IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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



# APPELLANT'S REPLY TO SUPPLEMENTAL RESPONDENT'S BRIEF

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

Honorable Lantz Lewis, Judge

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

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES



### STATE CASES

# ARGUMENT

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

Before trial started in this case, co-defendant Miller spoke with police twice. In his first interview, Miller admitted the idea to rob the store was his (Miller's), he had done other robberies with defendant, he knew there was going to be a robbery that night, he stole cigarettes in the robbery and he later bragged about the robbery. (37 RT 8389-8582.) The state properly disclosed this interview to the Rices defense.

But Miller also had a second, several-hour-long "free talk" with police. In this second conversation, Miller told a very different story. In this second talk, Miller said (1) the robbery was *not* his idea, it was Rices's, (2) he had *not* committed other crimes with Rices, (3) he did *not* know there was going to be a robbery that night (until they got to the store), (4) he did *not* steal cigarettes during the robbery and (5) he did not talk to others about the crime. (40A SCT 8902-8936.) The state did not disclose this interview to the Rices defense team until years after the trial had ended.

Normally, of course, prior to trial the state would have been required to disclose

the second statement to the defense pursuant to the plain terms of Penal Code section 1054.1, subdivision (b). Here, however, the state kept the statement a secret from the defense by filing a Penal Code § 1054.7 motion with the trial court to avoid disclosure. (3 CT 590-591.) At a subsequent in camera hearing from which defense counsel was excluded, the state justified this request, in part, by noting that "John Doe 1" "will not be called as a witness by the People." (4 CT 769.) The trial court granted the state's motion to keep the free-talk a secret in an order dated November 26, 2008. (4 CT 769.)

Although the two defendants were given separate juries, when Miller testified in his own case the court re-convened the Rices jury to hear his testimony. (5 CT 1102; 13 RT 1891.) Thus, when Miller was called to testify, defense counsel for Rices was entirely unaware of the second statement he had given police and did not know that Miller was now telling a very different version of events.

And that is just what happened. On direct examination in front of the Rices jury Miller testified that Rices was a prominent gang member and that he (Miller) participated in the crime only because he was scared of Rices. (13 RT 1909-1921, 1939.) During the prosecutor's cross-examination -- and still in front of the Rices jury -- the jury heard Miller's statements that Rices shot the victims as they were pleading for their lives. (13 RT 1958-1959.)

In his initial Appellant's Opening Brief, Mr. Rices contended that once it became clear Miller was going to be a witness -- regardless of who called him -- the trial court erred in failing to modify the November 26 ruling keeping the Miller free-talk a secret from the defense. (AOB 176-184.) In its initial Respondent's Brief, the state argued that any error was not the trial court's fault; according to the state, the trial court had no duty to revise its order because "there are a whole host of situations where the trial court is under no obligation to act without a request from the moving party." (RB 102.)

In light of the state's argument that the trial court committed no error in failing to revise its order "without a request from the moving party," Mr. Rices filed a Supplemental Opening Brief. In that brief he contended that if the state's initial position was correct -- that is, if the trial court had no duty to revise its order absent a request from the prosecution as "moving party" -- then the "moving party" (the prosecution) erred in failing to make such a request once it became clear Miller would testify. (Appellant's Supplemental Opening Brief ("ASOB") 9-15.)

The state has responded. To its credit, the state concedes that "Miller's second statement [the one kept secret from the defense] varied from the first" in that (1) "Miller attempted to distance himself from the crime," (2) "Miller claimed he was scared and intimidated by appellant and felt he had no choice but to go along," and (3) "Miller tried

to talk him [Rices] out of it to no avail." (Respondent's Supplemental Brief ("RSB") 8.) The state concedes that in his testimony, Miller "testified consistently with his 'free-talk' interview." (RSB 9.) The state concedes that on cross-examination in front of the Rices jury, the prosecutor elicited Miller's statements that Rices shot the victims as they pleaded for their lives. (RSB 9-10.) The state concedes that during closing arguments the prosecutor urged jurors to sentence Mr. Rices to death because "the victim's begged for their lives before appellant shot them." (RSB 9-10.) And the state concedes that it kept the free-talk a secret until "record correction [proceedings] in 2014." (RSB 11.)

Nevertheless, having first argued that the trial court's failure to provide the free-talk was not prejudicial error absent a request by the prosecutor, the state now argues that the prosecutor's failure to make such a request was not prejudicial error either. The new argument has three parts: (1) the court should avoid the issue entirely because it was improperly raised on appeal (RSB 11-13), (2) any error did not violate the federal constitution (RSB 13-17) and (3) any error was harmless. (RSB 17-18.) Mr. Rices will address each argument in turn.

A. The Issue Is Properly Raised On Appeal.

Echoing an argument it made in its original Respondent's Brief, the state argues

that this issue cannot even be resolved on appeal because "crucial underlying facts are not contained in the record." (RSB 12. *Compare* RB 101-102) According to the state, the Court cannot resolve this issue on appeal because -- for example -- the Court does not know "the tactical decisions [defense counsel] might have made had he been privy to the [free-talk] interview." (RSB 12.)

Because Mr. Rices has already responded to this claim in his Reply Brief, his argument here will be brief. (*See* Appellant's Reply Brief 96-97, 101.) Suffice it to say that under the state's view, every time the state suppresses evidence -- be it in violation of *Brady v. Maryland* (1963) 373 U.S. 83 or a rule governing discovery -- the issue could not be addressed absent evidence from defense counsel as to the "tactical decisions [defense counsel] might have made had he been privy to the [evidence]." (RSB 12.) As the United States Supreme Court has made clear, however, this has never been the law. To the contrary, when evidence is improperly kept from the defense in a criminal case, reviewing courts routinely assess prejudice by looking to see what reasonable defense counsel could have done with the material had he or she been aware of it -- they do not remand for hearings to see in retrospect what the specific lawyer involved says would have been done. (*See, e.g., Kyles v. Whitley* (1995) 514 U.S. 419, 446-448 [looking to see what defense counsel "could have" done with the suppressed evidence].) Not surprisingly, California courts take the same approach. (*People v. Johnson* (2006) 142

Cal.App.4th 776, 786 [looking to see what defense counsel could have done with information state failed to disclose]; *People v. Shaparnis* (1983) 147 Cal.App.3d 190. 196 [same].) As these courts all recognize, and contrary to the state's position, this Court certainly has the wherewithal to assess prejudice from the state's failure to provide defense counsel with Miller's free-talk prior to trial. And Mr. Rices has already explained some of the steps defense counsel would have taken had the free talk not been kept secret -- including preventing Miller from even testifying at the Rices penalty phase. (ARB 101.)

The state observes that nothing in the record shows defense counsel (1) did not know about the free-talk, (2) "did not know how Miller was going to testify," or (3) was unprepared to respond to Miller's testimony. (RSB 11.) These observations are a bit curious.

The state now concedes -- and the record shows -- that Miller's second (secret) interview was very different from his first interview which was disclosed. (RSB 8.) The state now concedes it kept the second (secret) interview hidden until years after trial ended, revealing it only in response to a specific request during record correction proceedings. (RSB 11.) The state does not explain how defense counsel could have known about the free-talk, much less been aware of the substance of that talk or Miller's

testimony, given the state's success in keeping the second interview a secret for so many years. Nor does the state suggest how defense counsel could possibly have prepared to cross-examine Miller given that he had no idea what Miller would testify about. Indeed, the proof is in the pudding. The fact of the matter is that defense counsel did not cross-examine Miller at all. (13 RT 1983.)

Similarly, the state adds that the issue should be avoided on appeal because "the issue was not litigated before the trial" and there are "no findings." (RSB 12.) The irony of this observation should not be lost on the Court.

The entire reason the issue was not "litigated before trial" is because -- after learning that Miller would indeed testify -- neither the trial court nor the prosecutor told the defense about the free-talk or moved to revise the November 2008 order keeping that free-talk a secret. The state should not be permitted to benefit from its remarkable success in keeping the free-talk a secret for so many years. And as for "findings," the state has conceded it did not reveal the free-talk until 2014. (RSB 8.) No other findings are required; the differences between the free-talk and the first interview are a matter of record and -- as noted above -- because the state kept the free-talk a secret until 2014, the state does not explain how defense counsel could have known the substance of the secret interview.

And the state's passing suggestion that Miller himself would have told Rices that he (Miller) was now throwing Rices under the bus makes no real-world sense. After all, the entire reason the free-talk was kept from the Rices defense team was to protect Miller from any adverse fallout after having turned against his co-defendant. These facts, apparent on the record before this Court, are sufficient for appellate review. The issue is properly before the Court.

B. The Failure To Provide The Free-Talk Violated Both State And Federal Law.

In his supplemental brief Mr. Rices contended that the failure to disclose the Miller free-talk violated section 1054.1 as well as Mr. Rices's Due Process rights. (ASOB 10-15.) Once again to its credit, the state concedes that "federal appellate courts have found on occasion that the failure to provide inculpatory evidence could rise to the level of a due process violation . . . ." (RSB 15.) In light of the case law, this concession was entirely warranted. (*See, e.g., Duong v. Hedgpeth* (C.D. Cal. 2011) 2011 WL 5161952 at *6; *United States v. Tamura* (9th Cir. 1982) 694 F.2d 591, 599; *United States v. Royball* (9th Cir. 1977) 566 F.2d 1109, 1110; *Lindsey v. Smith* (11th Cir. 1987) 820 F.2d 1137, 1151; *Ghoulson v. Estelle* (5th Cir. 1982) 675 F.2d 734, 738-739; *Smith v. Estelle* (5th Cir. 1979) 602 F.2d 694, 699-701, *affirmed on other grounds, Estelle v. Smith*

(1981) 451 U.S. 454.)

The state argues, however, that the "unique facts of this case do not compel a finding that appellant's federal constitutional rights were implicated." (RSB 16.) This is so because in the state's view there was no "fundamental unfairness." (RSB 17.)

Mr. Rices will start with a point of agreement. The facts of this case are indeed unique. The prosecution freely disclosed its initial interrogation with co-defendant Miller, an interrogation in which Miller took full credit for the robbery. Later, the prosecution had a several hour free-talk with Miller in which he told a very different story. Out of defendant's presence, however, the prosecutor moved to keep a transcript of this free-talk a secret, assuring the trial court that Miller would not be a witness. The trial court agreed. When Miller *was* called as a witness, neither the trial court nor the prosecutor batted an eyelash, and neither took any steps to provide the free-talk to defense counsel. Instead, the court permitted Miller to testify against Rices knowing that the state had kept secret from the defense the free-talk. During cross-examination, the prosecutor introduced statements Miller made to police about the crime -- statements which had nothing to do with Miller's own case, but which were devastating to the Rices penalty phase. Later, in closing argument at the Rices penalty phase, the prosecutor urged jurors to rely on these statements in imposing death.

The state sees no unfairness at all in this kind of trial by ambush. The Court can now assess whether this is fair process in a capital penalty phase.

C. The State Cannot Prove The Error Harmless.

In the alternative, the state argues that any error was harmless beyond a reasonable doubt. (RSB 17-19.) The state argues that "Miller's testimony was not particularly damaging to appellant" and the prosecutor "spent little time discussing Miller during closing arguments." (RSB 17-18.)

The argument is difficult to square with what actually happened at trial. Because the state kept the Miller free-talk a secret, defense counsel was unaware of the sea change in Miller's version of events. Thus, counsel raised no objection when Miller was called by the co-defendant during the Rices penalty phase. And for reasons explained in Mr. Rices's original opening brief, had counsel objected the co-defendant would never have been able to call Miller to testify in Rices's penalty phase. Absent an objection, however, the Rices jury heard Miller's testimony that Rices was a prominent gang member with a "reputation" and that Miller participated in the crime only because Rices threatened him and that Rices had a "killer glaze in his eyes." (13 RT 1899 1907-1921, 1939-1940, 1945.)

The state suggests, however, that Miller's testimony was destroyed by the prosecutor's "scathing cross-examination." (RSB 18.) In making this characterization, however, the state completely ignores the actual verdict of the Miller jury. *The fact of the matter is that despite the prosecutor's "scathing cross-examination," the Miller jury was unable to reach a verdict on the murder charge.* (17 RT 2473-2497.) Thus, Miller jurors did *not* apparently view the prosecutor's examination as particularly "scathing" or -- more importantly -- persuasive. To the contrary, despite the prosecutor's cross-examination, one or more of the Miller jurors affirmatively believed that Miller was telling the truth.

Equally important, the Rices jury also heard Miller accuse Rices of shooting the victims as they were begging for their lives. (13 RT 1958-1959.) And contrary to the state's current suggestion that the prosecutor did not place significant reliance on Miller (or these statements) during his penalty phase closing argument, the prosecutor focused repeatedly on this evidence. (19 RT 2747, 2748, 2780.) The prosecutor's comments were rhetorically powerful:

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

(19 RT 2747.)

And although the state's current lawyers ignore it entirely, the state's prior lawyer went further and told jurors this aggravating evidence *alone* was sufficient reason to impose death:

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

(19 RT 2748. *See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same].) On this record, the state cannot carry its substantial burden of proving the error harmless. Reversal of the penalty phase is required.

## CONCLUSION

The state did not itself call Miller to testify in the Rices penalty phase trial. Instead, in what is certainly a first for a capital trial in the state of California, the trial court permitted his co-defendant Miller to call himself as a witness at the Rices penalty phase. Because the state had kept Miller's free-talk with police a secret, defense counsel did not object and -- on cross-examination -- the state elicited devastating evidence from Miller which it told jurors alone justified death. A new penalty phase is required.

DATED: 5/1/17

Respectfully submitted,

Cliff Gardner
Attorney for Appellant
Jean Pierre Rices

CERTIFICATE OF COMPLIANCE

I certify that the accompanying non-redacted brief is double spaced, that a 13-point proportional font was used, and that there are 2809 words in the brief.

Dated: 5/1/17

Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

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

On May 2, 2017 , I served the within

**APPELLANT'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF**

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

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

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

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

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

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

I declare under penalty of perjury that the foregoing is true. Executed on May 2, 2017, in Berkeley, California.

Declarant