contention that the prosecutor's argument urging the jurors to consider the putative sexual battery committed by *someone else* in aggravation of *Mr. Morales's* sentence was entirely appropriate because Mr. Morales was "present" when that alleged unadjudicated crime was committed. (RB:161.) Because mere presence is insufficient as a matter of law to prove vicarious liability – as set forth in the opening brief – respondent's argument is that unadjudicated crimes committed by *others,* for which the defendant is neither directly nor vicariously liable, can be considered in aggravation on death's side of the scale. (See AOB:475, citing *People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [mere presence insufficient to

prove vicarious liability].) By the same logic, then, respondent would seem to contend that if *someone else* had removed the victim's pants and/or committed some kind of sexual assault against her in the kitchen, it still would be entirely appropriate for the jurors to consider that crime (and its impact on the victim and her family) in aggravation of Mr. Morales's penalty merely because he was "present" in the house when it was committed. Respondent's position is defeated by bedrock principles of death penalty jurisprudence it has inexplicably chosen to ignore.

In the opening brief, Mr. Morales included an extended discussion, supported by a vigorous body of Supreme Court precedent, of the bedrock principle that the irrevocable decision to put a man to his death must "be directly related to the *personal* culpability of the defendant . . . ." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 and *id*. at pp. 327-328, 336, italics added, and authorities cited therein) and based on "an *individualized* assessment of the appropriateness of the death penalty" at the selection phase (*id.* at pp. 319, 327-328, 336). (AOB:448-455, citing in accord, inter alia, *Lockett v. Ohio* (1978) 438 U.S. 586, 605, 607; *Tison v. Arizona* (1987) 481 U.S. 137, 147; *Enmund v. Florida* (1982) 458 U.S. 782, 798; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 and *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-304.) Therefore, for example, the traditional circumstances of the crime factor must focus on the manner or circumstances in which *the defendant* committed the capital crime. (*Kansas v. Marsh* (2006) 548 U.S. 163, 173-174*; Tuilaepa v. California* (1994) 512 U.S. 967, 976.) Likewise,

victim impact evidence must be limited to the "specific harm *caused by the defendant."* (*Payne v. Tennessee* (1991) 501 U.S. 808, 822-825, italics added; accord, e.g., *People v. Thomas* (1992) 2 Cal.4th 489, 535, italics added ["the injury inflicted *by the defendant*"].) In the felony murder context, the defendant cannot be rendered death-eligible for the acts and harm caused by his co-felons unless he specifically intended to aid in those acts and achieve that harm or he was a major participant who acted with reckless indifference to the harm that resulted. (*Tison v. Arizona*, *supra*, 481 U.S. at p. 158; *Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-801.) In other words, mere "presence" is not sufficient to support a death sentence even in part. Likewise, Penal Code section 190.3 limits the jurors' consideration of other crimes in aggravation to those committed "*by the defendant*" (Pen. Code, § 190.3(b), italics added), meaning those for which he is directly or vicariously "criminally liable" (*People v. Ray* (1996) 13 Cal.4th 313, 351). These principles are consistently applied to penalty phase evidence. For example, in *People v. Beardslee* (1991) 53 Cal.3d 68, 111-112, this Court recognized that evidence in aggravation of a co-defendant's culpable mental state concerning the crimes of conviction bore only on the co-defendant's individual culpability and was constitutionally irrelevant to the jury's determination of the defendant's *personal* or *individual* culpability. Similarly, the Ninth Circuit Court of Appeals has held the "manner of a killing that a defendant did not participate in or direct" is constitutionally irrelevant to the defendant's personal culpability in the absence of proof that he intended or reasonably

anticipated the killing would be accomplished in that manner. (*Robinson v. Schriro* (9th Cir. 2010) 595 F.3d 1086, 1103-1108; AOB:447-455.)

Despite this argument and Mr. Morales's citations to these considerable authorities, respondent blithely declares – again, without supporting citation to authority – that sexual crimes committed by Mr. Morales's co-felons while Mr. Morales was "present" could be considered by the jurors in making their individualized determination of Mr. Morales's personal culpability and death-worthiness. Respondent's assertion is not only blithe but blind to law governing the enormity of the life versus death decision in the penalty phase of a capital case and must be rejected.

As to respondent's remaining argument that the prosecutor's summation did not misstate the evidence and was otherwise entirely proper, respondent raises no point and cites no authority that is not thoroughly addressed and refuted in the opening brief. Mr. Morales therefore rests on his opening brief with respect to respondent's remaining points on this subject and makes no further reply here. (AOB:487-494; see also AOB:372-379 [analyzing similar misstatements of same evidence in guilt phase summation].)

///

///

3. Defense Counsel did not forfeit Mr. Morales's right to challenge the prosecutor's improper argument on appeal and the trial court erred in refusing to admonish the jurors to disregard it

Finally, respondent contends that defense counsel forfeited Mr. Morales's right to challenges the prosecutor's misstatements of the evidence in argument because, although they objected three times and requested a jury admonition, they did not make *enough* objections or requests for admonitions. (RB:157-158.)

Primarily, the objections and request for an admonition defense counsel did make were sufficient to preserve Mr. Morales's challenge to the prosecutor's misconduct claim on appeal. (AOB:487-490.) As set forth in the opening brief, defense counsel objected three times to the prosecutor's remarks without effect. The court sustained the objections, but the prosecutor's misstatements continued unabated. (*Ibid.)* Indeed, he even made a speaking response to a sustained objection denying that he was misstating the evidence. (AOB:489.) When defense counsel requested an admonition to the jurors to disregard the remarks after the prosecutor finished – rather than again interrupting to make yet another futile attempt to reign in the prosecutor – the court refused. (AOB:490, 493-494.) Hence, even assuming there were additional objections to make or admonitions to request, it is clear from the record they would have been futile. (See, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 587 [no duty to bring futile objections].)

But to the extent defense counsel were required to make additional objections, Mr. Morales has contended their omissions with respect to the admission and prosecutorial use of the unadjudicated sex crimes evidence was constitutionally unreasonable. (AOB:502-517.) Defense counsel's errors in this regard, together with those of the prosecutor and the trial court, combined to deprive Mr. Morales of a fundamentally fair trial and a constitutionally reliable death verdict. (AOB:518-531, citing, inter alia, *People v. Milner* (1988) 45 Cal.3d at 227. 254-258 [combination of prosecutor's misleading argument, defense counsel's failure to challenge or mitigate it, and trial court's failure to provide instructions to correct it, "so affected 'the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment"] and *Romano v. Oklahoma* (2004) 512 U.S. 1, 11-13.)

Finally, as to the trial court's refusal to admonish the jurors, although it is not entirely clear, respondent seems to defend the ruling on the ground that counsel's request for the admonition was "untimely." (RB:158, 163.) As a matter of law, respondent cites no authority for the proposition that a request for an admonition brought at the close of the prosecutor's argument – or indeed at any other time – is "untimely" and hence this Court should pass respondent's point without consideration. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764 [court may decline to consider argument unsupported by citation to authority].) As a matter of fact, the trial court never said the request was "untimely" and certainly did not refuse the admonition for that

reason, as respondent asserts. (RB:158.) While the court did remark that it was too late for an admonition to undo the harm because "it was all said and done," the crux of the court's ruling was that although the prosecutor had misstated the evidence, it was an honest mistake and hence not "misconduct" at all. (AOB:490-491, 493-494.) Respondent does not dispute that the court's understanding was contrary to long settled law that a prosecutor's misstatement of evidence in argument is misconduct – or "prosecutorial error" – regardless of his or her subjective good faith or bad faith. (AOB:493-494, citing, inter alia, *People v. Hill* (1998) 17 Cal.4th 800, 823 and *People v. Bolton* (1979) 23 Cal.3d 208, 212-214.)

For these and the other reasons set forth in the opening brief, the prosecutor erred in several respects in arguing the putative sexual assault crimes in aggravation and the trial court, through properly sustaining defense counsel's objections, erred in refusing to admonish the jurors to disregard the prosecutor's improper remarks.

///

///

E. The Trial Court Erred by Instructing the Jurors to Consider All Guilt Phase Evidence and Unadjudicated Violent Criminal Activity in Determining the Appropriate Penalty but Failing to Instruct Them the Prosecutor Bore the Burden of Proving Beyond a Reasonable Doubt Mr. Morales's Commission of a Specific Unadjudicated Violent Crime, Absent Which they Were to Disregard any Such Evidence in Determining the Appropriate Penalty

As Mr. Morales explained in the opening brief, the trial court instructed the penalty jury to consider all evidence that was admitted at the guilt phase, including evidence of unadjudicated violent criminal activity in aggravation when the *only* such evidence admitted and argued was the sexual assault evidence. (AOB:495-496.) The trial court erroneously failed, on the other hand, to instruct the jurors that they could not consider any unadjudicated violent crimes in aggravation unless and until the prosecution proved beyond a reasonable doubt that Mr. Morales was criminally liable for a specific violation of the penal code governing "sexual assault." (*Ibid.)* The state's only response to Mr. Morales's argument in this regard is repetition of its leitmotif that the putative unadjudicated violent sexual crimes the prosecutor alleged, presented evidence to prove, and argued in aggravation to the jurors, were circumstances of the crime of conviction under factor (a) (which imposes no standard of proof requirement) and therefore not subject to factor (b)'s proof beyond a reasonable doubt standard. (RB:164-165.) Repetition does not make respondent's argument more persuasive. For all the

reasons stated in the preceding sections, respondent's reasoning is flawed and not only unsupported but affirmatively contradicted by legal authority and hence its argument must be rejected.

Finally, respondent does not dispute that if the evidence were subject to that standard, the trial court erred not only in failing to instruct on the reasonable doubt requirement under factor (b) but also in failing to specify the penal code violations the prosecution bore the burden of proving. (AOB:497-500; see RB:164-165.) Indeed, as set forth in the opening brief, that instruction was particularly critical in this case because it would have alerted the jurors they could not – as the prosecutor urged them to do – consider an undifferentiated "sexual assault" in aggravation, which the jurors would have understood to be "criminal activity," and which in fact is used in the penal code to describe a *category* of penal code violations, but which is not itself a specific penal code violation, as factor (b) requires. (AOB:494-500, citing, inter alia, Title 9 of California Penal Code covering "Of Crimes Against the Person Involving Sexual Assault," *People v. Raley, supra*, 2 Cal.4th at pp. 889-891, *People v. Phillips* (1985) 41 Cal.3d 29, 71-72, and *People v. Boyd* (1985) 38 Cal.3d 762 , 778.)

For these and the other reasons discussed in the opening brief, the trial court's instructional errors violated state law, which together with the other guilt and penalty phase errors on this subject, deprived Mr. Morales of a fundamentally fair penalty trial and a constitutionally reliable death verdict in violation of the state and federal constitutions. (AOB:495-502.)

F. Defense Counsel's Performance Regarding the Unadjudicated Violent Sexual Crimes Fell Below an Objective Standard of Reasonably Competent Assistance at the Penalty Phase of a Capital Murder Trial

In the opening brief, Mr. Morales argued that his trial attorneys' performance fell below objective standards of reasonable assistance at the penalty phase of a capital case for the following omissions relating to the uncharged sexual crimes evidence and inferences: (1) failing to bring a motion to preclude the prosecutor from relying on, and the jurors from considering, the erroneously admitted guilt phase evidence on the question of penalty; (2) failing to correct the trial court's misunderstanding of the law in denying counsel's request for an admonition to the prosecutor's penalty phase argument and elaborating on the objections they did make to that argument; (3) failing to invoke the trial court's sua sponte duty to instruct on the proof beyond a reasonable doubt standard and request instructions on the elements of the crimes the jurors could consider under that standard; and (4) failing to rebut the prosecutor's penalty phase argument in their own argument after the trial court refused to admonish the jurors to disregard it. (AOB:502-518.)

Respondent contends that counsel's performance at the penalty phase was entirely free from error. (RB:165-169.) Respondent is wrong.

1. Defense counsel's failure to move to preclude the use in aggravation of the erroneously admitted guilt phase evidence as proof of unadjudicated sexual crimes fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial

Mr. Morales argued in the opening brief that defense counsel's failure to: (1) move to strike the erroneously admitted guilt phase evidence suggestive of sexual assault; (2) object the evidence was legally insufficient to prove a specified violation of the penal code governing sexual assault and hence to allow the prosecutor to rely on, or the jurors to consider, such unadjudicated criminal activity in aggravation of penalty; and (3) request a jury admonition to disregard any suggestion of an unadjudicated crime from the victim's partially unclothed body, fell below an objective standard of reasonably competent assistance in the penalty phase of a capital murder trial. (AOB:504-510.) It was clear from the objections and arguments defense counsel did make that they had no tactical reason for their omissions. (AOB:509-510.)

Respondent repeats the unadjudicated sexual crimes evidence and inferences the prosecutor argued in his penalty phase summation (as well as his guilt phase summation) did not constitute unadjudicated criminal activity subject to proof beyond a reasonable doubt. (RB:165-167.)[21] Mr. Morales having already

---

[21] In this regard, Mr. Morales reminds the Court that respondent has not disputed that the evidence was insufficient to

thoroughly addressed and refuted that argument in the preceding sections, no further discussion of this issue is necessary here.

2. Defense counsel's failure to correct the trial court's misimpression of the law and elaborate on the objections they did make to the prosecutor's penalty phase summation fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial

Defense counsel also failed to respond appropriately to the trial court's refusal to admonish the jurors to disregard the prosecutor's misstatements of the evidence on the ground the prosecutor's misstatements were not intentional but rather innocent mistakes of fact and therefore did not amount to "misconduct." (AOB:510-512; see also Part D-2, *ante*; AOB:493-494.) Specifically, objective standards of reasonableness in a capital case demanded that counsel attempt to correct the court's mistake of law, which unambiguously holds that intentionality or bad faith is not an element of prosecutorial misconduct or prosecutorial "error." (*Ibid.)* Similarly, the same standards demanded that counsel elaborate on the objections they did make to prosecutor's penalty phase argument by, inter alia, adding the argument was not only factually incorrect but also legally improper because the unadjudicated criminal activity he urged the jurors to consider in

---

prove beyond a reasonable doubt that Mr. Morales was criminally liable for a specific violation of the penal code governing sexual assault. (See AOB:468-486.)

aggravation was unsupported by sufficient evidence to prove beyond a reasonable doubt Mr. Morales's criminal liability for a specific violation of the penal code governing "sexual assault." (AOB:510-513.) Finally, to the extent counsel was required to make any additional objections to preserve the prosecutor's improper penalty phase arguments concerning the unadjudicated sexual criminal activity for appeal, their failure to do so was objectively unreasonable for the same reasons. (See RB:157-158; Part D-2, *post*.)

As to defense counsel's failure to challenge the court's mistake of law, respondent asserts it would have been futile because the prosecutor had not misstated the evidence and therefore had not committed misconduct even under the correct law. (RB:167-168.) The state presumably offers the same response to any other omitted objections to the prosecutor's misstatements in argument. (See Part D-2, *ante*.)

Of course, respondent ignores the record showing the trial court ruled to the contrary that the prosecutor had misstated the evidence when it sustained defense counsel's objections to the prosecutor's argument on that ground. (AOB:487-490.) Furthermore, the trial judge's later rulings in response to careful objections regarding misstatements of the evidence essentially identical to the prosecutor's reveal that correcting the court's understanding of the law would have resulted in a different ruling. Specifically, after judgment was imposed and while Mr. Morales's case was pending on appeal, he brought a motion to strike

statements in the probation report concerning the putative sexual assaults – statements mirroring those of the prosecutor in his penalty phase summation. (2 3SCT:286, 288-298.) Mr. Morales provided the court with a detailed analysis of the actual evidence presented at trial, compared it to the statements in the probation report, and persuaded the court that the true evidence either contradicted or did not support those statements, including statements that Mr. Morales "raped," "attempted [to] rape," and "sexual[ly] assault[ed]" the victim. (*Ibid.*; see also 2/2/18 SRT:17-22.) Accordingly, the trial court ordered that those statements be stricken from the probation report as inaccurate, or not representing objective statements of the true facts. (2/2/18 SRT:17-22; 2 3SCT:288-298.) On this record, there is no merit in respondent's contentions that any further objections surrounding the prosecutor's misstatements of the evidence on the crucial subject of putative unadjudicated sexual crimes would have been futile.

As to defense counsel's failure to add that the prosecutor's argument was not only factually but also legally incorrect, respondent repeats its mantra that the unadjudicated violent criminal activity the prosecutor urged the jurors to consider in aggravation was not unadjudicated violent criminal activity that had to be proved beyond a reasonable doubt. (RB:168.) Having thoroughly addressed this argument in the sections above, no further discussion of it is necessary.

3. Defense counsel's failure to invoke the trial court's sua sponte duty to instruct on factor (b)'s proof beyond a reasonable doubt standard or to request further instruction on the elements of the specific crimes the prosecution bore the burden of proving fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial

Defense counsel also failed to press the court to discharge its sua sponte duty to instruct the jurors that unadjudicated criminal activity must be proved beyond a reasonable doubt and to request further instruction on the elements of the specific penal code violations governing sexual assault the prosecution bore the burden of proving. (AOB:513-516.) Once again, the state's response is the unadjudicated criminal activity evidence presented and argued by the prosecutor in aggravation was not unadjudicated criminal activity subject to factor (b)'s proof beyond a reasonable doubt standard. (RB:168.) Mr. Morales incorporates here his replies to this argument in the preceding sections. Importantly, respondent does not dispute that if it were subject to the proof beyond a reasonable doubt standard, there could be no conceivable tactical reason for counsel's failure to request *both* instructions – on the burden of proof beyond a reasonable doubt *and the elements* of the specific penal code violations at issue. (AOB:514-515.) Mr. Morales takes this as a concession. Otherwise, Mr. Morales having already demonstrated the lack of merit in respondent's argument, no further discussion of this issue is necessary.

4. Defense counsel's failure to rebut the prosecutor's penalty phase summation concerning the unadjudicated criminal activity fell below objective standards of reasonably competent assistance in the penalty phase of a capital case

Finally, the trial court having denied their request for a jury admonition to disregard the prosecutor's misstatements of the evidence, objective standards of reasonable competence made it incumbent on defense counsel to answer or rebut those misstatements in their own argument, yet they failed to do so. (AOB:517-518, citing, inter alia, *Correll v. Ryan* (9th Cir. 2008) 539 F.3d 938, 947-948 [defense counsel's penalty phase closing argument that did not attempt to rebut some of the aggravating factors on which the prosecution relied amounted to "virtual concession of" those factors and fell below objective standards of reasonably competent assistance] and *Herring v. New York* (1975) 422 U.S. 853, 862 [emphasizing the critical nature of closing argument to marshal the evidence from both sides].) Given the objections counsel did make throughout the prosecutor's argument and their request for a jury admonition, they clearly had no tactical reason for failing to alert the jurors that Mr. Morales disputed the prosecutor's statements and the true evidence contradicted or did not support them. (AOB:517-518.)

Respondent defends defense counsel's omission on the ground they could have made a reasonable tactical decision to forgo highlighting the aggravating evidence and instead focus solely on

the mitigating evidence. (RB:168-169.) Not so. Among other things, respondent's hypothesized tactic is simply irreconcilable with defense counsel's request for a jury admonition to disregard the prosecutor's misstatements. (14RT:3186-3189.) Closing argument explaining how the prosecutor's misstatements were contradicted by or otherwise unsupported by the true evidence would no more have highlighted the remarks than the jury admonition counsel requested and the court refused. Indeed, it is difficult to conceive of how the unadjudicated sexual crimes could have been highlighted any more than they already were. The whole record leaves no remote possibility that the jurors might have disregarded it if counsel did not address it in their argument. On the other hand, it was highly likely that in the absence of such argument from counsel, the jurors would have accepted the prosecutor's misstatements and Mr. Morales's failure to dispute the prosecutor's statements of the evidence was a tacit concession that they were true. On this record, it is clear defense counsel had no reasonable tactical basis for failing to dispute the prosecutor's misstatements and *ask* the jurors to disregard them as incorrect after the trial court refused their request to *direct* the jurors to do so.

///

///

G. The Death Judgment Must be Reversed Because the Cumulative Effect of the Foregoing Errors, Particularly in Combination with the Guilt Phase Errors on the Same Subject, Was Prejudicial and Violated Mr. Morales's State and Federal Constitutional Rights to A Fair Penalty Trial and a Highly Reliable Death Verdict Under the Sixth, Eighth and Fourteenth Amendments

Mr. Morales argued the cumulative effect of the penalty phase errors on the part of the prosecutor, the trial court, and defense counsel – either alone or together with any or all of the guilt phase errors on the same subject – violated his state and federal constitutional rights to a fair penalty trial and a highly reliable death verdict. (AOB:518-531, citing, inter alia, *Romano v. Oklahoma, supra,* 512 U.S. at pp. 11-13 [admission of irrelevant and inadmissible evidence at penalty phase of capital murder trial can result in fundamentally unfair trial based on the record as a whole], *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1226-1229 [state court's erroneous admission of highly inflammatory evidence irrelevant and more prejudicial than probative of a state statutory aggravating factor resulted in fundamentally unfair penalty trial under, inter alia, *Romano v. Oklahoma*, *supra*], *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [error that was harmless at guilt phase was prejudicial at penalty], *Taylor v. Kentucky* (1978) 436 U.S. 478 484-490 & fn. 15 [cumulative effect of adverse trial events resulted in fundamentally unfair trial]; see also AOB:351, 377, citing *People v. Milner*, *supra,* 45 Cal.3d at pp. 254-258 [prosecutor's acts and trial court and trial counsel's omissions

combined to "so affect[] 'the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment"].)

Respondent inexplicably devotes a separate section of its brief to arguing the prosecutor's penalty phase summation was harmless *alone*. (RB:161-163 [Argument IV-D-2-c].) Inasmuch as this argument is no response to Mr. Morales's claim, this Court should pass it without consideration. Certainly, it warrants no reply from Mr. Morales.

Otherwise, the state provides the following, single-sentence response to Mr. Morales's claim of cumulative prejudice "even if errors occurred, they were harmless." (RB:170.) This response, of course, is meaningless. Respondent does not address the actual impact of the errors on the jurors' penalty decision, including the strength (or weakness) of the prosecution's case for death, the jury's struggle to reach their decision, or the uniquely prejudicial nature of errors concerning putative unadjudicated sexual crimes like attempted rape on the jurors' choice between life and death. (See AOB:520-531, and authorities cited therein.) This Court should treat respondent's single-sentence assertion of harmless error as a tacit concession the cumulative effect of any or all of the guilt and penalty phase errors on the same subject was prejudicial under any standard and deprived Mr. Morales of a fundamentally fair penalty trial and a constitutionally reliable death verdict. For the foregoing reasons, as well as those set forth in the opening brief, the death judgement must be reversed.

V.
THE TRIAL COURT VIOLATED MR. MORALES'S RIGHTS UNDER STATE LAW AND THE FEDERAL CONSTITUTION BY DENYING HIS PETITION FOR ACCESS TO INFORMATION NECESSARY TO INVESTIGATE EVIDENCE OF POSSIBLE JUROR MISCONDUCT FOR THE PURPOSE OF A NEW TRIAL MOTION

Mr. Morales argued in the opening brief the trial court abused its discretion and violated the appellant's constitutional rights by denying the motion for the release of the identifying information of two jurors. (AOB:532-577.) Respondent argues that Mr. Morales failed to demonstrate sufficient good cause for disclosure and the trial court's actions were justified. (RB:171-184.)

Defense counsel presented the trial court with a narrowly drawn and eminently reasonable request for the identifying information on only two jurors pursuant to Code of Civil Procedure section 237. (28CT:8094-8102.) The basis of the need to contact these two jurors was to explore the possibility of juror misconduct, "whether or not there truly was a unanimous jury decision to return a death sentence." (28CT:8102.) The curious way the penalty verdict had been obtained – two notes telling the trial court the jury was deadlocked and jurors were "frustrated and angry" resolving, without any court action, into a sudden verdict – certainly suggested potential irregularities. (See 28CT:8042, 8044-8045, 8097.) One juror, never identified, literally sent the court a plea for "help" that went unanswered. (14RT:3222.)

The grounds for the section 237 request rested upon this unique factual situation, and included the jury's abrupt about-face, the juror's unanswered plea for help, information the foreperson had pressured the holdout juror during "heated" conversations, and information the holdout juror had decided to capitulate to the death verdict because "giving [Mr. Morales] the death penalty is giving him mercy." (28CT:8099.) Considering the facts and inferences before the trial court, the judge erred, and abused her discretion, in denying the request for a hearing on disclosure. (AOB:560-576.)

The trial court's remarks, asserting that it was "prohibited" from considering the reasoning of the jurors, demonstrate that it failed to understand that a showing of good cause need not include admissible evidence. (14RT:3274.) On the contrary, a showing of good cause in this foundational way may be based on otherwise inadmissible evidence. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 87; AOB:547-548.) Respondent correctly concedes this point, admitting that "Evidence Code section 1150 . . . does not directly govern petitions for access to a juror's personal identifying information. . . ." (RB:176.) Consequently, the application of Evidence Code section 1150 does not shield the trial court's erroneous ruling.

The crux of the issue here is whether the circumstances before the trial court actually demonstrated, in the words of the applicable statute, "a prima facie showing of good cause for the release of the personal juror identifying information." (Code Civ. Proc., § 237 subd. (b).) Notably, the statute requires only a minimal "prima facie"

showing. "[S]light evidence which creates a reasonable inference . . . [that] need not eliminate all contrary inferences" satisfies this low bar. (*Evans v. Paye* (1995) 32 Cal.App.4th 265, 280-281, fn. 13; see *People v. Towler* (1982) 31 Cal.3d 105, 115; *People v. Bell* (1989) 49 Cal.3d 502, 554 (conc. opn. of Kaufman, J.).) As the Court of Appeal explained in one recent opinion:

> Section 237, subdivision (b), requires the court to set a hearing, and notify the jurors, if the defendant makes a "prima facie" showing of good cause for disclosure, unless the court finds a compelling interest against disclosure. But that does not mean the court has made a finding that good cause exists. It is merely a determination that good cause potentially exists.

(*People v. Zamora* (2022) 73 Cal.App.5th 1084, 1091.)

The factual basis for the potentiality of juror misconduct before the trial court included the jury's abrupt reversal from deadlock to verdict, the indications of coercion by the foreperson, the indications of Juror 5's misunderstanding of the instructions, Juror 5's refusal to gather with the other jurors after the trial, and the nature of the note from the unknown juror pleading for the court's "help." Certainly, the "possibility of jury misconduct" was present. (See *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1097.)

The denial of the request undercut defense counsel's understandable and reasonable attempt to investigate juror misconduct, improperly hindering counsel's ability to effectively represent appellant. Mr. Morales's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments were violated.

The case must be remanded to give Mr. Morales an opportunity to investigate possible juror misconduct and request a new trial. In the alternative, and in the event the remand procedure is inadequate, the judgment and sentence should be vacated. (See also AOB:576-577.)

VI.
RESPONDENT HAS FAILED TO DEMONSTRATE THAT A REMAND FOR THE TRIAL COURT TO EXERCISE ITS DISCRETION OVER WHETHER TO DISMISS THE FIREARM ENHANCEMENTS ALLEGED AND IMPOSED PURSUANT TO PENAL CODE SECTION 12022.53 WOULD NOT BE FUTILE

In his supplemental opening brief, Mr. Morales argued the case should be remanded for the trial court to exercise its new discretion under new legislation over whether to strike the firearm use enhancements alleged (and imposed) under Penal Code section 12022.53. In its supplemental respondent's brief, respondent agrees the new legislation is retroactive and the court would have the power on remand to exercise its discretion in favor of striking the enhancements. (SRB:5.)

Nevertheless, respondent argues that remand is inappropriate because it would be an "idle act." (RB:5-7.) Specifically, respondent contends the trial court's denial of the automatic motion to modify the death sentence with remarks that the weight of the evidence supported that sentence demonstrates that it would not exercise its discretion in favor of leniency on remand. (*Ibid.*) Not so.

As a preliminary matter, remand is necessary for the court to exercise its discretion in this regard "unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; accord, *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) Because the trial court made no such indication, remand is necessary. Nor can any such indication be inferred from the court's remarks in its denial of the automatic motion to modify Mr. Morales's death sentence for three reasons.

First, the court's considerations in ruling on the automatic motion to modify and deciding whether to exercise its discretion in favor of leniency by striking the firearm use enhancements simply are not the same. The court function in ruling on the motion to modify is to independently weigh the evidence and determine if it *supports the jury's death* judgment. (See, e.g., *People v. Crew* (1991) 1 Cal.App.4th 1591, 1600-1601.) In contrast, in deciding whether to exercise its discretion to strike under Penal Code sections 1385 and 12022.53, the court makes an independent determination as to whether the enhancement, *though supported by the evidence*, should nevertheless be stricken "in the interests of justice." Hence, a court's denial of an automatic motion to modify the death sentence bears little relationship to its independent judgment as to the "interest of justice" in a particular case.

Second, the trial court's statement of its reasons for denying the motion to modify in this case was based in significant part on

the putative inference that Mr. Morales had attempted to rape – or commit some kind of sexual assault against – the victim when she was killed. (15RT:3285-3286.) But the record affirmatively proves the same inference would not influence the trial court's judgment on remand.

As discussed in Argument IV-F, *ante*, after judgment was imposed, the trial court was presented with a detailed recitation of the actual evidence presented at trial and a comparison thereof against statements in the probation report, including statements that Mr. Morales had "raped," "attempted [to] rape," and committed a "sexual assault" against the victim. (3CT:286, 288-298; 2/2/18 SRT 17-22.) Based thereon, the trial court agreed that the probation report's statements concerning Mr. Morales's alleged sexual crimes against the victim were either affirmatively contradicted or otherwise unsupported by the actual evidence and hence were not objective statements of the true facts. (2/2/18 SRT:17-22.) The court ordered those statements stricken, including the statements that Mr. Morales had "raped," "attempted [to] rape," and "sexual[ly] assault[ed]" the victim. (2 3SCT:297-298; 2/2/18 SRT:17-22.) On remand, then, the court's view of the evidence against Mr. Morales will be markedly different than it was at the time of its ruling on the automatic motion to modify his death sentence.

Third, other record evidence affirmatively reflects the court's amenability toward leniency for Mr. Morales. After the guilt phase verdicts were returned, the trial court considered the appropriate remedy for the superior court's errors surrounding the appointment

of counsel (Argument I, *ante*) and proposed: "I think in all fairness perhaps we should just end it now and he has been convicted and the special circumstances have been found true and go forward from there. But that is up to the prosecution." (13RT:2793.) The court's view that life, not death, was a "fair" punishment in this case even after hearing what was essentially the prosecution's penalty phase case is simply incompatible with respondent's effort to cast the trial judge as a staunch proponent of the harshest punishment possible for Mr. Morales who will not entertain the idea of leniency on remand.

For all these reasons, the matter should be remanded for the trial court to exercise its discretion over whether to dismiss the firearm use enhancements.

///

///

CONCLUSION

For all the foregoing reasons, the true findings on the special circumstance and personal firearm use enhancement allegations must be vacated and the death judgment reversed.

Dated: August 15, 2022

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/ C. Delaine Renard
C. DELAINE RENARD
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, rule 8.630(b)(1)(C))

I, C. DELAINE RENARD, am a Supervising Deputy State Public Defender, and am appellate counsel for JOHNNY MORALES in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 53,570 words in length, within the 54,000 word limit this Court granted.

DATED: August 15, 2022

/s/ C. Delaine Renard
C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: PEOPLE v. JOHNNY MORALES Supreme Court No. S137307
(Superior Court No. FVA015456)

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

JOHNNY MORALES, V-94083
4-EY-31,
CSP-SQ
San Quentin, CA 94974

CLERK OF THE COURT
San Bernardino County Superior Court
247 West 3rd Street
San Bernardino, CA 92415-0063

Each said envelope was then, on, August 15, 2022 sealed and deposited in the United States mail at Sacramento, California, with the postage thereon fully prepaid.

ELECTRONIC SERVICE

AMANDA LLOYD
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
VIA TRUEFILING @ Amanda.Lloyd@doj.ca.gov on August 15, 2022

California Appellate Project
345 California Street, Suite 1400
San Francisco, CA 94104
VIA TRUEFILING @ Filing@capsf.org on August 15, 2022

I declare under penalty of perjury that the foregoing is true and correct. Signed on this August 15, 2022 at Sacramento, California.

Kecia A. Bailey Digitally signed by Kecia A. Bailey Date: 2022.08.15 15:24:17 -07'00'

Kecia A. Bailey

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 8/15/2022 by Larry Blake, Jr., Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MORALES (JOHNNY)**
Case Number: **S137307**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **delaine.renard@ospd.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPELLANTS REPLY BRIEF	2022_08_15_Morales ARB _S137307

Service Recipients:

Person Served	Email Address	Type	Date / Time
Attorney Attorney General - San Diego Office Christine Y. Friedman, Deputy Attorney General	sdag.docketing@doj.ca.gov	e-Serve	8/15/2022 3:27:54 PM
Amanda Lloyd Office of the Attorney General 239682	amanda.lloyd@doj.ca.gov	e-Serve	8/15/2022 3:27:54 PM
Office Office Of The State Public Defender-Sac Timothy J. Foley, Sr. Deputy State Public Defender 000000	docketing@ospd.ca.gov	e-Serve	8/15/2022 3:27:54 PM
California Appellate Project	filing@capsf.org	e-Serve	8/15/2022 3:27:54 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/15/2022
Date

/s/Kecia Bailey
Signature

Renard, C. Delaine (169893)
Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm