DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, V. JOSEPH ANTHONY BARRETT, DEFENDANTS AND APPELLANTS.	No. S124131 Imperial County Superior Court No. CF5733 **CAPITAL CASE**

Automatic Appeal from Judgment of the Superior Court
of the State of California for the County of Imperial

Honorable Joseph W. Zimmerman, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSEPH ANTHONY BARRETT, Defendant and Appellant.	No. S124131 (Imperial County Superior Court Case No. CF5733) **CAPITAL CASE**

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

INTRODUCTION

This supplemental opening brief addresses new and additional authorities relevant to Appellant's Opening Brief Arguments I, XIII, and XVI, and asserts as a separate ground for relief the ineffective assistance of counsel issue raised in Appellant's Reply Brief in Argument XVI.

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I.
THE DENIAL OF MR. BARRETT'S MOTION TO EXCUSE CDCR EMPLOYEES FROM THE JURY POOL FOR CAUSE VIOLATED HIS RIGHTS TO AN IMPARTIAL JURY AND DUE PROCESS

In Appellant's Opening Brief, appellant argued the trial court erroneously denied his requests to excuse all CDCR[1] employee prospective jurors as impliedly biased. (Appellant's Opening Brief (AOB), Argument I.) As a result of this error, a biased juror, Juror No. 12, a correctional officer at Centinela, sat on the jury. The court's ruling violated California law (Code of Civ. Proc., § 229), Mr. Barrett's federal and state constitutional rights to an impartial jury (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15), and his due process right to intelligently exercise his peremptory challenges (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15).

Code of Civil Procedure section 229 sets forth the exclusive grounds for an implied bias finding under state law. (Code of Civ. Proc., § 229; *People v. Ledesma* (2006) 39 Cal.4th 641, 670 (*Ledesma).*) However, under the federal constitution there is a more fundamental inquiry: whether "the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." (*United States v. Kechedzian* (9th Cir. 2018) 902 F.3d 1023, 1027 (*Kechedzian*)

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[1] Hereafter, appellant refers to what is currently known as the California Department of Corrections and Rehabilitation as "CDCR." At the time of Mr. Barrett's trial, the agency was called the California Department of Corrections, or "CDC." (See AOB 2.)

[citation and internal quotation marks omitted].) Implied juror bias that violates the constitution arises in "extraordinary cases," (*ibid.*), and "may be implied or presumed from the 'potential for substantial emotional involvement' inherent in certain relationships." (*Ledesma*, *supra*, 39 Cal.4th at p. 670, quoting *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71 (*Allsup*).) It is an objective test, and implied bias may be found "even if a juror states or believes that she can be impartial." (*Kechedzian*, *supra*, 902 F.3d at p. 1028.)

In this case, the unique combination of CDCR's extensive involvement in the trial, the relationship between Imperial County CDCR personnel and their employer, and the particular facts of the trial, presented an "extreme situation warranting a finding" that CDCR employee prospective jurors were impliedly biased. (*United States v. Diaz* (5th Cir. 2019) 941 F.3d 729, 738.) Mr. Barrett's counsel vigorously but unsuccessfully contested the inclusion of such prospective jurors in the jury pool. (See AOB 91.) The sheer number of CDCR employees remaining in the pool after the denial of the cause motion put counsel in an impossible strategic and ethical bind, and justified his failure to exhaust peremptory challenges. (See AOB 92.) This Court should therefore reach the merits of Mr. Barrett's claims. Further, the trial court's failure to excuse these biased jurors and the resulting disadvantage to the defense during voir dire undermined appellant's right to intelligently exercise his peremptory challenges in violation of due process. Juror No. 12, a biased juror, was in effect forced upon Mr. Barrett, and reversal is required. (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973, fn. 2

(*Dyer*) ["The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice."].)

A. Appellant moved to excuse all CDCR employees for cause

Trial counsel raised the issue of CDCR employee implied bias several times before voir dire commenced. (See AOB 92-99.) During pretrial discussions on August 20, 2003, the trial court remarked that it expected many CDCR employees in the jury pool. Defense counsel responded that, in his experience, the parties typically stipulated to excuse correctional officers. (14RT 2158.) He added that numerous CDCR officers were expected to testify, and that many alleged rules violations involving officers would come up at trial. (*Ibid*.) The trial court stated that it knew of no law "that says they can't sit on a case like this," and it would not exclude a group of people "on speculation." (*Id*. at pp. 2158-2159.) "Unless somebody can find some specific law that says that correctional officers or any other C.D.C. employee can't sit on a criminal case, I'm going to allow them on the jury panel." (*Id*. at p. 2161.)[2]

On October 2, 2003, trial counsel asked for a stipulation excusing CDCR personnel or "at least" correctional officers from the

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[2] Code of Civil Procedure section 219, subdivision (b), exempts certain peace officers from jury service, but not CDCR correctional officers. This exemption does not reflect any legislative determination about implied bias among certain law enforcement groups and not others, but an effort to avoid burdening essential public services and compromising public safety by taking officers away from their duties. (See California Bill Analysis, S.B. 303 Assem., June 19, 2001.)

jury pool. (26RT 2961.) Counsel again pointed to the number of anticipated CDCR employee witnesses, including potential superiors of prospective jurors, and the expected aggravation evidence at penalty phase, including Mr. Barrett's altercations with officers. (*Id.* at pp. 2962-2963.) The trial court rejected counsel's request, stating that it would not make "any blanket recusals of certain people," or "exclude any cognizable segment of the population of Imperial County." (*Ibid.*) Counsel also argued that he had gone to "great lengths to" hide Mr. Barrett's shackling from the jury, and any CDCR employee would know that it was a "deception." The trial court responded, "There is nothing we can do about that." (*Id.* at p. 2964.)

Once jury selection was underway, trial counsel informed the court it would be making a cause motion to excuse correctional officers. (35RT 4135.) On November 14, 2003, counsel filed a motion to excuse CDCR personnel as impliedly biased, citing California Code of Civil Procedure section 229 and Mr. Barrett's constitutional right to an impartial jury. (44CT 12523.) The motion set forth numerous factors contributing to implied bias: the anticipated number of CDCR employee witnesses; employee familiarity with shackling and other security procedures; the central dispute at trial about CDCR credibility; the notoriety of the case and Mr. Barrett within the prisons; employee familiarity with niche prison issues; and finally the likelihood that such jurors would view prisoners as a threat to their safety, especially when confronted with instances of Mr. Barrett's misconduct and violence in prison. (*Ibid.*)

On November 17, 2003, the trial court heard argument on the motion, stated its belief that other counties with large prisons did not excuse CDCR personnel, and observed that they had already "knocked a lot off" during voir dire. (45RT 5441.) The court denied the motion to excuse CDCR employees for cause as impliedly biased. (*Id.* at p. 5446.) Ultimately, Juror No. 12, a CDCR correctional officer, was seated on Mr. Barrett's jury.

B. The federal constitutional doctrine of implied bias is well-established

The objective test for implied juror bias is well-recognized by federal courts, but California decisions addressing the federal constitutional doctrine are limited. Recently, in *People v. Ramirez* (2022) 13 Cal.5th 997 (*Ramirez*), this Court rejected a capital defendant's implied bias claim under Code of Civil Procedure section 229. In that case, a Kern County defendant was charged with numerous crimes that did not occur in prison. Trial counsel moved to excuse all correctional officers from the jury pool, arguing that the answers of various correctional officer venire members during voir dire revealed that prisons were "centers of interest and concern" about the case, and that many such prospective jurors had preconceived, unfounded, and false notions about the case. (*Id.* at p. 1046.) On appeal, the defendant contended that the denial of his motion violated his right to an impartial jury. This Court rejected the claim, concluding that, as in *Ledesma*, *supra,* 39 Cal.4th 641, none of the statutory grounds set forth in section 229 were present and none of the challenged seated jurors were actually biased. (*Ramirez*, *supra*, 13 Cal.5th at p. 1047.) This Court did not address

the federal constitutional doctrine in *Ramirez*, though *Ledesma* itself briefly touched on it.

The defendant in *Ledesma* moved to excuse a county correctional officer as impliedly biased because the prospective juror knew the defendant was in custody. (*Ledesma*, *supra*, 39 Cal.4th at p. 668.) This Court found no implied bias under section 229 and rejected the federal constitutional argument, finding that "[e]ven assuming" the federal decisions relied upon by the defendant were "otherwise persuasive," the record indicated no potential for the type of "emotional involvement" discussed in the cases. (*Id.* at p. 670, citing *Allsup*, *supra*, 566 F.2d at p. 71 [jurors should have been excused for cause from serving on case in which the defendant was charged with robbing a bank that employed them, even though they claimed they could be impartial]; *Fields v. Woodford* (9th.Cir. 2002) 309 F.3d 1095 [evidentiary hearing required to determine whether juror whose wife had been the victim of a crime quite similar to the ones charged was biased]; *United States v. Eubanks* (9th.Cir. 1979) 591 F.2d 513 [juror who had two sons who were serving long prison terms for murder and robbery committed in an attempt to obtain heroin should have been excused from serving in case in which the defendant was charged with conspiracy to possess and distribute heroin].) The mere fact that the juror knew defendant was incarcerated "did not render him unable to be impartial." (*Ledesma*, *supra*, 39 Cal.4th at p. 670.)

Since *Ledesma* was decided, however, and since the filing of the original briefing in this case, numerous additional federal courts of appeal have acknowledged the validity of the federal

constitutional implied juror bias doctrine. (See e.g., *Fylling v. Royal Caribbean Cruises, Ltd.* (11th Cir. 2024) 91 F.4th 1371, 1376-1377; *United States v. Nieves* (2d Cir. 2023) 58 F.4th 623, 632-633; *United States v. Kuljko* (1st Cir. 2021) 1 F.4th 87, 93; *United States v. Nasir* (3d Cir. 2021) 17 F.4th 459, 468; *United States v. Diaz* (5th Cir. 2019) 941 F.3d 729, 737-738; *Frye v. CSX Transportation, Inc.* (6th Cir. 2019) 933 F.3d 591, 604-605; *Kechedzian*, *supra*, 902 F.3d at pp. 1027-1028; *Zia Shadows, L.L.C. v. City of Las Cruces* (10th Cir. 2016) 829 F.3d 1232, 1244; *Manuel v. MDOW Ins. Co.* (8th Cir. 2015) 791 F.3d 838, 843-845.) While these cases are not binding on this Court, they are not only persuasive but entitled to great weight. (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320.) Thus, in evaluating whether Mr. Barrett's constitutional rights were violated by the seating of Juror No. 12, this Court should apply the well-established federal constitutional test for implied bias and review the trial court's rulings de novo. (*United States v. Gonzalez* (9th Cir. 2018) 906 F.3d 784, 796 (*Gonzalez*) [a trial court's determination of implied bias is a mixed question of law and fact that is reviewed de novo].)

C. Mr. Barrett's trial presented extraordinary circumstances rendering CDCR employee prospective jurors impliedly biased

The relationship between CDCR and its personnel in Imperial County made bias far more likely than in a typical employer/employee relationship, due to economic and demographic circumstances, and the expansive, highly visible role of the agency in the trial. The subject matter of the trial, which hinged on agency

and personnel credibility and other highly inflammatory topics for CDCR employees, further increased the likelihood that such a juror would be unable to remain impartial.

1. CDCR's involvement in and influence over the trial was exceptional

CDCR operations had a substantial positive economic impact on the Imperial Valley in the early 2000s. At the time of the trial in 2003, Imperial County had the highest unemployment rate in the state — almost three times the state average.[3] CDCR's operation of two large prisons, Centinela and Calipatria, in the sparsely populated rural county[4] accounted for a significant number of much-needed jobs in the area. It's no surprise then, that of the 310 prospective jurors who filled out juror questionnaires, 55 (17.74%) were currently employed by CDCR, and close to half of prospective jurors, 148 (47.74%), indicated they had friends or relatives employed by CDCR. (CT Vols. 5-44 [juror questionnaires pp. 8, 14, questions 27, 28, 52].) Considering the economic conditions in the county, both CDCR employees themselves, and those with friends and family members working there, were even more predisposed to

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[3] Imperial County's unemployment rate was 18.8%; California's overall unemployment rate was 6.9%. (State of California Employment Development Department – California Labor Force & Unemployment Rates by County, [as of July 9, 2024] https://labormarketinfo.edd.ca.gov/data/interactive-labor-market-data-tools.html.)

[4] United States Census Bureau, 2000 Census of Population and Housing, Summary Population and Housing Characteristics: California (2002) p. 89

feelings of gratitude, loyalty, and obligation toward the agency than individuals in a typical employee/employer relationship. When asked their opinion of the prisons opening in Imperial County, 67 (21.61%) prospective jurors specifically referenced CDCR bringing jobs to the region or helping the local economy in their responses. (*Ibid.* [juror questionnaires p. 17, question 65].)

CDCR was also omnipresent in the criminal proceedings themselves, its involvement extending far beyond the typical role of an investigating law enforcement agency. CDCR was the physical setting for the crime and had in its legal and physical custody both the defendant and the decedent. CDCR conducted the ensuing criminal investigation: its personnel responded to the scene of the killing, collected, documented, and processed all of the physical evidence, submitted it for further analysis by state criminalists, and took witness statements. (AOB 20-25.) At the conclusion of that investigation, CDCR personnel decided to refer the case to the District Attorney for prosecution.[5] During all pretrial and trial proceedings, CDCR maintained custody of Mr. Barrett and oversaw his access to legal materials, written and telephone communications, and visits. CDCR was responsible for securing Mr. Barrett during transport and in the courtroom, including placing

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[5] See CDCR Department Operations Manual § 52080.6 Referral for Criminal Prosecution, p. 421 <https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2024/03/2024-DOM.pdf> ("All conduct that constitutes a crime, which occurs on facility property, shall be referred by the Warden or RPA to appropriate criminal authorities for possible investigation and prosecution when there is evidence substantiating each of the elements of the crime to be charged.")

him in shackles during trial. CDCR was also the petitioner in related litigation regarding discovery, Mr. Barrett's access to counsel and legal materials, and the use of restraints in the courtroom. (See, e.g., 2CT 503-529, 538-562.)

2. The central disputed issues at trial implicated CDCR employee bias

The contested issues at the guilt and penalty phases would have required CDCR employee jurors to make credibility determinations about their fellow officers and superiors, and consider inflammatory, emotional issues related to their own personal safety and job performance. Twenty-one of the prosecution's twenty-six witnesses in its guilt phase case in chief were CDCR employees. (AOB 108, fn. 54.) On the other hand, in Mr. Barrett's case in chief, of the only five witnesses called, two incarcerated people testified, Mr. Barrett and Christopher Poore. (58RT 7467; 63RT 7943.) He called an additional incarcerated witness, Edward Vargas, in surrebuttal. (65RT 8311.) The large number of CDCR employee prosecution witnesses and, by contrast, the handful of incarcerated defense witnesses, implicated CDCR employee juror bias in evaluating witness credibility, as CDCR employees were likely to be biased in favor of CDCR employees and against those incarcerated. (See subsection C.3. [discussing voir dire record], *post*.)

The prosecution and defense theories called for evidence and argument regarding niche prison-related topics that only CDCR employees would have familiarity with, including prison subcultures and politics, dynamics between guards and prisoners, weapons

manufacturing, storage, and use, housing, and disciplinary issues and proceedings. The prosecution's theory of motive for Mr. Richmond's killing was a complicated narrative in which Richmond was labeled a snitch for giving up weapons to prison staff and as a result moved to a different, special housing unit. (See, e.g., 47RT 5702-5707; 48RT 5723, 5780.) Explaining Richmond's cooperation and move required an understanding of disciplinary consequences and protocols related to incarcerated people providing incriminating information to prison staff. (See, e.g., 48RT 5723-5740; 48RT 5809-5812.) The jury was also asked to determine whether Mr. Barrett did or could have known about Mr. Richmond's cooperation with staff, and whether Mr. Barrett would have been expected to or motivated to kill Mr. Richmond as a result, based on various prison protocols and procedures, and prisoner culture and communication practices. (See AOB Argument IV; see e.g., 58RT 7409-7416, 7508-7514, 7527-7529; 63RT 7993-7995, 8010, 8019, 8032, 8056-8059.) The prosecution and defense cases also relied on testimony from correctional staff and incarcerated people regarding inmate-manufactured weapons — the particular ways that incarcerated people make, hide, and pass them around, and the signals communicating their intended use. (See, e.g., 48RT 5727-5729; 63RT 7950-7956; 58RT 7523-7526.)

A crucial issue at trial was whether the physical evidence in Mr. Richmond's and Mr. Barrett's cell corroborated Mr. Barrett having acted in self-defense. This issue hinged mostly on the reliability of CDCR's investigation, and whether personnel properly processed the scene and preserved physical evidence for later

analysis. The defense expert, forensic specialist Lisa DiMeo, testified regarding the numerous deficiencies in CDCR's investigation. (See e.g., 60RT 7750-7751, 7773-7775, 7779.) Her opinion that Mr. Richmond also had a knife during the altercation contradicted the prosecution theory based on that investigation. (See *Id.* at pp. 7848-7849, 7842.) Resolving this issue therefore required jurors to credit or discredit CDCR's investigative abilities and resulting determination that Mr. Barrett had committed a crime.

The prosecution was also permitted to present evidence of Mr. Barrett's character for violence through multiple instances of weapons possession and assaults while in prison. (59RT 7651-7670.) This evidence would have understandably activated CDCR employee jurors' fears about their personal safety while at work.

In sum, CDCR employees possessed a great deal of preexisting familiarity and — inevitably — their own biases and opinions about — niche prison issues critical to the trial's outcome. Even more important, especially because it was a self-defense case, determining guilt required jurors to pick a side, to credit either the prosecution narrative, presented primarily through CDCR employee witnesses, or that of Mr. Barrett, a prisoner, corroborated by other prisoners. This credibility contest directly implicated CDCR employee bias in favor of their employer and against Mr. Barrett. Finally, they would also have reason to fear violence during the course of their jobs, and the evidence of Mr. Barrett's character for violence in prison was likely to inflame bias against him.

The penalty phase evidence also created an especially high likelihood of bias for CDCR employee jurors. Thirty-one of the

thirty-seven prosecution witnesses were CDCR employees. (AOB 108, fn. 54.) As evidence in aggravation, the prosecution presented 20 instances of Mr. Barrett's prison misconduct, including weapons and weapons stock possession, assaults on other inmates, and, most problematically, assaults on correctional officers. (See *id.* at pp. 73-79.) All of this conduct either directly or indirectly threatened CDCR personnel safety and made their jobs more difficult. The prosecution heavily emphasized these incidents during closing argument, and the danger to officers presented by any violence in prison, even if not directed at staff. (84RT 10063-10089, 10083 ["And then we get a . . . lieutenant who's injured during this process of trying to break it up. This is what happens when violence occurs in prison even between inmates."].) Like the impliedly biased bank employees in *Allsup*, who had "good reason to fear" violence from bank robbers in the course of their jobs, this litany of violent, assaultive acts against correctional officers created an undue potential for emotional involvement from CDCR employee jurors who would view Mr. Barrett as undermining their job performance and threatening their safety. (See *Allsup*, *supra*, 566 F.2d at pp. 71-72 ["The employment relationship coupled with a reasonable apprehension of violence by bank robbers leads us to believe that bias of those who work for the bank robbed should be presumed."].)

3. The voir dire record substantiates CDCR employee implied bias

The voir dire record further demonstrates that, under the extraordinary circumstances presented, CDCR employees were presumptively biased and should have been excused. As discussed in

Appellant's Opening Brief, 35 of the 55 current CDCR employees in the jury pool were excused during *Hovey* voir dire. (AOB 95-96.) Several were excused specifically on *Witherspoon-Witt* grounds for their pro-death penalty views.[6] (28RT 3070-3077; 6CT 1682; 31RT 3430-3437; 13CT 3596; 34RT 3926-3942; 21CT 5908; 40RT 4747-4760; 35CT 9956, 9965.) But the majority of those excused acknowledged that as CDCR employees they could not be fair and impartial and/or were more likely to believe their colleagues than other witnesses. (See AOB 109-110, citing 36CT 10165; 39CT 11063; 43RT 5104; 44RT 5398; 40RT 4670; 24CT 6779-6780; 39RT 4607; 40RT 4726; 35CT 10034; 41RT 4838; 41RT 4840; 20CT 5661; 46RT 5600.) Many specifically admitted they were biased against prisoners, would not find them credible, and assumed they were guilty. (*Id.* at p. 111, citing 20CT 5651-5658; 24CT 6770; 34RT 3989; 36RT 4312-4313; 20CT 5664; 13CT 3608; 20CT 5667, 5670; 39CT 11063.) Some prospective jurors disclosed they had been personally assaulted by incarcerated people. (*Id.* at p. 112, fn. 60-61 citing 34RT 3988-3989; 31CT 8696; 43 CT 12066; 35RT 4086; 20CT 5658.) The prospective jurors who acknowledged bias as a result of their employment were not just correctional officers but held a variety of positions at the prisons. (See, e.g., 36CT 10164 [counselor]; 13CT 3596 [telecommunications tech]; 7CT 1718 [engineer]; 30CT 8585 [dental assistant].)

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[6] Two CDCR employees were excused for their opposition to the death penalty, and one for hardship. (43RT 5139-5141; 40CT 11198, 11207; 41RT 4823-4834; 36CT 10259, 28RT 3036-3041, 6CT 1475.)

A prospective juror may not recognize their own potential for bias during voir dire and may still be presumptively biased. (*Kechedzian*, *supra*, 902 F.3d at p. 1027.) However, the considerable record of CDCR employees acknowledging their bias during voir dire in this case is compelling evidence of the "potential for substantial emotional involvement" inherent in the relationship between CDCR and its employees. (*Allsup*, *supra*, 566 F.2d at p. 71; see *ibid.* ["the reality [of implied juror bias may] be revealed by circumstantial evidence"].)

4. Under these extraordinary circumstances, Juror No. 12, a CDCR employee, was impliedly biased and should have been excused

Courts have found implied bias based on a juror's employment where it was "accompanied by additional factors." (*Rodriguez v. County of Los Angeles* (9th Cir. 2018) 891 F.3d 776, 804, citing *Allsup*, *supra*, 566 F.2d at pp. 71-72.) The additional factors discussed above made it likely that CDCR employees, including Juror No. 12, would be unduly "emotionally involved" in the issues at trial, and thus impliedly biased against Mr. Barrett.

Juror No. 12 was a correctional officer at Centinela and had worked in corrections for the last 10 years. (29CT 8040.) She had grown up in Imperial County and never lived anywhere else. Juror No. 12's father had worked in corrections for the last 16 years, her sister for the last nine, and her cousin for the last eight. (*Id.* at p. 8051.) Her sister had also recently been assaulted by a parolee while conducting a home visit. (*Id.* at p. 8046.) When asked her opinion on the opening of the two prisons in Imperial County on her juror

questionnaire, Juror No. 12 responded, "I had a good opinion of the prison, the Imperial Valley has a need for work, I feel this helped employ a lot of people in our Valley." (*Id.* at p. 8051.) Juror No. 12 listed her job duties as: "custody of inmates." She worked around "lifers," and level 4 prisoners, with the understanding that a "good percentage" of them had been convicted of murder. She was familiar with the security protocols for inmates on trial, and knew the prosecutor "in a professional capacity." (38RT 4400-4402.)

During voir dire, Juror No. 12 may have sincerely believed that pressure or intimidation from other CDCR personnel would not affect her and that she could give Mr. Barrett a "fair shake." (38RT 4405-4406.) But bias may be presumed "even if the juror professes a sincere belief that she can be impartial." (*Gonzalez*, *supra*, 906 F.3d at p. 797.) Bias, specifically implicit bias, or "attitudes, stereotypes, and identities that operate without full conscious awareness or conscious control," is automatic and unintentional, but "nevertheless affects judgments, decisions and behaviors." (Morehouse & Banaji, *Understanding Implicit Bias: Insights & Innovations* (2024) Vol. 153, No. 1, at pp. 21, 24.) Given the nature of her relationship with CDCR, a central prosecution player, and in spite of her assurances that she could remain impartial, Juror No. 12, was very likely to economically, socially, and emotionally, identify with the prosecution via her employer and thus be biased against Mr. Barrett. (*See Allsup*, *supra*, 566 F.2d at p. 71 ["That men will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human character."]; *Dyer, supra*, 151 F.3d at p.

982 ["[P]ermitting such a juror to serve would introduce into the jury room an extraneous influence that could materially color the deliberations. The juror in question would be lacking the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror."].) Because she was seated on Mr. Barrett's jury, reversal is required.

D. Defense counsel's failure to exhaust peremptory challenges was justified and the biased juror claims are thus preserved

To preserve a claim of error based on denial of a cause challenge, defense counsel must either exhaust their peremptory challenges and object to the jury as finally constituted, or justify the failure to do so. (*People v. Rices* (2017) 4 Cal.5th 49, 75 (*Rices*); *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005, disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390.) Here, as explained below, counsel's failure to exhaust peremptory challenges was justified and this Court should reach the merits of the claim.[7] (See AOB 125-126.)

When the parties began exercising peremptory challenges, at least 17 CDCR employees remained in the jury pool. When defense counsel ultimately passed on using additional peremptory challenges, he had used 14 of his 20 challenges. (46RT 5578-5628.) At that point, he had been forced to use *half* of those challenges to

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[7] In the Opening Brief, appellant also urged the court to disavow the exhaustion of peremptory challenges requirement because it has been inappropriately converted from a prejudice consideration to a rule of forfeiture. (AOB 120-125.)

excuse impliedly biased CDCR employees. (*Ibid.*) Seven more such jurors remained in the pool, but counsel had only six remaining strikes. It was distinctly possible that counsel would not have enough peremptory challenges to excuse every CDCR employee that was called into the jury box thereafter. At that juncture, the prosecution had not been forced to, and did not, use any of its strikes to excuse CDCR employees, and had already "passed," indicating its satisfaction with the jury as constituted, seven times. (*Ibid.*)

While endeavoring to excuse as many CDCR employee jurors as possible, trial counsel also had to consider which non-CDCR employee venire members to strike, and attempt to use the allotted peremptory challenges to eliminate other potentially biased or undesirable jurors. Among the seven other prospective jurors stricken by defense counsel were V. Lozano, a border patrol agent who believed in an "eye for an eye," and whose sister had been murdered, (24CT 6730, 6737, 6740), N. Bock, who strongly favored the death penalty, (9CT 2397), J. Castillo, who strongly favored the death penalty and believed it "cleaned society," (11CT 2979), R. Cordova, who strongly favored the death penalty, (11CT 3086), and K. Caldera, a former LAPD officer and current Homeland Security agent, whose 16 year old son had been murdered and who knew some of the witnesses, (10CT 2694, 2697, 2721, 2722).

After using these 14 peremptory challenges, trial counsel found himself at an inflection point, and in a professional and strategic bind: having had to expend half of his peremptory challenges on CDCR employees who should have been excused for cause, Mr. Barrett was already at an obvious strategic disadvantage

compared to the prosecution, who faced no such substantial impediment to a fair trial. Counsel was now faced with the choice of whether to preserve the strength of whatever tactical decisions he had been able to make during selection, knowing that one biased juror would remain on the jury, or to strike Juror No. 12, and risk running out of peremptory challenges while an even more biased CDCR employee juror remained in the jury box, alongside other undesirable prospective jurors who counsel would have also excused if he had peremptory challenges remaining. These circumstances justify counsel's difficult decision not to use the remaining six peremptory challenges and should not result in the forfeiture of Mr. Barrett's right to an impartial jury.

This Court has found biased juror claims forfeited in several recent cases, but none of those cases presented analogous, extraordinary circumstances justifying failure to exhaust peremptory challenges. (See e.g., *People v. Suarez* (2020) 10 Cal.5th 116, 143; *People v. Bell* (2019) 7 Cal.5th 70, 94; *People v. Winbush* (2017) 2 Cal.5th 402, 425-426 (*Winbush*).) Comparison with *Winbush*, *supra*, 2 Cal.5th 402, is instructive. In that case, trial counsel unsuccessfully challenged two jurors for cause based on actual bias, did not exhaust his peremptory challenges, and both challenged jurors ultimately sat on the jury. (*Id.* at p. 425.) In concluding appellant had forfeited his biased juror claims, this Court noted that when counsel accepted the jury as constituted, the defense had 25 combined challenges left, and that the defense had "passed" — indicating its satisfaction with the panel — four times after the first challenged juror was seated. (*Ibid.*) This Court

emphasized that counsel had enough challenges remaining to "repopulate the panel twice over," and using additional challenges would not have depleted the venire. (*Id.* at p. 426.) Indeed, so many qualified jurors remained that the trial court sat six alternate jurors and allowed for 12 peremptory challenges per side. (*Ibid*.) By contrast, in this case, trial counsel passed for peremptory challenges only once, at the pivotal point discussed above, and only after having expended half of his strikes on the challenged category of prospective juror. Counsel did not have sufficient strikes to repopulate the panel, let alone twice over, and more to the point, did not have sufficient strikes left to excuse the CDCR employees remaining in the jury pool.

In applying the forfeiture requirements in *Winbush*, this Court reasoned there is "nothing arbitrary or irrational about a . . . requirement that the defendant use peremptory challenges to cure a trial court's assertedly erroneous refusals to dismiss jurors for cause," because this requirement "reasonably subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." (*Winbush*, *supra*, 2 Cal.5th at p. 426, quoting *Ross v. Oklahoma* (1988) 487 U.S. 81, 90 [internal quotation marks omitted].) In Mr. Barrett's case, however, rigid application of this rule would be irrational. Counsel was unlikely to be able to cure the trial court's error through the exercise of his remaining peremptory challenges, and any attempt to do so would have been at the expense of what little tactical advantage counsel had managed to secure during voir dire *in spite* of the court's error.

This Court's decision to reach the merits of a prosecutorial misconduct claim in *People v. Hill* (1998) 17 Cal.4th 800, is also instructive. In *Hill*, defense counsel was "thrust upon the horns of a dilemma" analogous to the one faced by trial counsel in this case. Counsel there failed to object to numerous instances of prosecutorial misconduct adequately, or in some cases, entirely. (*Id.* at p. 821.) Noting the pervasiveness of the misconduct and the trial court's failure to correct it, this Court observed the double bind counsel found himself in: if he continued to object, he "ran an obvious risk of prejudicing the jury towards his client." (*Ibid.*) If counsel declined to object instead, the defendant would suffer prejudice caused by the prosecutor's misconduct. Thus counsel "must be excused" from complying with the applicable technical issue preservation requirements. (*Id.* at pp. 821-822.) Trial counsel's failure to comply with the technical requirement of exhaustion here was justified by similarly counterpoised considerations.

The other requirements and underlying spirit of issue preservation were satisfied as well. Counsel raised the issue of CDCR employee juror bias multiple times; the trial court and the prosecution were fully on notice of it and of counsel's dissatisfaction with any jury containing a CDCR employee. (See *Rices*, *supra*, 4 Cal.5th at p. 75 [no specific wording is required in order to express dissatisfaction with the jury].) Likewise, through its repeated rejection of counsel's request to excuse these prospective jurors, the trial court made clear that any request for additional peremptory challenges in order to excuse such jurors would be futile. (Cf. *People v. Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to

proffer futile objections."]; accord *People v. Penunuri* (2018) 5 Cal.5th 126, 166; *People v. Young* (2019) 7 Cal.5th 905, 951, fn. 5; cf. *People v. O'Connell* (1995) 39 Cal.App.4th 1182, 1190 [where a court has already ruled against the defense on a particular issue, counsel is excused from objecting again when the same issue arises in a slightly different context].)

This Court has long recognized a theoretical exception to the forfeiture rule in juror bias claims. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087, overruled on other grounds in *Rices*, *supra*, 4 Cal.5th at p. 76; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Harris* (2013) 57 Cal.4th 804, 839.) The exceptional circumstances presented here justify its real world application. This Court should reach the merits of Mr. Barrett's claim, and accordingly find that his right to an impartial jury was violated.

E. The erroneous denial of the motion to excuse CDCR employees also violated Mr. Barrett's due process right to intelligently exercise his peremptory challenges

Though the loss of a peremptory challenge due to the erroneous denial of a cause challenge does not automatically amount to a constitutional violation, "it cannot be denied that a significant diminution of opportunities to exercise lawful peremptory strikes is problematic if it affects only the defense in a criminal trial." (*People v. Black* (2014) 58 Cal.4th 912, 922 (*Black*) (conc. opn. of Liu, J.); see *Rivera v. Illinois* (2009) 556 U.S. 148, 160, citing *U.S. v. Martinez–Salazar* (2000) 528 U.S. 304, 316 and *Ross*, *supra*, 487 U.S. at p. 91, fn. 5, [concluding the erroneous denial of a single peremptory challenge did not rise to the level of a due process

violation because the trial judge did not *repeatedly* or deliberately misapply the law].) In his concurring opinion in *Black*, Justice Liu described a hypothetical due process violation under circumstances comparable to those here: Where a defendant is forced to expend five peremptory challenges on jurors who should have been excused for cause and is then forced, after exhausting his peremptory challenges, to accept five jurors he would have otherwise struck for reasons short of cause — and the prosecution was not forced to use any peremptory challenges in this manner — the defendant is clearly "substantially disadvantaged relative to the prosecution," in violation of due process. (*Black*, *supra*, 58 Cal.4th at p. 922 (conc. opn. of Liu, J.).)

In this case, counsel was forced to use half, seven, of his expended peremptory challenges on jurors who should have been excused for cause, while the prosecution was not forced to use any of its challenges in this way. In the hypothetical scenario, the defendant exhausted his peremptory challenges, but the extenuating circumstances in Mr. Barrett's case justifying the failure to do so were not contemplated. Moreover, in Justice Liu's scenario, no biased juror was forced upon the defendant, only those jurors counsel would have stricken for reasons short of cause, nevertheless unconstitutionally disadvantaging the defendant. Thus, in that scenario, the Court's "prejudice inquiry [would] examine whether a trial court's errors substantially disadvantaged the defendant relative to the prosecution in the opportunity to remove jurors for lawful reasons short of cause." (*Black*, *supra*, 58 Cal.4th at pp. 922-923.) Here, the prejudice analysis is much more

straightforward. By repeatedly forcing Mr. Barrett to use peremptory challenges to cure its erroneous cause challenge denials, the trial court put the defense at a substantial disadvantage. Counsel was unable to intelligently exercise peremptory challenges to excuse both legally incompetent jurors and those who counsel would have stricken for lawful reasons short of cause. As a result, Juror No. 12, an impliedly biased juror, was seated on the jury. The denial of the cause motion thus violated not only Mr. Barrett's right to an impartial jury, but his due process right as well. For both of these reasons, this Court should reverse the judgment.

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II.
POLICE EXTRACTED MR. BARRETT'S 1986 JUVENILE CONFESSION IN VIOLATION OF *MIRANDA* AND IT SHOULD HAVE BEEN EXCLUDED FROM THE PENALTY PHASE

In the Opening Brief, appellant argued that Mr. Barrett's confession, at 16 years old, to Mr. Jackson's homicide, should not have been admitted at the penalty phase because it was unreliable and obtained in violation of his *Miranda* rights. (AOB, Argument XVI.) Below, appellant addresses new and additional authorities supporting the contention that Mr. Barrett's purported *Miranda* waiver was not knowing, intelligent, and voluntary. Additionally, in addressing respondent's forfeiture argument, appellant raised ineffective assistance of counsel in the Reply Brief. Below, appellant further addresses this issue and sets forth ineffective assistance of counsel as a separate ground for relief.

Prior to custodial interrogation, police must advise a person "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*People v. Elizalde* (2015) 61 Cal.4th 523, 531, fn. 4, (*Elizalde*) quoting *Miranda v. Arizona* (1966) 384 U.S. 436, 479.) "Once properly advised of *Miranda* rights, a suspect may waive them provided the waiver is voluntarily, knowingly and intelligently made." (*In re T.F.* (2017) 16 Cal.App.5th 202, 210 (*In re T.F.*).) The prosecution must establish the validity of a waiver by a preponderance of the evidence. (*People v. Williams* (2010) 49 Cal.4th 405, 425.) The denial of a motion to suppress a confession is

reviewed de novo, and courts must use special care and caution when scrutinizing a juvenile's waiver and confession. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1166, citing *In re Gault* (1967) 387 U.S. 1, 45.)

A. Penalty phase evidence regarding Mr. Jackson's homicide

During the guilt phase trial, Mr. Barrett stipulated that he was convicted of first degree murder in 1987, forming the basis for the jury's prior murder special circumstance finding. (73RT 8896-8897; see Penal Code § 190.2(a)(2).) The prosecution played a recording of his interrogation and confession to the killing of James Jackson for the jury during the penalty phase, over defense objection. (See subsection B., *post*.)

As described by his former probation officer, Mr. Barrett grew up in a "deplorable" situation. (81RT 9643.) He experienced physical and sexual abuse and often did not have enough food to eat. (*Id.* at pp. 9643, 9656.) Mr. Barrett's mother also struggled with substance abuse. (*Id.* at p. 9640.) By the time he was 16 years old in 1986, Mr. Barrett was transient and had had many contacts with police while intoxicated with alcohol or drugs. (*Ibid.*; 82RT 9804.)

That year, Mr. Jackson, an adult man, first approached the teenaged Mr. Barrett outside the Double Rainbow ice cream parlor in the Haight neighborhood of San Francisco. (3SuppCT 429.) He offered Mr. Barrett food and let him stay the night at his apartment. (*Id*. at pp. 429, 445.) Over the next few weeks, Mr. Barrett visited Mr. Jackson's apartment about three times. (*Ibid.*) Mr. Jackson seemed nice, and Mr. Barrett believed he was a friend. (*Id.* at p.

460.) On October 4, Mr. Jackson again approached Mr. Barrett outside the ice cream shop. (*Id.* at p. 430.) They went back to Mr. Jackson's apartment and watched T.V. (*Ibid.*) As the hours passed, Mr. Jackson plied Mr. Barrett with copious amounts of alcohol and marijuana. (*Id.* at pp. 433, 444.) Mr. Jackson played heterosexual pornographic videos on the T.V. in his bedroom and took off all his clothes, lying on the bed next to Mr. Barrett, who remained fully clothed. (*Id.* at pp. 431-432.) Mr. Jackson tried to force himself on Mr. Barrett numerous times over the course of the night, attempting to engage in oral sex with Mr. Barrett. (*Id.* at pp. 431, 442.) Late into the night, as Mr. Jackson lay on the bed, perhaps feigning sleep, Mr. Barrett retrieved a dumbbell from the living room and struck Mr. Jackson's head with it several times. (*Id.* at pp. 433-434.) He believed Mr. Jackson was still alive afterwards. (*Id.* at p. 458.) Frightened, Mr. Barrett then searched the apartment for cash to help him run away. (*Id.* at p. 450.) Ultimately, he grabbed some items of value he could re-sell from Mr. Jackson's closet (a leather jacket, some "bondage" equipment he found, and two VCRs) and left. (*Id.* at pp. 454-456.) One week later, when Mr. Barrett was arrested for an unrelated matter, he volunteered his involvement in Mr. Jackson's death. (82RT 9806.)

1. The interrogation and confession

Mr. Barrett was taken into police custody late on the night of October 11, 1986, or in the early morning hours of October 12. (76RT 9049; AOB 408, fn. 188.) Although some of the interrogation was tape-recorded, any constitutional advisements given to Mr. Barrett were not recorded. (3SuppCT 426.) There is no indication that the

police attempted to notify Mr. Barrett's mother that he, a minor, was in their custody, or that they informed Mr. Barrett that he had a right to contact his mother. (See Welf. & Inst. Code, § 627 [requiring arresting officer to "take immediate steps to notify the minor's parent . . . that such minor is in custody," and to "immediately" advise the minor they have a right to call both their parent or guardian and an attorney].) Additionally, there is no indication that Mr. Barrett was given any food or an opportunity to sleep at any point between his arrest and the interrogation. The record does not establish when the interrogation started, but at 4:52 a.m. Mr. Barrett asked the interrogating officers for "another cup of coffee." (46CT 13057.) The interrogation concluded at 5:16 a.m. (46CT 13069.)

There is also evidence that Mr. Barrett was intoxicated on the night of his arrest and at the time of the interrogation that followed. Mr. Spychala testified that Mr. Barrett assaulted him around 8:30 or 9 pm on October 11, and observed that Mr. Barrett "had been drinking." (76RT 9028.) Mr. Barrett was arrested and interrogated sometime after that. When prompted by interrogating officer, Inspector McCoy, "Tonight you were -ah- arrested," Mr. Barrett responded, "highly intoxicated." (3SuppCT 446.)

2. The murder conviction

Mr. Barrett was prosecuted as an adult and convicted of first degree murder. (73RT 8896-8897.) Though, based on conversations with his attorney, he believed he would receive no more than 7 years if convicted at trial, Mr. Barrett was sentenced to 26 years to life in state prison. (82RT 9806-9807.) At 17 years old, he was transferred

to Vacaville state prison, which he described as "hell on earth." (*Id.* at p. 9807.) The capital offense occurred less than 10 years later, when Mr. Barrett was 26 years old.

B. Trial counsel moved to exclude the confession under *Miranda*

Before the penalty phase trial began, trial counsel moved to exclude Mr. Barrett's confession under *Miranda* and because Mr. Barrett was a juvenile at the time of his interrogation. (46CT 12959; see AOB 407-409.) Counsel specifically raised the absence of any constitutional advisements from the recorded interrogation, and argued that Mr. Barrett's statements should be excluded absent proper foundation. (46CT 12961.) Counsel also argued there was insufficient evidence that Mr. Barrett, as a juvenile, adequately understood the effect of his confession and that his parents should have been notified prior to interrogation. (*Ibid.*) The motion contained a separate request to exclude admissions to other crimes in the interrogation recording. (*Id.* at p. 12962.)

At a hearing a few days later, trial counsel brought the *Miranda* motion to the trial court's attention. (74RT 8935.) In response, the prosecutor stated, "I'm going to have the inspector who is retired now who handled that case and conducted that interview in court to lay the foundation for the admissibility of the defendant's confession." (*Id.* at p. 8936.) Counsel then moved on to the motion to exclude references to other crimes in the confession, arguing that they should be excluded, "even apart from the confession as it relates to what happened to Mr. Jackson[.]" (*Ibid.*) After further back and forth about the other crimes issue, counsel stated, "What

happened to Mr. Jackson and his confession to the details of that I understand are probably going to come in. It's these other misconduct – potential crimes that should not come in since there is no evidence apart from what Mr. Barrett said that they actually occurred." (*Id.* at p. 8938.) The court indicated that any references to crimes for which there was no other, independent evidence should be redacted from the confession, but made no other comments on the admissibility of the confession. (*Id.* at pp. 8938-8939.)

During the penalty phase trial, retired San Francisco Police Inspector Frank McCoy testified for the prosecution regarding Mr. Barrett's interrogation 17 years earlier. (76RT 9049.) Inspector McCoy affirmed that he advised Mr. Barrett of his "constitutional rights," because he was "required to do so," and that Mr. Barrett said he understood and was willing to speak with him. (*Id.* at p. 9052.) Inspector McCoy never specified what rights he advised Mr. Barrett of, or provided any additional detail about how he did so. A redacted version of the recorded interrogation (without some references to other crimes) was then played for the jury. (*Id.* at p. 9056.)

C. The prosecution failed to establish any waiver of *Miranda* rights was knowing and intelligent

The prosecution failed to establish Mr. Barrett's *Miranda* waiver was knowing and intelligent because they presented no evidence of what rights Mr. Barrett was advised of prior to his interrogation. (See AOB 412-415.) While no "talismanic incantation" of rights is required to satisfy *Miranda*, a law enforcement officer must reasonably convey each of the four rights to a detainee, such

that any waiver of the rights is knowing and intelligent. (*People v. Sta Ana* (2021) 73 Cal.App.5th 44, 53, citing *Duckworth v. Eagan* (1989) 492 U.S. 195, 203.) Thus, reviewing courts examine the substance of the admonition given to an appellant in determining whether it was adequate. (See, e.g., *id*. at pp. 54-55; *People v. Miranda-Guerrero* (2022) 14 Cal.5th 1, 16-17; *U.S. v. Botello-Rosales* (9th Cir. 2013) 728 F.3d 865, 867.) Juveniles, in particular, often "have a poor comprehension of what is at stake," and courts must examine admonitions in those cases with special care. (See Goldstein, et. al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights* (2018) 21 N.Y.U. J. Legis. & Pub. Pol'y 1, 24-25 [noting that around 90% of youth waive their *Miranda* rights — a much higher rate than adults, and often fail to adequately understand the stakes].) For example, in *In re T.F.*, *supra*, 16 Cal.App.5th at p. 211, the appellate court observed that the police detective "rapidly rattled off the *Miranda* admonition without taking time to determine whether [the juvenile] understood all of his rights." The advisement occurred after nearly an hour of questioning. (*Ibid*.) The detective also informed the minor he would read him his rights "before [they] talk," which was "contradictory and confusing." (*Id.* at p. 212.) Under the circumstances, the court found the prosecution failed to establish the minor's waiver was knowing, intelligent, and voluntary. (*Id.* at p. 211.)

The most obvious and unavoidable problem in this case is that the prosecution never actually established that Inspector McCoy, or any other police officer, advised Mr. Barrett fully of his *Miranda*

rights — let alone in a manner that was not contradictory, confusing, or manipulative when presented to a juvenile. Significantly, the recording of the interrogation began only *after* some kind of unspecified admonition was apparently provided to Mr. Barrett:

> [recording begins]
>
> McCoy: Joe, do you understand each of these rights that I have explained to you?
>
> Barrett: Yes, I do.
>
> [. . .]
>
> McCoy: And having these rights in mind do you wish to talk to us now?
>
> Barrett: Yes.

(3SuppCT 426.) Though the prosecution was on notice of the issue before trial and assured the court it would lay the foundation through Inspector McCoy's testimony, McCoy provided no additional detail about what Mr. Barrett was advised of, or what transpired prior to this supposed waiver — whether Mr. Barrett asked to speak to his mother or an attorney, for example, or whether police questioned him prior to the recording or any admonition.

Respondent contends that Mr. Barrett's "responses clearly showed that he understood the rights that were read," supporting an inference of a valid *Miranda* waiver. (Respondent's Brief 218.) But *what* rights were read? Without any evidence of what Mr. Barrett was advised of, there is no waiver — express or implied— that can satisfy *Miranda's* admissibility requirements. As the

appellate court in *People v. Bradford* (2008) 169 Cal.App.4th 843, (*Bradford*) observed:

> Although courts have permitted officers some latitude in the manner in which the *Miranda* warnings are delivered, we are unaware of any post-*Miranda* decision that has permitted the admission of a defendant's statements in the absence of a showing that a recognizable version of each of the four warnings was provided to the suspect. . . . In some . . . cases, the courts examined the record to determine that the defendant understood the *Miranda* advisements, but they turned to the record only after finding that some form of each warning was given to the defendant. The evidence of understanding was therefore used not as a substitute for one of the four warnings, but rather to demonstrate that the defendant properly understood an arguably imperfect warning.

(*Id.* at pp. 852-853.) By failing to present evidence of an adequate *Miranda* admonition, the prosecution did not meet its burden of establishing that Mr. Barrett's waiver was knowing and intelligent by a preponderance of evidence. Accordingly, the confession should not have been admitted.

D. Recent scientific developments and legislation support the involuntariness of Mr. Barrett's purported *Miranda* waiver

Even if a *Miranda* admonition could somehow be inferred from the interrogation recording, the prosecution also failed to establish Mr. Barrett's waiver was voluntary. (See AOB 415-421.) A "waiver of *Miranda* rights must be voluntary in the sense that it was the product of a free and deliberate choice, and was made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." (*In re T.F.*, *supra*, 16

Cal.App.5th at p. 210.) The prosecution's burden to establish voluntariness is greater in the case of a minor than an adult. (*Id.* at p. 212, citing *In re Anthony J.* (1980) 107 Cal.App.3d 962, 971.) In determining whether a juvenile's *Miranda* waiver was voluntary a court considers the totality of the circumstances, "including the minor's "age, experience, education, background, and intelligence, and ... whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Id.* at pp. 210-211, quoting *Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

In the Opening Brief, appellant argued that any waiver of Mr. Barrett's *Miranda* rights was involuntary based on his vulnerable age, lack of sleep, intoxication, absence of parental support or the opportunity to consult an attorney, and the absence of evidence that he was indeed properly advised of his rights. (AOB 415-421.) Neuro- and social- scientific developments over the past decade lend further support to these contentions. Moreover, recent legislation recognizes juveniles' particular vulnerabilities to coercive interrogation dynamics.

At 16, Mr. Barrett was especially vulnerable to the effects of sleep and food deprivation and the inherently coercive nature of interrogation by two adult authority figures. (See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272 [children are more vulnerable to outside pressures and more likely to become overawed and overwhelmed during police interrogation than an adult]; *In re Aven S.* (1991) 1 Cal.App.4th 69, 75 ["lack of food or sleep, are all likely to have a more coercive effect on a child than on an adult"]; Pierce,

Juvenile Miranda Waivers: A Reasonable Alternative to the Totality of the Circumstances Approach (2017) 2017 B.Y.U. L. Rev. 195, 205 ["adolescents are more susceptible and vulnerable to coercion because they are still maturing in their psychosocial development"].) But, because of Mr. Barrett's traumatic history (i.e., homelessness, food insecurity, and abuse) he was even more vulnerable to coercive interrogation dynamics than a typical teen. (Cleary, et al, *How Trauma May Magnify Risk of Involuntary and False Confessions Among Adolescents* (2021) 2 The Wrongful Conviction L. Rev. 173, 176, 184 (hereafter, Cleary).) Because teenagers with trauma often have "depleted self-regulatory abilities," they are "more passive and likely to acquiesce to the 'default' option" – for example, to accede to the pressure of an interrogating officer – "rather than exert the mental effort necessary to actively challenge that default" by maintaining their innocence or right to remain silent. (*Ibid*.)

Based on an improved scientific understanding of the adolescent brain, the Legislature has, in recent years, enacted safeguards against the coercive effect of custodial interrogation on juveniles — measures not in place during Mr. Barrett's interrogation 39 years ago. Effective January 1, 2021, anyone 17 years of age or younger is required to consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights. (Welf. & Inst. Code, § 625.6, subd. (a); see Sen. Bill 335 (2019-2020 Reg.) § 1 [findings & declarations].) Additionally, effective July 1, 2024, law enforcement officers are prohibited from using threats, deception, and "psychologically manipulative interrogation tactics" while interrogating minors, including

minimizing the "moral seriousness of the offense," and making indirect promises of leniency. (Welf. & Inst. Code, § 625.7.)

In this case, considering the totality of the circumstances, including Mr. Barrett's vulnerable age and trauma exposure, environmental stressors, lack of opportunity to speak with his mother or an attorney, and the dire consequences of making inculpatory statements in a murder case, (see *In re T.F.*, *supra*, 16 Cal.App.5th at p. 211), the prosecution failed to show that any waiver of Mr. Barrett's *Miranda* rights was the "product of a free and deliberate choice, and was made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." (*Id.* at p. 210.)

E. The admission of the confession was not harmless

At the outset of the penalty phase, the jury knew only that Mr. Barrett had been convicted of murder in 1987. As discussed below, the detailed, graphic confession was profoundly aggravating. Even with the admission of this prejudicial evidence, however, the case was close, and the jury struggled with their ultimate decision. Respondent cannot demonstrate beyond a reasonable doubt that without the confession, not one juror would have voted for life without parole rather than death. (See *Elizalde*, *supra*, 61 Cal.4th at p. 542 [erroneous admission of confession obtained in violation of the Fifth Amendment is reviewed for prejudice under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*); respondent must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"]; AOB 423-425.)

In assessing prejudice, Mr. Barrett's confession must be viewed in the context of all the penalty evidence. The prosecution relied heavily on Mr. Barrett's juvenile record to imply that he was incorrigible even from a young age. And Mr. Jackson's killing was by far the most egregious prior act of violence — juvenile or otherwise — the prosecution presented to the jury in aggravation. While the parties stipulated to the conviction itself, nearly all of the detail of the offense, much of it vivid and inflammatory, came in through the recorded confession. The graphic details of the attack provided excellent fodder for the prosecution's incorrigibility narrative and were much more likely to elicit a negative emotional reaction from the jurors than the bare fact of the prior conviction.

During his interrogation, Mr. Barrett recounted "smashing [Mr. Jackson's] skull in," striking him five or six times in the head, and putting a pillow over his head to muffle the "gurgling" and "choking" sounds emitting from him afterwards. (3SuppCT 459.) When asked why he hit him, Mr. Barrett responded, "I don't know to tell you the truth I really don't know . . . I don't know I just hated him at that point I really despised him . . . Probably his homosexuality – um – and the fact that he knew that I was sixteen years old and that he tried to engage in oral copulation with me." (*Id.* at pp. 441-442.) "I wanted to hurt him. I will admit that. I wanted to hurt him bad. I wanted to make him feel pain." (*Id.* at p. 461.) When asked if Mr. Jackson ever fought back, Mr. Barrett answered, "He didn't stand a chance." (*Ibid.*) Mr. Barrett also described spending a substantial amount of time searching through Mr. Jackson's apartment and belongings after the attack and taking

things of value when he left to re-sell on the street. (*Id.* at pp. 450-456.)

Moreover, though trial counsel succeeded in excluding references to other crimes, the interrogation contained other damaging information about Mr. Barrett's substance use, juvenile record, and criminal savvy. He described having done LSD earlier in the day, and ingesting copious amounts of marijuana and alcohol on the evening of the attack. (3SuppCT 433, 444, 446.) Mr. Barrett described going "AWOL" from Log Cabin Ranch a juvenile facility, and using a fake I.D. with police "to cover [his] tracks in case [he] ever got pulled over." (*Id.* at p. 447.) Mr. Barrett also spoke intelligently and articulately throughout the interrogation, which contributed to an impression of sophistication (inaccurate though it may have been), cutting against the inherent vulnerability of his youth.[8] All of these details helped advance a compelling prosecution narrative of Mr. Barrett as undeserving of the jury's compassion,

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[8] Twenty years later, possible explanations for Mr. Barrett's relative eloquence and coherence during the interrogation have evolved away from the simple of lack of remorse or empathy emphasized by the prosecution at the time of trial: "[A]dolescents with trauma histories may underreact to the threat of the interrogation room and thus be viewed as indifferent, apathetic, or insincere–which police may also perceive as indicating guilt. . . . Likewise, adolescents with trauma exposure may experience feelings of detachment or estrangement from others, particularly following traumas with an interpersonal component, such as sexual assault, [and] violence. . . A detached, emotionally numb adolescent may be as equally unreactive to the interrogating officer's lighthearted banter as they are to descriptions of the violent crime being investigated, and police officers may view this perceived coldness with suspicion." (Cleary, *supra*, at p. 176.)

someone who, "not even a teenager yet," was innately inclined towards crime and violence. (75RT 8954-8955.)

However, when the confession is viewed through a contemporary lens, Mr. Barrett described, in essence, predatory, grooming behavior, targeted at an especially vulnerable minor: an adult man approaching and befriending a homeless teen (who had a history of abuse) by offering him food and shelter, plying him with drugs and alcohol, and then repeatedly attempting to sexually assault him.[9] Thus, Mr. Barrett's lack of insight into his reaction to these assaults and his failure to leave the apartment after the attempted sexual assaults began might be viewed with more nuance and understanding today. But in 2003, the prosecution was able to persuasively discredit Mr. Barrett's account of sexual abuse, and imply that, if it was true, Mr. Barrett himself was to blame:

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[9] See Winters & Jeglic, *Stages of Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters* (2017) 38 Deviant Behavior 6, 724-733 (grooming strategies include selecting a vulnerable victim and developing trust); Duron, et al., *Observing Coercive Control Beyond Intimate Partner Violence: Examining the Perceptions of Professionals About Common Tactics Used in Victimization* (2021) 11 Psychology of Violence 2, 144-154 ("Grooming is a predatory tactic that is often discussed in the context of child sexual abuse [citation] although it has been used to describe the process in which predators establish trust with their victims in other violent contexts [citation]."; Perpetrators "rely on the development of trust, doing so by helping victimized youth and young adults in ways they need, such as by providing shelter, food, clothing, money, personal items, or transportation"; "At the core of the grooming process is gaining the victim's trust, often through fulfillment of the victim's needs and goals. These needs can be physical such as a need for money or food").

> The defendant claims that Mr. Jackson forced himself upon him, and that upset the defendant. Bear in mind, if you listen to this tape and read your transcripts, you'll see that the defendant had gone to Mr. Jackson's home over a course of a month at least four times. The first time he went to Mr. Jackson's residence a month or so prior to the killing of Mr. Jackson, the defendant stayed overnight. You will hear that on the tape. . . . In fact, you'll hear on the tape that the defendant was asked, "well why didn't you just get up and leave?" He didn't. He stayed there. The fact is he laid in the bed with the man next to him until the man fell asleep before getting up out of that bed, going in the living room, picking up a ten-pound dumbbell, holding it behind his back, walking back in the bedroom, standing over the man, and then proceeded with both hands smashing his skull in five or six times with the dumbbell over a 30 second period." I ask you, did the guy put up a struggle? Mr. Jackson? From the defendant's own statement, he never had a chance. That's an aggravating factor. . . .

(84RT 10045-10046.)

> What else is aggravating about Mr. Jackson's murder? . . . The defendant stayed in that residence with Mr. Jackson. You'll read it in transcript and hear it on the tape.

(84RT 10047.)

> Listen to the tape, because this thing about sexual advances to Mr. Barrett may or may not have been true. And the reason I say that is because in the tape, you'll hear that the sexual advances by Mr. Jackson allegedly occurred in two different locations . . . Well, if, in fact, it really did happen, why did it supposedly happen in two different places? So before you take too much of that weight away from that situation based upon Mr. Barrett's testimony that "he made sexual advances toward me," please listen to the tape. That's all I ask.
>
> The defendant's lack of remorse for committing both murders – again listen to the voice . . . Listen to see if you hear any remorse.

(84RT 10048-10049.) These arguments likely held sway with at least some of the jurors, particularly in light of Mr. Barrett's record of violence and misconduct, and commonplace biases against male sexual assault victims.[10]

On the other hand, trial counsel sought to "allay [the jury's concerns] that Mr. Barrett was nothing more than an animal, a beast, a monster," through the presentation of sympathetic, humanizing mitigation evidence from a credible and objective witness: Mr. Barrett's former probation officer, Officer Rand. (81RT 9628.) Rand testified to the extremely difficult circumstances of Mr. Barrett's childhood, including poverty, food and housing insecurity, and physical and sexual abuse. (*Id.* at pp. 9642-9643.) Officer Rand

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[10] Victim blaming in sexual assaults (implying that a victim's behavior is the reason for their sexual assault) is a well-documented, widely occurring phenomenon. (See Morrison & Pedersen, *The Influence of Sexual Orientation on Attributions of Blame Toward Victims of Sexual Assault* (2018) J. Homosexuality, 2-3.) In particular, studies have found that people blame male victims more for their own abuse than female victims, stemming from negative perceptions of their behavior, such as failing to protect oneself, fight back, or escape during a sexual confrontation. (Davies, et al., *Sexual preference, gender and blame attributions in adolescent sexual assault* (2011) J Soc. Psychol. 151, 5-6.) Findings for adolescent victims are the same, because "adolescents are generally seen to be quasi-adults possessing the ability to understand sexual meaning, to engage in sexual activity consentingly and to resist any form of unwanted sexual contact [citations]. Boys who have been sexually assaulted seem especially vulnerable to negative perceptions. [citations]." (Davies, et al., *Effects of victim gender, victim sexual orientation, victim response and respondent gender on judgements of blame in a hypothetical adolescent rape* (2009) Legal and Crim. Psychol., 331-338, 332.)

also discussed Mr. Barrett's love and protective inclinations towards his younger sister, Lisa, and his capacity for insight and growth. (*Id.* at pp. 9638, 9645-9646.) Additionally, trial counsel presented credible evidence that if Mr. Barrett were sentenced to life, he would be sent to Pelican Bay and prevented from engaging in further misconduct. (82RT 9713-9726.) In light of this significant mitigation evidence, even with the confession's damaging impact, the jury still struggled with their ultimate decision. They deliberated for approximately 15 hours over the course of four days, (47 CT 13167 [Feb. 24, 2004]; 47 CT 13171 [Feb. 25, 2004]; 47 CT 13175 [Feb. 27, 2004]; 47 CT 13182 [Mar. 10, 2004]), and asked for readback of Mr. Barrett's statement, (47 CT 13175; 87 RT 10213-10216). (See *In re Sakarias* (2005) 35 Cal.4th 140, 167 [juror deliberations of more than 10 hours over three days suggested close case]; *People v. Vasquez* (2018) 30 Cal.App.5th 786, 802 [juror deliberations of two days, jury questions and supplemental closing argument suggested error not harmless]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close."].)

"An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." This is most true in the "specific context of a confession." (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman*, *supra*, 386 U.S. at p. 24.; see *People v. Cahill* (1993) 5 Cal.4th 478, 503 (*Cahill*) [the improper admission of a confession is "much more likely to be prejudicial under the traditional harmless-error standard"].) The gruesome details and Mr. Barrett's seeming

lack of remorse were especially impactful in the penalty determination, where the jury was asked to decide whether Mr. Barrett's "moral culpability [] warrant[ed] death," (*People v. Nieves* (2021) 11 Cal.5th 404, 503), and "[t]he precise point which prompts the [death] penalty in the mind of any one juror is not known." (*People v. Hines* (1964) 61 Cal.2d 164, 169.) The confession likely eclipsed other evidence both mitigating and aggravating, as "jurors tend to view confession evidence as more potent than any other type of evidence presented at trial, including eyewitness evidence and character testimony." (Lisa Dobrowolsky, *Are Jurors' Judgments about Confessions Affected by Juvenile Defendant Race?* (2018) University of Albany, N.Y.U. 1, 8-9[11]; see *Cahill*, *supra*, 5 Cal.4th at p. 503 ["the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence"].) For these reasons, the State cannot show beyond a reasonable doubt that the confession was not a factor in at least one juror's vote for death.

F. This Court should reach the merits of this *Miranda* claim

Trial counsel preserved this issue for appeal by moving to exclude Mr. Barrett's confession because the prosecution failed to demonstrate that he was properly advised of, and lawfully waived, of all four of his rights under *Miranda*. (See Appellant's Reply Brief (ARB) 164-165.) Though the trial court never actually ruled on the

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[11]https://scholarsarchive.library.albany.edu/cgi/viewcontent.cgi?article=1014&context=honorscollege_cj

pending motion after the prosecution indicated it would lay the requisite foundation, the failure to formally rule constituted an implied ruling in favor of admissibility. (See *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1651 ["where the court reserves its ruling, a failure to renew the point has been held not to bar its consideration on appeal"; the court's failure to rule is an implied ruling against the objection and in favor of admissibility].) However, even if this Court finds counsel was obliged to renew the objection after Inspector McCoy testified, it should address this claim on the merits because it affects Mr. Barrett's core constitutional rights.

"It is well settled that an appellate court may decide an otherwise forfeited claim where the trial court has made an error affecting 'an important issue of constitutional law or a substantial right.'" (*People v. Anderson* (2020) 9 Cal.5th 946, 963(*Anderson*), quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) In *Anderson*, this Court concluded it should reach the merits of a notice issue despite the lack of objection below. (*Ibid.*) Without indicating that any individual reason was necessary or sufficient, it supplied three grounds for reaching the merits: the error (1) was "clear and obvious," (2) affected the defendant's substantial rights, and (3) went "to the overall fairness of the proceeding." (*Ibid.*; accord, *People v. Wash* (1993) 6 Cal.4th 215, 276-279 (conc. & dis. opn. of Mosk, J.) [although no objection raised, penalty phase prosecutorial misconduct required reversal of death sentence because error was manifest and because comments both seriously affected the defendant's substantial rights and had unfair prejudicial impact on deliberations].)

All three *Anderson* factors apply here. First, the prosecution indisputably failed to establish that Mr. Barrett was adequately advised of his *Miranda* rights — a "clear and obvious" foundational defect in admitting the confession. Second, "[i]t appears beyond question that 'substantial rights' include the privilege against self-incrimination[.]" (*Cahill*, *supra*, 5 Cal.4th at p. 538 (dis. opn. of Mosk, J.).) Third, use of a *Miranda*-violative confession extracted from a 16 year old minor to secure a verdict of death cannot be deemed fair. Therefore this Court should reach this crucial issue on its merits.

G. If trial counsel forfeited this issue, the forfeiture violated Mr. Barrett's right to effective assistance of counsel

If this Court finds the issue forfeited, it should further find that counsel rendered ineffective assistance in failing to preserve it. Though ineffective assistance of counsel was raised in Appellant's Reply Brief as a basis for excusing any forfeiture, it was not explicitly asserted as a separate ground for relief. (ARB 165-166, citing *People v. Trujeque* (2015) 61 Cal.4th 227, 249 (*Trujeque*) [addressing merits of challenge to prior conviction where trial counsel's failure to object on proper ground would constitute ineffective assistance of counsel].) Appellant asserts it here. There is no conceivable, reasonable justification for trial counsel's failure to renew his objection on foundational *Miranda* grounds after having moved to exclude the confession on the same grounds before trial. Thus any failure on the part of counsel to effectively preserve the issue was a denial of Mr. Barrett's right to effective representation

under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution.

While ineffective assistance of counsel claims are most often reviewed by way of habeas corpus, when "counsel's ineffectiveness is so apparent from the [appellate] record" that a Sixth Amendment violation is arguably demonstrated, it is appropriate to raise and consider the merits of the claim on direct appeal. (*Massaro v. United States* (2003) 538 U.S. 500, 508; accord, *People v. Pope* (1979) 23 Cal.3d 412, 426.) As the Court has frequently reiterated, to make out a claim of ineffective assistance, appellant

> must prove "'that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.'" (*In re Crew* (2011) 52 Cal.4th 126, 150.)

(*In re Champion* (2014) 58 Cal.4th 965, 1007, parallel citations omitted.) A reasonable probability is "a reasonable chance, more than an abstract possibility" the result would have been different. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; see also *Hernandez v. Chappell* (9th Cir. 2017) 878 F.3d 843, 846 [a reasonable probability is "even less than a fifty-fifty chance"].)

If there is no conceivable, reasonable tactical purpose or strategy for counsel's omissions, deficient performance is established. (See, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 675-676; *People v. Nation* (1980) 26 Cal.3d 169, 179; *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104; *People v. Moreno*

(1987) 188 Cal.App.3d 1179, 1191; see also *Pope*, *supra*, 23 Cal.3d at p. 426.) Here, counsel's strategy was to exclude the damaging confession. He filed a motion in limine moving to exclude the confession because no constitutional advisements were included in the recorded interrogation and the confession thus lacked proper foundation. (46CT 12961.) In response, the prosecutor assured counsel and the trial court that Inspector McCoy's testimony would provide the proper foundation. Thus at the time McCoy took the stand, the motion was pending. Yet, McCoy failed to cure the defect in the recorded confession, and testified only that he advised Mr. Barrett of his "constitutional rights." (76RT 9052.) Lacking proper foundation, the confession would have been excluded had counsel properly objected. (See subsection C., *ante*; *Bradford*, *supra*, 169 Cal.App.4th at p. 854.)

"[A] trial strategy cannot be considered reasonable unless it is executed properly." (*State v. Fitzpatrick* (Fla. 2013) 118 So.3d 737, 768.) There can be no strategic reason for counsel's failure to renew the objection after having identified the issue and attempting to exclude the damaging evidence. Therefore, deficient performance is established. (Cf. *Trujeque, supra,* 61 Cal.4th at p. 249 ["Despite initiating the questions on double jeopardy himself, defense counsel did not move to strike the prior conviction on double jeopardy grounds, and we see no possible tactical reason for counsel not to have done so."]; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131 [no possible tactical reason for counsel's failure to assert objection with "substantial merit"]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 870

["Trial counsel made a sound strategic choice to present an alibi defense, but nonetheless failed in his duty to present that defense reasonably and competently"]; *Patterson v. State* (Mo. Ct. App. 2003) 110 S.W.3d 896, 903 ["Counsel clearly made a strategic decision to have the jury instructed on the lesser-included offense of stealing but then failed to execute that strategy when he submitted instructions to the court that did not properly track the language of the [lesser-included offense instruction] . . . ."]; *State v. Barnes* (Ohio Ct. App. 2013) 994 N.E.2d 925, 928 [it is not trial strategy to attempt to raise a defense by presenting evidence supporting it, but fail to request a corresponding jury instruction].)

Even with the damaging juvenile confession, this was a close case. Had the confession been properly excluded, "there is a reasonable probability that at least one juror would have struck a different balance" between life and death. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.) Under this standard, reversal of the death judgment is required.

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III.
THE PRIOR MURDER SPECIAL CIRCUMSTANCE FINDING MUST BE REVERSED BECAUSE MR. BARRETT WAS 16 YEARS OLD AT THE TIME OF THE OFFENSE

The jury found true the prior murder special circumstance under Penal Code section 190.2(a)(2) based on Mr. Barrett's conviction for first degree murder in 1987. (46CT 12953.) As described in the previous section, the conviction arose out of the killing of James Jackson, an adult man who sexually assaulted Mr. Barrett when he was 16 years old. (75RT 8973-8977; 56RT 7330; Section II., *ante*.) In his opening brief, appellant argued that pursuant to the United States Supreme Court's reasoning *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), reliance on a juvenile prior murder conviction — that is a conviction arising from an offense committed when a defendant was a child — to render a defendant eligible for the death penalty violates the 8th and 14th Amendments. (AOB, Argument XIII.) Recognizing that juveniles are less culpable for their crimes than adults, *Roper* banned capital punishment for offenses committed by juveniles. Thus section 190.2(a)(2), may not treat a defendant with a prior juvenile murder conviction and one with a prior adult murder conviction as equally, automatically, eligible for execution. (AOB 376-379.) Furthermore, there is a meaningful distinction between using a juvenile offense at the eligibility stage of a capital punishment scheme, and at the selection stage as aggravation evidence. (*Id.* at p. 380; see *People v. Bivert* (2011) 52 Cal.4th 96, 123 [use of juvenile offenses as evidence in aggravation at penalty phase of capital trial does not violate 8th Amendment].) Finally, appellant argued that because of the "special

difficulties" juvenile defendants face in criminal proceedings, juvenile convictions are insufficiently reliable to satisfy the heightened reliability standards for capital cases. (AOB 381, citing *Graham v. Florida* (2010) 560 U.S. 48, 78 (*Graham*).)

This Court rejected application of *Roper* to the prior murder special circumstance in *People v. Salazar* (2016) 63 Cal.4th 214, 225-228 (*Salazar*), and affirmed this holding again in *People v. Smith* (2018) 4 Cal.5th 1134, 1178, concluding, among other things, that there is "no persuasive reason why it should be constitutional for a jury to consider a murder committed as a juvenile for the purpose of its penalty determination, but unconstitutional for the state to include convictions for such murders in the prior-murder-conviction special circumstance." (*Salazar*, *supra*, 63 Cal.4th at p. 226.) However, in his concurrence, Justice Cuellar observed the "question [was] a close one." (*Id.* at p. 258, (conc. opn. of Cuellar, J.).) "In light of the high court's decisions concerning the punishment of juvenile offenders [e.g., *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*); *Graham*, *supra*, 560 U.S. 48; *Roper*, *supra*, 543 U.S. 551] . . . [t]here is at least some tension between our jurisprudence concerning the culpability of juveniles (see, e.g., *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1375; *People v. Caballero* (2012) 55 Cal.4th 262, 266) and the idea that a murder committed by a juvenile is no different from any other murder for purposes of applying the relevant special circumstance here." (*Id.* at p. 259.) As discussed below, given our rapidly evolving understanding of the juvenile brain and laws reflecting diminished juvenile culpability — since *Roper*, and even since *Salazar* — the tension recognized by Justice Cuellar is no

longer constitutionally tenable. A new "line must be drawn," prohibiting the use of prior juvenile convictions to render people eligible for death. (*Roper*, *supra*, 543 U.S. at p. 574.)

A. Although he was not treated accordingly 37 years ago, Mr. Barrett's culpability for the homicide he committed was diminished because of his youth

In 1986, 16 year old Mr. Barrett had experienced food and housing insecurity, physical and sexual abuse, and was living on the streets of San Francisco. (81RT 9643, 9656.) He was targeted by Mr. Jackson, who gained his trust by providing him with food and shelter, and then attempted to sexually assault him. (Section II.A, *ante*.) Mr. Barrett struck Mr. Jackson in the head with a dumbbell several times, killing him. (*Id.* at pp. 433-434.) A week later, after volunteering his involvement in the killing to police, he was arrested while "highly intoxicated." (*Id.* at p. 446.) There is no evidence police attempted to contact Mr. Barrett's mother, informed him that he had the right to speak to her or counsel before being questioned by them, or was offered food or the opportunity to sleep. (Section II.A, *ante*.) He was interrogated into the early morning hours of the following day and confessed. (*Ibid*.)

Mr. Barrett was prosecuted as an adult, convicted at trial, and sentenced to 26 years to life in prison. (82RT 9806-9807.) At 17, he was placed in an adult prison. (*Id.* at p. 9807.) Less than 10 years later, a few weeks after his 26th birthday[12], Mr. Barrett killed his

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[12] Recent neuroscientific studies have established that young adults in their early to mid-twenties are still maturing neurologically, and, like teens, are less capable than fully mature

cell mate, Thomas Richmond. (56RT 7330; 1CT 1A.) Physical and testimonial evidence presented at the resulting capital trial corroborated Mr. Barrett's account of mutual combat and self-defense. (59RT 7580-7581; 60RT 7738-7858; 63RT 7956-7957.) The Jackson homicide was the basis for the prior murder special circumstance finding at that trial, and a central feature of the prosecution's penalty phase case for death. (See Section II.E, *ante*.)

Given our improved social- and neuro- scientific understanding of the adolescent brain and the laws reflecting it, it is exceedingly unlikely that Mr. Barrett would be prosecuted and convicted of first degree murder as an adult if he were charged with the Jackson homicide today. Scientific consensus establishes that adolescents are less able to appreciate risk and resist impulse than adults because their brains are still maturing. (See *People v. Caballero* (2012) 55 Cal.4th 262, 266, citing *Graham*, *supra*, 560 U.S. at pp. 69-70, and *Roper*, *supra*, 543 U.S. at p. 570; *Making the*

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adults of appreciating risk and controlling impulses. (See Casey, et al., *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders* (2021) 5 Ann. Rev. Criminology 321, 327-331, 337 (hereafter, *Making the Sentencing Case*); Reniers et al., *Is It All in the Reward? Peers Influence Risk-Taking Behaviour in Young Adulthood* (2017) 108 Brit. J. Psychol. 276, 277.)

There also appears to be overlapping or compounding neurological limitations in young adults who have a history of childhood trauma. (See Thomason & Marusak, *Toward Understanding the Impact of Trauma on the Early Developing Human Brain*, (2017) 342 Neuroscience, 55-67 (hereafter, Thomason); Marshall, et al., *Deficient Inhibitory Control as an Outcome of Childhood Trauma* (2016) 235 Psychiatry Research 7-12 (hereafter, Marshall.)

Sentencing Case, supra, 5 Ann. Rev. Criminology at pp. 327-331 [adolescents are predisposed to risky, impulsive decision-making].) Negative emotional arousal (e.g., perceived threats), alcohol and drug intoxication, and trauma, including sexual abuse, compound these limitations.[13] The law has taken account of these developments in numerous contexts, including special parole provisions for defendants who were under the age of 26 at the time of their commitment offense, expanded discretion to strike or dismiss sentencing enhancements if the defendant was a juvenile at the time of the crime or any prior crime or juvenile adjudication, and creating a presumption of low-term determinate sentencing where

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[13] Henin and Berman Cohen, et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts* (2016) 27 Psychol. Sci. 549, 559-60; *Making the Sentencing Case*, *supra*, 5 Ann. Rev. Criminology at pp. 327-329 (studies show adolescent decision-making ability is impaired in negative emotion situations, i.e., where potential threats are perceived in the environment); Lisdahl, et al., *Dare to delay? The impacts of adolescent alcohol and marijuana use onset on cognition, brain structure, and function* (July 2013) Frontiers in Psychiatry, Sec. Addictive Disorders, Volume 4, 1-19 (alcohol use under ages 22-25 is associated with poor decision making, impulsivity, and aggressiveness); Silveri, *Adolescent Brain Development and Underage Drinking in the United States: Identifying Risks of Alcohol Use in College Populations* (2012) 20 Harvard Rev. of Psychiatry 189 (alcohol impairs judgment and decision making and studies show adolescents who consumed high levels of alcohol also showed a higher risk preference that lasted up to three months after alcohol use was discontinued); Marshall, *supra*, 235 Psychiatry Research at pp. 7-12 (study showed individuals with history of childhood trauma showed greater dysfunction in inhibitory control); Thomason, *supra*, 342 Neuroscience at pp. 55-67 (2017) (growing body of research shows altered neurological structure and function in those that experience childhood trauma).

the defendant was under 26 at the time of the offense. (Pen. Code §§ 3051, eff. Jan. 1, 2018 [youth offender parole], 1385, subd. (2)(G) [court shall "afford great weight" to fact that defendant was a juvenile at time of current or prior offense when considering whether to strike or dismiss an enhancement]; 1170, subd. (b)(6)(B) [presumption of low-term determinate sentence for youthful defendants].) Recent decisions also require factfinders to consider a defendant's youthful age into young adulthood in assessing their culpability for implied malice and felony murder. (See *In re Moore* (2021) 68 Cal.App.5th 434, 454 [defendant's youthful age of 16 was relevant to whether he "adequately appreciate[d] the risk of death posed by his criminal activities" to establish felony murder liability]; *In re Jones* (2019) 42 Cal.App.5th 477, 480 [defendant's youthful age of 20 was relevant to felony murder liability]; *People v. Pittman* (2023) 96 Cal.App.5th 400, 416 [defendant's youthful age of 21 was relevant to whether he acted with conscious disregard for life as required for implied malice murder liability].)

Most relevant though, the Legislature has codified these advancements in the juvenile transfer laws. In 1987, Welfare and Institutions Code section 707, governing juvenile transfer to adult court, contained a presumption of unfitness for juvenile adjudication in cases of murder. (Former Welf. & Inst. Code, § 707, Stats. 1986, ch. 676, § 2.) Today, section 707 contains no such presumption and further provides that if a prosecutor seeks to transfer a minor to a court of criminal jurisdiction, the burden is on the prosecutor to demonstrate the minor is not amenable to rehabilitation. (Welf. & Inst. Code, § 707, subd. (a)(3)(A)(ii).) The court must consider, inter

alia, "the minor's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense; the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior; the effect of familial, adult, or peer pressure on the minor's actions; the effect of the minor's family and community environment; the existence of childhood trauma; the minor's involvement in the child welfare or foster care system; and the status of the minor as a victim of human trafficking, sexual abuse, or sexual battery on the minor's criminal sophistication." (*Ibid.*) The court must also specifically consider evidence that "the person against whom the minor is accused of committing an offense trafficked, sexually abused, or sexually battered the minor." (Welf. & Inst. Code, § 707, subd. (a)(3)(E)(iii).) In fact, effective January 1, 2024, notwithstanding a finding of unfitness, section 707.2 *requires* a juvenile court to retain jurisdiction over a minor if there is evidence that the minor "was trafficked, sexually abused, or sexually battered by the alleged victim prior to or during the commission of the alleged offense," unless the court finds by clear and convincing evidence that the abuse did not occur. (Welf. & Inst. Code, § 707.2.) In sum, given today's laws and improved understanding of the juvenile brain, Mr. Barrett's diminished culpability would have been recognized and he would have, in all likelihood, remained in juvenile court, and never have suffered a qualifying conviction for the prior murder special circumstance.

The disparity in the way Mr. Barrett was viewed and treated as an adolescent 37 years ago and the way we view youth criminal culpability today underlines how dramatically our collective mores

and standards of decency "that mark the progress of a maturing society" have evolved — even since this Court's decision in *Salazar*. (*Miller*, *supra*, 567 U.S. at p. 469.) The logical extension of *Roper* and its progeny is to preclude use of juvenile convictions, like Mr. Barrett's, to qualify an adult for capital punishment. Juveniles "simply cannot be held to the same culpability level as adults, and while turning eighteen should not wipe a defendant's slate clean, a crime committed when a juvenile brain does not possess the same capabilities and capacities as its adult counterparts should not be allowed to elevate a non-capital crime to a capital one." (O'Neill, *An Aggravating Adolescence: An Analysis of Juvenile Convictions As Statutory Aggravators in Capital Cases* (2017) 51 Ga. L. Rev. 673, 687.)

B. Use of a prior juvenile murder conviction to render a defendant *eligible* for the death penalty is constitutionally different than use of the offense as aggravating evidence

"[C]apital punishment cases under the Eighth Amendment address two different aspects of the capital decision making process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." (*Tuilaepa v. California* (1994) 512 U.S. 967, 971.) Selection, on the other hand, is an "individualized determination on the basis of the character of the individual and the circumstances of the crime." (*Ibid.*, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 879.) This requirement is met when the jury is allowed to consider all relevant mitigating evidence and the circumstances of the crime. (*Ibid.*)

On the one hand, a crime committed while a defendant is a juvenile is categorically ineligible for the death penalty. (*Roper*, *supra*, 543 U.S. at p. 578.) On the other, this Court has concluded that use of prior juvenile offenses as evidence in aggravation during the selection phase, is constitutionally permissible. (*Bivert*, *supra*, 52 Cal.4th at p. 123.) The prior murder special circumstance, i.e., reliance on a juvenile crime to define the class of offenders eligible for execution, is only one step removed from the eligibility issue addressed in *Roper* and is meaningfully distinct from the use of a juvenile offense during the selection stage. At the guilt phase, when determining the truth of a special circumstance, the jury may consider only the truth of the alleged prior conviction, which automatically renders the defendant death eligible. They may not consider the mitigating features of adolescence or reject the allegation on that basis. (See AOB 380.) Whereas at the penalty phase, the jury can consider the "hallmark features [of youth]—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," (*Miller*, *supra*, 567 U.S. at p. 477) that mitigate culpability and may tip the scales towards a life sentence.

The Court in *Roper* reiterated that "[c]apital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." (*Roper*, *supra*, 543 U.S. at p. 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319.) Because the prior murder special circumstance concerns an attribute of the offender rather than the capital offense (unlike all the other special circumstances), it cannot be said to limit death eligibility to "a

narrow category of the most serious crimes," but instead must function to limit eligibility to those "most deserving." (Compare Pen. Code § 190.2, subds. (a)(1), (a)(3)-(22).) By painting juvenile and adult prior murder convictions with the same brush, it fails to perform this function reliably. The eligibility process does not permit recognition of the lesser culpability of youth, and thus fails to reliably classify those within the current ambit of section 190.2(a)(2) as the "worst offenders" – the very issue at the heart of *Roper*. By contrast, use of this evidence at the selection stage allows the jury to consider the relevance of youth, which now more than ever, our law and courts recognize as essential to a just and reliable disposition.

C. Invalidating the prior murder special circumstance requires reversal of the death penalty

An invalidated special circumstance "will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Brown v. Sanders* (2006) 546 U.S. 212, 220, footnote omitted; see *People v. Thomas* (2023) 14 Cal.5th 327, 382.) Specifically in the case of a juvenile prior murder conviction, the fact of conviction introduced to the jury via the prior murder special circumstance finding adds an improper element to the aggravation scale not introduced by evidence of the underlying offense and thus requires reversal of the penalty verdict. The fact of Mr. Barrett's juvenile conviction served as factor (a) evidence in aggravation, separate from evidence of the underlying conduct. (See

Pen. Code § 190.3, subd. (a).) It signified to the jury not only that another factfinder had considered all of the evidence in the case and found, beyond a reasonable doubt, that Mr. Barrett was guilty of the most serious form of homicide, first degree murder, and no lesser, mitigated form (see AOB 383), but that Mr. Barrett's culpability for the offense was deemed worthy of *adult* prosecution and punishment, rather than juvenile adjudication. In other words, the prior conviction served as evidence cutting against the mitigating value of Mr. Barrett's youth. Even though Mr. Barrett's adult conviction was a product of a less enlightened time and he would likely not suffer the same fate today, the fact of the adult conviction served as evidence he was "more culpable" for the prior offense "than those whose prior murder was adjudicated in juvenile court." (*Salazar*, *supra*, 63 Cal.4th at p. 227.) The prior murder special circumstance thus added aggravating weight to the prosecution's case that would not have otherwise existed and reversal of the death verdict is required.

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CONCLUSION

Based on the arguments made in Appellant's Opening and Reply Briefs, and for all the reasons argued above, Mr. Barrett's convictions and sentence must be reversed.

DATED: July 12, 2024

Respectfully submitted,

GALIT LIPA
State Public Defender

/s/
JESSIE HAWK
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1))

I, Jessie Hawk, am the Senior Deputy State Public Defender assigned to represent appellant JOSEPH ANTHONY BARRETT in this automatic appeal. I have conducted 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 15,642 words in length excluding the tables and this certificate.

DATED: July 12, 2024

/s/
JESSIE HAWK
Senior Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Joseph Barrett***
Case Number: **Supreme Court Case No. S124131**
Imperial County Superior
Court No. CF5733

I, Ana Boyea, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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CMC Joseph Barrett, CDCR #D-72002 D-8154-L P.O. Box 8101 San Luis Obispo, CA 93409	Imperial County Superior Court 939 West Main Street El Centro, CA 92243
Imperial County District Attorney's Office 940 West Main Street, Suite 102 El Centro, CA 92243	

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **July 12, 2024**, at Sacramento, California.

Ana Boyea Digitally signed by Ana Boyea Date: 2024.07.12 13:01:41 -07'00'

ANA BOYEA

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BARRETT (JOSEPH ANTHONY)**
Case Number: **S124131**
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.

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7/12/2024
Date

/s/Ana Boyea
Signature

Hawk, Jessica (278762)
Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm