

demonstrate his ability to connect to humans and leave a positive impression on those who know him. Since the Constitution demands “individualized” considerations of a particular defendant under the Eighth and Fourteenth Amendments, “execution impact” comports with those protections given that “any relevant evidence for a sentence less than death” is mitigating.

Claim 386: The State violated *Napue* by presenting false testimony about graffiti in the jail.

Claim 387: Counsel was ineffective in failing to object to, investigate, and present accurate evidence about graffiti in the jail.

Deputy Alan Terry testified at trial that in June 2007, he had gone to Mr. Ray’s cell in the Arapahoe jail to return him to Colorado State Penitentiary. He noticed graffiti in the cell when he removed Mr. Ray. Photos of what he identified as that graffiti were admitted as *P Exs 937 through 951*. Trial counsel did not object. *5/29/09 am #2 pp 10-14*. The testimony was false, however.

This was admitted as an aggravating circumstance: “vandalism of a cell at the Patrick Sullivan Detention Center after he was serving his sentence at the Colorado State Penitentiary,” *P2#26(10)*. During the State’s rebuttal closing, she showed these photos, and stated:

This was found in Robert Ray's jail cell on June the 21st of 2007. So the two-year anniversary of this murder and he's touting the Gangster Disciples.... he's writing this on the two-year anniversary of the death, particularly in light of his passionate plea yesterday, he's dubbing himself the Murder Prince. How much remorse do you hear in that? Murder Prince.... He hasn't learned anything about mercy and he will not learn anything about mercy from you. *6/03/09 p 202*.

Had counsel investigated this issue, or even looked at the discovery related to it, they could have effectively counteracted this damaging evidence.

First, Terry’s report indicates that Mr. Ray was assigned to cell 6A8, which is where he found Mr. Ray:

NARRATIVE:

On June 21, 2007 I was assigned with Deputy Schneider #01020 to return Robert Ray to DOC (CSP) from the Sullivan Detention Center. Ray was housed on a writ in pod 6A from 06-01-07 to 06-21-07. The cell he was assigned to during that time was 6A8.

This is also supported by jail records of Mr. Ray’s housing:

<u>Booking #</u>	<u>Inmate Name</u>	<u>Entry Date</u>	<u>Entry Time</u>	<u>Block</u>	<u>Cell</u>	<u>Bed</u>	<u>Exit Date</u>	<u>Exit Time</u>
200700007671	Ray, Robert	6/1/2007	1428	POD6	6A	12A	6/3/2007	1415
200700007671	Ray, Robert	6/3/2007	1415	POD6	6A	8A	6/15/2007	1538
200700007671	Ray, Robert	6/15/2007	1538	POD6	6A	12A	6/17/2007	1014
200700007671	Ray, Robert	6/17/2007	1014	POD6	6A	8A	6/21/2007	1124

The trial exhibits showing the graffiti are not photographs of cell 6A8, but of cell 6A12. *E.g.*, *P Ex. 937, 938.*



People v. R. Ray 06CR697 People's Exhibit # 938

In fact, as can be seen in *P Ex 937*, 6A12 is on the bottom tier, while 6A8 is just out of the photo on the top tier. Additionally, even a layperson would be able to differentiate the graffiti handwriting from Mr. Ray's, particularly in the formation of the words "Free" and "Rob G" (in fact, the two graffiti examples of the word "Free" appear to be written by two separate people):



People v. R. Ray 06CR697 People's Exhibit # 940



People v. R. Ray 06CR697 People's Exhibit # 942



People v. R. Ray 06CR697 People's Exhibit # 951

Note these excerpts of Mr. Ray's handwriting from *P Exs 918* and *919*:

50 \$ money order, If you get it let me no ASAP so I can
Drop some mo, cause I dont even no how to send this
letter off. I be having my wife do this shit. All my nigga
is locked up love you nigga stay up
Hold it down
Rob G
mima # 303-537-7454
720 859 2235
^ Keep these #s till you get out

01805

00000

ROBERT RAY 06CR697
PEOPLE'S Exhibit # 918

penitentiary aint what
I WANNA Be free

Multiple sheriff's deputies and inmates confirmed that graffiti is common in cells, and according to Lt. JD Knight, it is particularly common in disciplinary pods like Pod 6A. Also, graffiti can last in a cell for weeks.

An inmate housed in 6A12 between June 4 and June 13, 2007, told PC that he drew six-pointed stars in all the cells he was housed in and that it was likely he was responsible for at least some of this graffiti. After reviewing the photos admitted at trial, he believed that all that graffiti had been in the cell when he was housed in it before Mr. Ray was.

This evidence had a multi-form effect on the sentencing proceedings: it portrayed Mr. Ray as a person who disrespected the law because he was willing to damage jail property, it depicted him as a member of the Gangster Disciples gang who was willing to spread their symbols through graffiti, it described him as a person thumbing his nose at the justice system and its true victims, and eliminated any possibility that the jury would see Mr. Ray as a person who spent his time since the shootings in reflection or remorse. Had this egregiously false testimony not been admitted against Mr. Ray, it is reasonably probable that the jury would not have unanimously voted for a death sentence.

Trial counsel's failure to investigate this important issue and to refute the State's evidence was unreasonable.

Claim 388: Mr. Ray's rights under the constitutions, statutes, case law, and the rules of evidence were violated by the State's admitting evidence of Mr. Ray's beliefs and affiliations.

Claim 389: Counsel was ineffective in failing to object to the violation of Mr. Ray's rights under the constitutions, statutes, case law, and the rules of evidence were violated by the State's admitting evidence of Mr. Ray's beliefs and affiliations.

Throughout the trial the government improperly admitted evidence and made arguments relating to Mr. Ray's religion, racial beliefs, affiliations, and tattoos. This violated his constitutional rights to due process and freedom of speech and religion, *see Dawson v Delaware*, 503 US 159 (1992); *State v Driscoll*, 55 SW3d 350 (Mo, 2001)). This also violated *C.R.S. 13-90-110* and represented prosecutorial misconduct. Trial defense counsel was ineffective for failing to object to this evidence and arguments.

Mr. Ray's personal beliefs and allegiances had no bearing on the sentencing proceeding, and he did not make them an issue himself. Thus it was improper for them to be admitted as a basis for condemning him to death.

For example, the State submitted both mitigation rebuttal and aggravating circumstance instructions that improperly argued that Mr. Ray should die because of his beliefs and affiliations.

“Gang affiliation” was also submitted to the jury as an aggravating circumstance in P2#26(3b). Although Sailor claimed that there were advantages for drug dealers who claimed to be gang members, *5/18/09 am*, pp 63-64, and photos of Mr. Ray using gang hand signs were admitted, *P Exs 912-915*, there was no evidence that he had actually claimed membership for any reason whatsoever, or that that indicated any continuing threat to society.

P2#26(7b) instructed the jury that an “aggravating circumstance” was Mr. Ray’s “pro-criminal attitude” as evinced by tattoos. This was again emphasized through Sailor’s testimony, *4/22/09 pm*, pp 7-10, and photos of Mr. Ray’s tattoos, *P Ex 206*, “Crime pays 999 ways”. The prosecution repeated its arguments in closing. *5/4/09*, pp 102 and 208, *6/3/09*, pp 87 and 199. Tattoos do not present a legitimate reason to execute a person.

Through Sailor’s testimony the State emphasized evidence that Mr. Ray believed that the justice system is racist. Such a belief cannot properly be presented as a reason to execute Mr. Ray.

Perhaps the most outrageous of these improper arguments by the State were its repeated references to religion. After “adopting” Maurice Ray as its witness, the State introduced evidence that Mr. Ray’s mother did not take the family to church, *5/11/09*, p 144, and that Maurice had to teach himself the bible, *5/12/09 pm*, p 52.

In rebuttal closing, the prosecutor argued, “Robert Ray doesn’t believe in God...He has God on his FU finger,” *6/3/09*, p 199. Of course, there was no evidence that Mr. Ray did not believe in or disrespected God, but even if there had been, it would have been improper. A person’s religious beliefs should never be grounds for condemning them to death in the United States, or we are no better than a middle-eastern totalitarian fundamentalist group.

The prosecution repeatedly admitted evidence, in contrast, of how religious Fields had been, *5/29/09 am*, pp 12 and 46, *5/28/09 pm*, p 62, as well as his belief that his dreams were a sign from God that he was going to die, *5/13/09 am*, p 166.

P2#23(3c) instructed the jury that affiliation with the Gangster Disciples (a group to which Mr. Ray never belonged) means that Mr. Ray is a continuing threat to society. However, there was no evidence that the Gangster Disciples endorse killing, and in fact, the prosecution

elicited testimony from Mr. Ray's brother that Gangster Disciples do not advocate or approve of killing witnesses.

Admission of this evidence and these arguments violated the due process and cruel and unusual punishment clauses, as well as Mr. Ray's rights under the 1st amendment and art. II, §4 and to a fair trial by impartial jury; *Zant v. Stephens, supra*; *Dawson v. Delaware, supra*. This evidence and arguments tainted the death verdict and injected an arbitrary and capricious consideration into the jury's decision-making.

Regarding the ineffective assistance of counsel claim, had this inflammatory evidence been properly excluded and/or the improper arguments been stricken, it is reasonably probable that the jury would not have voted unanimously for a death sentence.

Claim 390: Counsel was ineffective in failing to adequately investigate and rebut aggravating evidence and arguments regarding Mr. Ray's tattoos.

The State capitalized on the nature of Mr. Ray's tattoos at the trial on the charges and at sentencing. No rebuttal or mitigation evidence regarding Mr. Ray's tattoos was presented at trial.

Evidence of Mr. Ray's tattoo on his back, "Crime Payz 999 Wayz," was admitted at the trial on the charges when trial counsel opened the door to its admission by eliciting testimony from Sailor about Mr. Ray's attitude toward trial and that he was willing to take his punishment and go to jail. 4/22/09 pp 7-8. Over defense objection, the trial court found this tattoo admissible because it "shows an attitude of someone who is favoring crime." 4/22/09 p 8. *Cf. CRE 401, 403, 404(a), (b)*. Sailor identified the tattoo and said Mr. Ray got it between July 4th and June 20th. She described it – Crime Payz 999 Wayz, gun to the left, gun to the right. *Id.*, p 9.

Despite the fact that the tattoos were not raised in defense closings, without objection the State argued in rebuttal closing argument:

Now, there is this very interesting photograph, People's Exhibit 206. If you really want to know what motivates a person, take a look at what they permanently affix to their body. People's Exhibit 206 is a photograph of Mr. Ray's back. And this is a tattoo that he got between July 4th, 2004 and June 20th of 2005. This is his attitude towards his case, his attitude towards crime, his attitude towards the system. This tattoo says Crime Pays in 999 Ways. It has two handguns on the side, and it's hard to tell, but in the middle is a big stack of money. This is Mr. Ray's motivation. Not only is it his motivation in his life, it is his motive for this murder.¹⁶⁴ 5/04/09 pp 208-209.

¹⁶⁴Trial counsel's failure to object to this argument was ineffective assistance of counsel. Mr. Ray's "attitude towards crime, attitude towards the system" and "motivation in his life" were all

The court declared the tattoos to be aggravating circumstances. P2#26(7)(b)(pro-criminal attitude as evidenced by the pictures of tattoos). In addition, the State played a jail call between Mr. Ray and Dumas related to tattoos. 5/26/09 p 84; *P Ex 927* (jail call excerpt) and *927a* (transcript). In the February 2005 call, Mr. Ray told Dumas that he was going to get large tattoos that said “Crime Pays 999 ways” on his back and “Victim of the Ghetto” around his wound. Dumas replied that he was thinking about getting a tattoo that said “Blood Money.” 2/12/05 – 2/13/05 [*CD 25, Track 1*].

The State was also allowed to admit numerous photos of the tattoos. 5/26/09 p 86; *P. Exs 905, 906, 908, 911* and *917*. *P Ex 905* was a photo of Mr. Ray’s back that said “Crime Payz 999 Wayz” and included two guns and a stack of money. *P Ex 908* was a photo of Mr. Ray’s right bicep with a crucifix. *P Ex 909* depicted Mr. Ray’s arm with “Blood Money” and a hand holding cash with blood droplets. Det. Fronapfel testified that *P Ex 906* was a picture of a tattoo with “G-o-d” on Mr. Ray’s middle finger of his left hand. *P Ex 911* had a picture of Victim of the Ghetto (transcript erroneously reflects “goat”). *P Ex 917* had praying hands and said, “Blessed me.” *Id.*, p 87-88.

The State argued, “Tattoos are like the bumper sticker of the soul. He’s emblazoned on his body who he is.” 6/03/09 p 204.

Given that the State highlighted the tattoo evidence and used it as a reason to execute Mr. Ray, trial counsel had a duty to zealously mitigate the impact of this evidence. However, they did not. Counsel should have presented testimony, by experts and lay witnesses, about the prevalence and meaning of tattoos and rap lyrics in Mr. Ray’s culture.

Trial counsel failed to point out that the so-called “bumper sticker of the soul” for Mr. Ray’s tattoo was coined by singer-songwriter Freeway who wrote a song in 2003 called “Victim of The Ghetto,” an extremely popular “gangster rap” song listened to by many millions of young people. In a call, Dumas Brown referenced this rapper to Markeeta. 10/25/06 [*CD-78, Track 3*].

Because trial counsel did not listen to the jail calls, they failed to present evidence from 2008, where Mr. Ray was no longer interested in similar rap lyrics and titles. In one call, Mr. Ray told Ciara that he had sent a picture he had of a t-shirt with the words “Victim of the Ghetto”

unconstitutional, irrelevant, inflammatory and patently inappropriate arguments and violated the rules cited above and the due process clauses.

back to his mom. He told Ciara that he liked the t-shirt but did not want her to wear it around in public. 6/24/08 [CD-148, Track 7].

Trial counsel also never pointed out Mr. Ray's other tattoos or his attitude about getting tattoos of people he loved. In a call, Ciara discussed their desire to get tattoos for each other. She told Mr. Ray that she wanted to inscribe "Mrs. Ray" on her wrist. 8/01/08 [CD-138, Track 19]. Mr. Ray replied that he was going to get a tattoo with the words "Connected Til Death Ciara" on his forearm on the inside of "Rob G" and also on his chest. She asked him if he wanted her to get a tattoo of "Mrs. Ray" instead of "Robert Keith." 8/01/08 [CD-138, Track 20]. In another call, Ciara asked Mr. Ray if his tattoo of her full name looked like a "jail tattoo." He told her that it did not and that he had inscribed her full name on his left arm "right in the back of Blood Money, by elbow." 8/05/08 [CD-138, Track 34]. In the next track, Mr. Ray told Ciara that he had gotten a tattoo with Ciara's name on his arm next to his Blood Money tattoo. He told her that he wanted to put a big red heart around her name once he got some red ink. 8/05/08 [CD-138, Track 36].

Evidence that in 2008 Mr. Ray had inscribed his then-sweetheart's full name with a large red heart around her name would have mocked the value and arguments the State placed on these tattoos. Given the ruling that Mr. Ray's tattoos from 2005 "showed an attitude of someone who was favoring crime," then Mr. Ray's 2008 tattoo would have "shown an attitude of someone who was no longer favoring crime but instead his love interest." **According to the prosecution**, this would have been enormously mitigating.

Scottea Brooks, a classmate of Mr. Ray's at Overland High School, never interviewed by trial counsel, was with Mr. Ray when he obtained the "GD" tattoo on his finger. Mr. Ray had told her "GD" was for Gangster Disciples in Chicago and that his older brother was a GD. She would have testified that Mr. Ray got the tattoo just to be "cool." He never mentioned anything about wanting to join a gang or gangbanging. She figured Mr. Ray just copied his brother. Also, Mr. Ray's high school girlfriend, Amber Hunter, another powerful mitigation witness whom trial counsel ignored, recalled the six-pointed star tattoo, which meant "GD" in Indiana, however, she never saw Mr. Ray act like a gang member. Mr. Ray mocked his brothers when they were not around.

Trial counsel's failure to mitigate this aggravating evidence was ineffective assistance of counsel given the State's arguments at the trial on the charges and sentencing. The fact that the

State had to use evidence of Mr. Ray's tattoos at the trial on the charges and at sentencing demonstrated how the State needed to create fear in the jurors' minds, since the case against Mr. Ray was built entirely on incentivized witnesses.

Trial counsel's failure prejudiced Mr. Ray as he was deprived of rebuttal evidence against the State's case at trial and sentencing. Had the jury been provided with this evidence, it is reasonably probable that at least one juror would have had a reasonable doubt about whether the only appropriate sentence was death, and that there would have been a different verdict at the trial on the charges.

Claim 391: Counsel was ineffective in failing to adequately investigate and present rebuttal evidence to the "God on middle finger" tattoo.

The State elicited evidence that Mr. Ray had a tattoo on the inside of his middle finger that said "God." 5/26/09 p 115. With respect to the State's evidence of Mr. Ray's tattoo with "G-o-d" on his middle finger of his left hand, trial counsel did nothing to rebut this prejudicial aggravating circumstance evidence. P2#26(7)(b). Because trial counsel had called a jail pastor as a mitigation witness, the State in rebuttal arguments mocked Mr. Ray and argued:

Robert Ray is a man who will put on a cross because it's a nice piece of bling, and doesn't believe in God, and wear it with a live and die by the gun sweatshirt. If we could have 906. Robert Ray is a guy who will put the word God on his F-U finger. Don't waste your mercy on Robert Ray." 6/03/09 p 199.

Trial counsel did not object.

Jail calls reflected that Mr. Ray did in fact believe in God, spirituality and faith. This would have not only been mitigation but would have also countered the impact of the State's use of this tattoo and the State's outrageous argument that Mr. Ray should be executed because he "doesn't believe in God" and is a "guy who will put the word God on his F-U finger."

In one call, Mr. Ray asked Sailor if she had prayed for him. 7/05/05 [CD-44, Track 20]. In another call, Mr. Ray told Sailor that somebody sent him a card that said, "keep your head up, don't be scared, people praying for you." Sailor replied that she was happy people had him in their prayers. 7/14/05 [CD-41, Track 7]. Mr. Ray's conversation with Sailor reflected his fears:

Robert: I'm just thinking about that shit. With y'all's shit, but then, you always say, my shit goin come, fuck around it come around in here? You know what I always think about? I ain't even gonna say shit. No, cuz you always be like "God got a plan for you," or whatever shit like that. I swear, I think about that shit every fucking day. I hate it when you say that, man.

Sailor: Remember I told you don't be thinking about that.

Robert: Yeah. Well, don't say that no more either. I hate that.

Sailor: I don't like it either.

Robert: Because that might be his plan. 7/15/05 [CD-43, Track 67].

In another call, Sailor discussed with Mr. Ray her plan to go to church and had thought about joining a choir. Mr. Ray encouraged her:

Robert: You know what - there is no choir in Colorado I ever seen that make me feel so good like Heritage Christian Center make me. That music right there, boy, that music make you want to jump with them. That choir put you on yo feet, like in Chicago, chills all through body and shit.

Sailor: what is Heritage? Cashmier said it's a hypocrite ass church.

Robert: Heritage Christian – their choir is good. Their pastor is like, the Lord got me a brand new BMW today good - \$350,000 house – it be that white dude on TV with glasses. They choir ain't no joke and it's all black too. When they be having their plays, take Tyreese. They have lions and camels. Big ass church. Million dollar church. 7/26/05 [CD-46, Track 11].

Later in the same call Sailor told Mr. Ray that she wanted to bring Pastor Robert M. to his next court date and would ask the pastor that baptized their deceased son as well. Mr. Ray told her to ask both of them to come to his trial on the 30th. 7/26/05 [CD-46, Track 11]. Mr. Ray told her to keep praying for him and that he had been reading the Bible. 7/27/05 [CD-51, Track 3]. Mr. Ray asked Sailor whether she had a family Bible and told her that *Romans* was good. 8/10/05 [CD-50, Track 45]. The next day, Mr. Ray told Sailor to make sure she went to church, to try to get into it, to not just hear it but live it. 8/11/05 [CD-54, Track 9]. In a conversation with Cashmier Jones, Mr. Ray asked her to keep praying and she told him to keep praying, too. 7/30/05 [CD-48, Track 15]. Mr. Ray told Mrs. Owens that he had been reading the Bible and asked her to send him one. 8/03/05 [CD-47, Track 10].

Years later in a call with Mrs. Owens, Mr. Ray specifically recalled a time when he was first incarcerated and four inmates had called him over. Mr. Ray recalled how they had all prayed over him. Mr. Ray recalled how he and the inmates had all started crying and it “poured” over him. He commented about how good it felt to cry like that. 9/05/08 [CD-145, Track 15].

Additional rebuttal evidence to the State's arguments about Mr. Ray's lack of religious belief existed in jail calls. In one call, Markeeta conveyed Sailor's message to Mr. Ray that she loved him too and that she was “scared to fucking death.” Mr. Ray responded, “me too. Tell her me, too.” Markeeta added, “we all is.” Mr. Ray told Markeeta to tell Sailor to pray every night

at 11:30. 8/15/05 [CD-57, Track 1]. In a jail call between Sailor and Shekeenah White, Sailor asked if Mr. Ray had called. Shekeenah said that he had called Rose earlier and had told them to tell Sailor to pray at 11:30 and he would pray with her at that same time. 8/15/05 [CD-37, Track 1]. Sailor told Sarah that Mr. Ray had told her to pray every night at same time with him. 8/17/05 [CD-37, Track 5]. Sailor told Markeeta that she had written Mr. Ray and had prayed at 11:35, which was the same time Mr. Ray had said he would pray. 8/19/05 [CD-37, Track 12]. Mr. Ray told her to remember to pray at 11 o'clock on the 24th so they could pray at the same time. 8/09/05 [CD-50, Track 39]. He also asked Rose to ask Sailor whether she had been praying at 11:30 because he was still on his knees then. 8/19/05 [CD-58, Track 8].

Mr. Ray's interest in spirituality and belief in God was tangible in the jail calls. His conversations would have rebutted the State's theory that Mr. Ray did not believe in and was somehow disrespectful of God, albeit he had every right under the First Amendment to do both. In a call, Sailor told Mr. Ray that Rose and Markeeta had gotten into a fight and Sailor, of all people, could not believe how disrespectful Markeeta had been to Rose. Mr. Ray responded:

Robert: God do not like that. He say in Proverbs a million time. He do not like mf'ers who disrespect they momma. I hate when I said fuck that bitch. Boy – I think that's one of the reasons I'm in here. I ain't meant it though. And you told on me. 7/31/05 [CD-48, Track 18].

In another call, when Shekeenah told Mr. Ray that she had told Sailor to read the Bible, Mr. Ray commented, "That's what I'm about to do right now." 8/16/05 [CD-58, Track 3].

Jail calls contained evidence of Mr. Ray attending church services at the jail. In a call, Mr. Ray told Sailor that he had just returned from church and had been impacted by the female preacher. 7/31/05 [CD-48, Track 17]. Mr. Ray told Stephanie Clarke about a female black pastor who used language such as "damn, nigga, ass" in her sermons and would just tell the inmate the facts of the world. Mr. Ray appeared to enjoy her sermons and said he attended both the morning and evening sermons on Sundays. 8/14/05 [CD-55, Track 3].

Three years later, Mr. Ray demonstrated his maturing thought-process regarding spirituality. Ciara told Mr. Ray that she did not like anyone to feel sympathy for her. Mr. Ray agreed and told her it made him feel uncomfortable as he was not sure how to respond to sympathy and whether to say "thank you." They discussed how they also did not like the word "lucky" but agreed that "blessed" was a better word to describe how they each felt about having each other. Mr. Ray commented that he "did not try to put God into too much" when describing

events in his life. She agreed and gave an example of being in a terrible situation to force her to look at people around her. Mr. Ray remarked that God put people through messed up situations to make them appreciate the good stuff that came along. 6/25/08 [CD-149, Track 6].

No mitigation or rebuttal evidence of this kind was presented to the jury, either through witnesses or from the jail calls.

Claim 392: Counsel was ineffective in failing to adequately investigate and present mitigation and rebuttal evidence to gang affiliation and the use of gang affiliation to intimidate others.

No such mitigation or rebuttal to aggravating circumstances was presented at sentencing.

At sentencing, the State's elicited evidence about Gangster Disciples, security threat groups, and the impact of gangs as evidence of "continuing threat to society." Dennis Burbank testified, "In a correctional environment, many crimes can be committed while an individual is incarcerated. If you're using three-way phone calls, particularly with the gang situation, the security threat groups that we have in prison, a lot of the shots are called out on the streets by individuals who are incarcerated..."(5/28/09 p 52); that there is a Gangster Disciple presence within the DOC (5/28/09 p 53); that gangs create one of the biggest challenges for security and management for DOC as

about 78 percent of the offenders at CSP have been identified as gang members or have been involved in gang activity while they were incarcerated. So it's getting more and more difficult to keep rival gangs separated, to keep members within the same gang separated. There are certain criteria for them to be part of a gang, some of which involve serious violence, sometimes killing someone, and that can happen within the prison system. So it's - - and as I mentioned earlier, we have, particularly at CSP, we have a lot of the gang leaders, per se, but they still call a lot of the shots while they're incarcerated. So it affects what's happening out on the streets also." 5/28/09 p54.¹⁶⁵

Capt. Mark Altholz testified that somebody could be classified as possibly being a member of security threat group if affiliated with a gang like the Gangster Disciples. 5/27/09 p 22. Over objection, the trial court admitted a CD of a call between Mr. Ray and Nicole Beal where gang

¹⁶⁵See related argument, *infra*. Trial counsel's failure to object to this inadmissible evidence and related arguments was ineffective assistance of counsel. The government presented evidence and argued that Mr. Ray should be executed because it, the government, is incompetent and/or because it, the government, will unnecessarily allow Mr. Ray to be a danger to others. Such evidence and argument violated the due process and cruel and unusual punishment clauses. The death sentence based upon such evidence and arguments should be vacated.

banter was also on the call. 5/27/09 p 43.¹⁶⁶ The State's closing arguments, "[Javad] had seen Greg's dead body. He had felt his own gunshot wounds. You knew he was dealing with a Gangster Disciples' drug dealer named Robert Ray who did not play around." 6/03/09 p 67; "Mr. Ray is a Gangster Disciple. That gets you up to about 43.3 percent risk that he will commit a serious violent crime in prison." 6/03/09 p 201; *See also* P2#26(3)(b) (gang affiliation and use of gang affiliation to intimidate others).

Trial counsel was ineffective in not rebutting this aggravation evidence through expert and lay witness testimony about Gangster Disciples, gang affiliation, and youth culture.

Additionally, had trial counsel listened to the jail calls, they would have presented evidence that rebutted and minimized this aggravating evidence admitted by the State against Mr. Ray.

In one call Mr. Ray told Sailor that she and Rose could come to court, but "don't bring stupid people." Mr. Ray stated she would be in front or behind the victim's family and that if somebody wanted to act stupid, the police would be there. Mr. Ray told her, "I don't need all that." 7/02/05 [CD-44, Track 6]. In another call, Mr. Ray disassociated himself from gang affiliations. Mr. Ray told Sailor that he had had to "check" some inmate who had asked him, "You a GD? I am Blackstone. I don't really fuck with your kind 'cause some shit in Chicago." I'm like, "Hold on, cool all that shit out. I ain't on that level now. Y'all on that gangbanger shit." 7/13/05 [CD-41, Track 4]. Mr. Ray told Sir Mario Owens the same:

Robert: ...When I first got 23 hours. I was getting used to that shit. Now being around these mf'ers. Had to check a mf'er yesterday. He said, you Folks? I said what makes you say that? I was like yeah, what's up? He said I am Stone. He tried to shake my hand and shit. Then I get downstairs and shit and he like, um, come here and I come holla at him and he like, I don't really fuck with your kind cause what y'all did to my people back in the land. I'm like listening you dumb ass, I'm like, man, your mind is on a whole mf'ing. Fuck all that gangbanging shit. I don't give a fuck what you is, GD, mf'ers Stone, every man for hisself. That shit so far behind me right now. I'm not thinking about that. 7/14/05 [CD-43, Track 43].

Mr. Ray's act of disassociating himself was exculpatory and rebutted the State's entire theme regarding his "gang affiliation" and "future dangerousness."

¹⁶⁶ The Court: "[Mr. Ray's] affiliation with the gang has become an issue also. So if that's the issue I would overrule and you can play the tape or CD," referring to *P. Ex 935*.

In another call, when Sailor asked Mr. Ray whether he had met any “jailbird homies,” Mr. Ray replied that there was one guy still in from the year before and another old dude. He told her that he did not talk to the young guys as they were “on gang banging shit.” 7/13/05 [CD-43, Track 41]. In a call with co-defendant Perish Carter, Mr. Ray again dissociated himself from gangs while he was in jail:

Perish: I feel your pain. I already know how you feel. But once you see somebody you know, you’ll be straight.

Robert: I don’t want to see nobody I know. I mean, I don’t know nobody but y’all and y’all the only mf’ers I can talk to.

Perish: yeah, I know – that’s what I’m talking about

Robert: the other mf’ers ? time. Fuck that shit. I don’t want to talk to nobody. Mf’ers be swearing I told them some shit, trying to set me up.

Perish: yeah, I know –mf’ers would try to do some shit like that

Robert: I don’t talk to nobody in this bitch but the older mf’ers

Perish: yeah, ah yeah, they are the best ones, really

Robert: these young niggas come up to me like, what up, you from Chicago- boasting shit. I’m like yeah, what up. He like, man, I’m Blackstone and I don’t really fuck with y’all kind. I’m like, man, hold on, cool it out right now. Ain’t nobody on no gangbanging shit. 7/14/05 [CD-43, Track 52].

In another call, Mr. Ray commented to Raydell Clarke that his cellmate had just left that day and that he was the coolest one in there with him. Mr. Ray commented that he did not talk to people. When Raydell asked him something about other inmates, Mr. Ray responded, “This one dude but he be on some gang-banging stuff but I shut him down real quick.” 8/15/05 [CD-55, Track 4].

Mr. Ray’s comments in his jail calls rejecting gang affiliations as well as his statements that he was avoiding them and not discussing his case with them was also impeachment to the proposition that he would have “volunteered” a confession to Dexter Harris.

If the State’s aggravating evidence and arguments were true about “gang affiliation” and Mr. Ray’s brothers’ Gangster Disciples affiliation, there would have been evidence of Mr. Ray’s brothers engaging in “gang-like behavior” at the jail to protect their baby brother. However, no such evidence existed in the calls.

In fact, Maurice Ray distanced himself from Mr. Ray altogether at the jail, *e.g.*, in a call, Maurice commented to Owens in a call that “Bobby is a celebrity” as he was in the paper everyday for two weeks and that everybody had asked Maurice whether Mr. Ray was “his

people.” Maurice said he responded, “naw. I don’t know” and that he tried to change his name. 7/18/05 [CD-43, Track 89].

On July 25, 2005, a hearing was held Mr. Ray’s violation of bail bonds case. Fronapfel testified she had interviewed Mr. Ray’s brother Dumas who told her that Mr. Ray was part of the young Gangster Disciples, that “they (meaning young GDs) aren’t doing things the right way” and that “they wanted to be like Dumas.” 05CR1943 7/25/05 pp 91-92. In a call between Mr. Ray and Sailor on that day, after the hearing, Mr. Ray was incredulous that Dumas would “bold-faced lie” and had said “we want to be like him.” 7/25/05 [CD-41, Track 21]. In another call on the same day, Mr. Ray complained to Sailor that what Dumas had said sounded “retarded” because it made it seem as though Mr. Ray looked up to Dumas. 7/25/05 [CD-42, Track 26]. In another call with Owens, Mr. Ray referred to Dumas as a “retarded ass” for having lied about Mr. Ray “being a gang member and wanting to be like Dumas.” 7/25/05 [CD-52, Track 17]. In another call, Mr. Ray again expressed his disbelief that Dumas had talked to the police. Mr. Ray theorized that the police had probably told him to “say this, and we get your time cut or something.” Mr. Ray asked Sailor, “Why would he say that? I mean, why would he say that?” 7/26/05 [CD-46, Track 8]. In another call, Mr. Ray was again critical of what Dumas had purportedly told Det. Fronapfel:

They say what did you hear from Maurice? Not a whole lot, he didn’t say nothing. What did you hear from RayRay? Nothing, he my little brother, he GD, didn’t get blessed on but he grew up through the family and he look up to me, and she like well RayRay supposed to be some type of well-respected Gangster Disciple.

Owens: yeah? (incredulous tone)

Robert: yeah, he look up to me. He didn’t get blessed in but he’s a GD. I mean, what kind of shit is that?.....Where the fuck they get that? He didn’t get blessed on and all that shit... 7/25/05 [CD-52, Track 19]

In a call, Mr. Ray told Sailor that the gang unit was going to do anything in their power to see him go down. He remarked that they were trying to label him with his brothers. Sailor replied that she had heard and had thought to herself, “Are you serious? They have my husband mistaken. He is no gang member...you ain’t who you hanging around.” Mr. Ray added, “I just raised up in the house with ‘em.” Mr. Ray continued to wonder why Dumas would have said something like that. 7/26/05 [CD-46, Track 9].

Despite Mr. Ray being upset with Dumas, Mr. Ray could not bring himself to emotionally punish Dumas. In a call, Mr. Ray told Sailor that he did not want to send Dumas a birthday card.

He explained that he was so mad that Dumas would just lie to the police. Mr. Ray then asked Sailor's opinion on whether he should still send a birthday card. 7/26/05 [CD-46, Track 11]. Not only was this call rebuttal to gang affiliation, but also mitigation as he ultimately did send Dumas a card. 8/03/05 [CD-47, Track 11 of 11].

In another call, Mr. Ray told Percy Jr. that Dumas had told the police that Mr. Ray was a gang member and wanted to be just like Dumas. Percy Jr. responded that Dumas was "tripping"¹⁶⁷ and asked what was wrong with him. Mr. Ray remarked that if Dumas had said that, he was going to "rip up his letters." 8/01/05 [CD-47, Track 8]. The call reflected Mr. Ray's tone of incredulity that Dumas would say that to the police, as it was not true. The excerpt was relevant that Mr. Ray's reaction was not to threaten Dumas but instead to simply rip up his letter.

In another call with Percy Jr. on the same date, Mr. Ray mocked Dumas again and rhetorically remarked about Dumas, "You in jail, nigga, why wanna be like you?" 8/01/05 [CD-47, Track 9].

Years into his incarceration Mr. Ray continued to distance himself from the gang affiliation. In a call, Mr. Ray told Ciara that a new inmate had approached him and asked if he was "Rob G." This inmate had also told Mr. Ray that he was in prison with his brother. Mr. Ray remarked that he did not like folks knowing him and that is why he was getting "Rob G" (his tattoo) covered up on his arm. 7/18/08 [CD-135, Track 33]. In another conversation with Ciara about how they would raise a child, Mr. Ray continued to distance himself from gangs and gang lingo. When Ciara joked that their child would say things like, "What up, Cuz,"¹⁶⁸ he replied that he would "whoop" the imaginary child or Naia if they ever said "Cuz" or "Blood" or anything like that, referring to gang lingo. 7/30/08 [CD-138, Track 4].

Mr. Ray's act of turning conversations with other inmates towards his relationship and away from drugs and guns was mitigating and rebutted future dangerousness. In a call, Ciara counseled Mr. Ray not to make their relationship seem perfect when discussing it with other inmates as it was not fair and he needed to paint a realistic picture. Mr. Ray replied,

I don't want you to think I always, we is, I talk about everything we do all the time but yeah I do. (*Ciara laughs*). I do –and that shit hurt and blasé blasé. Look instead of talking about other shit, I retreat to talking about me and you so I don't have to talk about when

¹⁶⁷"Tripping" means "under the influence of hallucinogenic drugs." www.urbandictionary.com.

¹⁶⁸The term "Cuz" can have gang connotations. www.urbandictionary.com

they talking about: drugs and guns – you my fall back to talk about. 8/01/08 [CD-138, Track 15].

In another call Mr. Ray and Ciara discussed history. She commented that she wished she were 20 years old in the 1970's as she would have been a Black Panther. Mr. Ray told her that inmates compared Black Panthers as being the same group as the GDs (Gangster Disciples). Ciara exclaimed, "No, they not!" Mr. Ray agreed, "Man, these dudes is stupid." 8/03/08 [CD-138, Track 28]. Mr. Ray's remarks would have corroborated his continued rejection of GDs.

Gang evidence and gang affiliation permeated sentencing. Trial counsel's failure to listen to the jail calls greatly prejudiced Mr. Ray. Mr. Ray's words and conduct that actively disassociated him from the Gangster Disciples and gang-life mentality was mitigating. It was also fair rebuttal to the aggravating evidence.

Claim 393: The State violated *Napue* by presenting false evidence about "Stop Snitchin" T-shirts.

The State argued that one of the "Stop Snitchin" logo t-shirts, *P Ex 365*; admitted 4/24/09 pp 100-102 with no objection, collected from the Camaro driven by Owens on July 19, 2005 was dirty and worn—implying that Mr. Ray had worn it. However, he had been in custody for nearly a month by the time the t-shirts were seized, and the State also introduced evidence that when he was in custody he asked his wife to buy him one, 5/27/09 am p 25—thus he had never actually worn it. This was supported by a forensic expert who looked at the shirt for PCC and determined it did not appear to have ever been worn. Additionally, no such t-shirt had been found in the search of Mr. Ray's house August 12, 2005.

The State found this point important enough to argue in its opening, 4/08/09 p 107, and in both its closing arguments, 5/04/09 pp 71 and 199, in trial on the charges, and further used it to argue for death in its penalty phase closing. 6/03/09 p 71. Sailor falsely identified the shirt as one that Mr. Ray had worn. 4/21/09 pm p 218. Fronapfel referred to the t-shirt found in the car as "apparently used and worn," (which it is not) but then mentioned that Detective Welton found the receipt for the t-shirts in Owens's wallet—not mentioning that the receipt was dated July 18, 2005. 5/27/09 am pp 28-29.

According to CSI Faye Borquez, who collected the t-shirts when she was processing the Camaro, all the t-shirts "were new. They had store tags on them." 2/02/06 p 5. She further

testified that she found a bag from Underground Station, a t-shirt store, in the trunk of the Camaro. 2/02/06 p 5.

The State knew that the t-shirts were brand new and that Owens bought them after Mr. Ray was jailed, and argued that in Owens's trial: "He had the receipts for those shirts in his wallet when he was stopped on July 17 [sic]. He bought them on July 18." 06CR705 6/13/08 p 69.

The following exchange about the shirts occurred 4/24/09 p 84:

MR. HEDEEN: Judge, just briefly, out of an abundance of caution, I know that the next two witnesses have to deal with recovery of the Camaro. I believe the Court ruled that the shirts in the Camaro do not come in just to make sure.

MR. HOWER: We are aware of that.

THE COURT: We're ready for the jury.

MS. TOMSIC: Just for clarification, the shirts that were in the bag that were brand new. There's the worn shirt that's already been identified. Just wanted to make sure there's no misunderstanding.

Sailor testified that Mr. Ray actually wore that shirt, 4/21/09 pp 218-219; however, this is untrue.

The State then admitted *P Exs 367 and 368*, the shirts from the Camaro, 5/27/09 am pp 67-68; also photographs of the shirts, the bag they had been in, and the receipt for purchase, *P Exs 751-754 and 370, Id.* pp 68-70, at the penalty phase, in spite of their acknowledgement of the Court's earlier ruling, over trial counsel's objection, and in violation of Mr. Ray's rights to due process and individualized sentencing, the due process and cruel and unusual punishment clauses and *CRE 401-403*.

The prejudicial effect of this evidence is borne out by its repetition by the State in opening and closing argument in the guilt phase of Mr. Ray's trial and is hammered home by the State's use of this evidence as an "Aggravating Circumstance" in P2#26(7)(c) regarding lack of remorse: "the fact that the t-shirts were purchased and recovered from the Camaro."

The State committed misconduct by admitting this evidence, and counsel was ineffective in failing to investigate to uncover the fallacy of these statements and in failing to impeach and rebut the evidence and arguments.

Claim 394: Counsel was ineffective in failing to object to and rebut false evidence about "Stop Snitchin" T-shirts.

No rebuttal evidence of this kind was presented. The above section is incorporated.

Evidence of these shirts was admitted against Mr. Ray at the trial on the charges and at sentencing. The State highlighted this prejudicial evidence. In opening statements at the trial, the State argued:

On July 19, Sir Mario Owens was arrested on an unrelated marijuana warrant while driving the defendant's black Camaro. This is the Camaro. Inside that car found several things of interest. One was a dirty and worn t-shirt that said stop snitching on the front and had a little emblem like a target, crosshairs of a target and little pretend bullet holes on it. And on the back, rest in peace. That was a dirty and worn shirt. There was also a new package of shirts that had been purchased just the day before by Mr. Owens at the Aurora Mall saying the same thing, stop snitching, bullet holes, target, rest in peace. The message is very clear, you snitch, you die. 4/08/09 p 107.

Although the trial court precluded the brand new “Stop Snitching” t-shirts that were found in the Camaro at the trial on the charges, one of the t-shirts was admitted based on the State’s representation that it was “dirty and worn.”

Sailor testified that before June 20th, she had seen Mr. Ray wearing a t-shirt that said “stop snitching” on it. 4/21/09 p 217. The “dirty and worn” t-shirt found in the Camaro was admitted. 4/21/09 p 218, *P Ex 365*. Shekeenah White also claimed to have seen Owens and Mr. Ray wearing the “stop snitching” t-shirts before June 20th. 4/22/09 pm p 88; *P Ex 375*. Investigator Borquez testified to collecting a “stop snitching” t-shirt in the rear bench seat of the passenger side of the Camaro. 4/24/09 pp 100-101; *P Ex 365*.

At sentencing Fronapfel testified to a jail call on July 4, 2005, between Mr. Ray and Sailor about the “stop snitching” t-shirts and that Mr. Ray had requested she obtain him one. 5/27/09 pp 25-26. Fronapfel testified that Latoya had described that they had little bullet holes in them. *Id.*, p 26. The actual call was not played.

Fronapfel agreed with the State’s leading question that an apparently used and worn “stop-snitching” t-shirt was recovered from the automobile. *Id.*, p 28. She also testified that “new, unused, still in their package stop-snitching t-shirts” were also found in the car along with a receipt found in Owens’s wallet for the t-shirts reflecting purchase a day or two before July 19th, when Owens was arrested. *Id.*, p 29. Over defense objection, the State admitted all of the t-shirts found in the Camaro on July 19th. 5/27/09 pp 67-68; *P Ex 367* and *368*. The State even presented photographs of the t-shirts. 5/27/09 pps 69-70; *P Ex 751, 752, 753, 754*. The State also admitted against Mr. Ray the receipt reflecting the purchase date of July 18, 2005. 5/27/09 p 70; *P Ex 370*.

During cross-examination, Fronapfel testified that she had heard these t-shirts were kind of a fad and lots of people were wearing them, but then qualified her testimony that while the shirts were a part of the culture, these conversations between Mr. Ray and Latoya in the July 4, 2005 jail call occurred “right after Javad and Vivian are murdered.” 5/27/09 p 116. The court struck the answer as “nonresponsive” but the curative instruction did nothing to minimize the impact of her testimony. The evidence was declared by the court to be aggravating circumstances. P2#26(7)(c).

The State in sentencing closings argued the materiality and importance of these the jail calls:

I urge you to listen to all the CDs that have been given to you of his phone conversations. You know, I believe he said something in allocution about having to hear about his life and not be able to talk about it or something like that. Well, these are as close you can get because he’s talking to people he knows, he’s talking to friends and family. To get some kind of insight, these may give you more than anything else. Do any of them contain any indication of reflection, understanding, remorse? On July 4th, 2005....he tells Latoya to buy him one of those hideous t-shirts. 6/03/09 pp 104-105.

And again...the testimony is there, showed not only no remorse, but celebrated when he placed an order for those ghastly t-shirts. 6/03/09 p 133.

Robert Ray is a guy who, after sitting in custody in part because of the murder of these young people, would say, yeah, get me one of them t-shirts, the stop-snitching with the gun sites and the rest in peace on the back. That’s his idea of remorse. 6/03/09 p 199.

Jail calls contained evidence that Owens, and not Mr. Ray, was seen wearing a “Stop Snitching” t-shirt. Mr. Ray’s conversation about these t-shirts supported that he did not own one. However, Owens admitted to wearing one. In a call with Mr. Ray, Owens brought up the “Stop Snitching” t-shirts:

Owens: yeah, I bet. Get mfer face man. These goddamn t-shirts, man, they got every mfing eye in the world on you. White people be asking where you get “em from and shit. I ain’t took my shit off yet. I ain’t taking my shit off.

Robert: which one you got? That one Jay-Z had?

Owens: no, it just got the sign. It just say “Stop Snitchin.” I ain’t never see the one Tiny talking about. I saw a nigga one day, we got last two. Me and Keeta – we went to mfing Underground. Like them Blood Money ones, just like them. I ain’t taking my shit off. Fuck these mfers.

Robert: have them mfers wear that at my court date. Not! 7/14/05 [CD-43, Track 49].

Also, this call was relevant to rebut aggravating circumstance evidence that Mr. Ray was a continuing threat to society and lack of remorse. P2#26(7)(c). Further, if the State was accurate in its portrayal of Mr. Ray, he would have directed Owens to have family and associates wear the shirts to his court. In this call, Mr. Ray signaled to Owens to not let that happen.

Further, the police searched Mr. Ray's and Sailor's home at Kittredge on August 11, 2005 and no such shirt was found. Trial counsel failed to present this exculpatory and mitigating evidence, which was ineffective assistance of counsel. Logic dictated that if he already had a "Stop Snitching" t-shirt, he would be unlikely to have asked Sailor to get him one per CD-44, Track 16, as described by Fronapfel. 5/27/09 pp 23-29. Although two witnesses claimed they saw Mr. Ray wearing one, these shirts were extremely common and popular. As argued herein, Sailor would have said whatever the State required of her. Shekeenah was simply mistaken.

Trial counsel's failure to listen to the jail calls resulted in their inability to present compelling rebuttal evidence that would have likely 1) resulted in the trial court precluding the "stop snitching" t-shirt since the evidence made it much more probable than not that Mr. Ray never owned one; and 2) had the court admitted this prejudicial evidence nonetheless, Mr. Ray's trial counsel would have been able to present rebuttal evidence that Mr. Ray never wore one.

Claim 395: Counsel was ineffective in failing to adequately investigate and present rebuttal evidence to minimize the impact of the "stop snitching" t-shirts.

No rebuttal evidence of this kind was presented. Counsel should have presented testimony through expert and lay witnesses of the prevalence and meaning of this type of t-shirt and message in the culture in which Mr. Ray lived.

Jail calls also reflected the extent to which African-American entertainers and rap lyrics were an integral part of Mr. Ray and his family and friends' interests. In fact, in CD-43, Track 49, Mr. Ray asked Owens whether the "stop snitching" t-shirt Owens had obtained was like the one "Jay-Z" had. Jay-Z was [and is] a famous rapper, record producer, and extremely wealthy entrepreneur who co-created a clothing line called Rocawear.¹⁶⁹ *See also* Social History, Part V, pp 606-615 for additional evidence.

Had trial counsel adequately investigated and listened to the jail calls, they would have presented evidence that mitigated Mr. Ray's statement to Owens in the jail call to "get him a stop

¹⁶⁹ www.en.wikipedia.org/wiki/Jay_Z.

snitching t-shirt.” As effectively presented in the Social History, these “stop snitching” movement was not of Mr. Ray’s doing.

In one call, the following exchange occurred between Brandi and Dumas. Brandi was outraged that Carmelo Anthony was being persecuted for his “stop snitching” message :

Brandi: You see that Carmelo Anthony shit? That be making me mad – they need to stop sweating him. White folks just looking for some shit. At least he keeping it, you know. He just went back home, they acting like he say some shit. He didn’t say shit – he was there, so what. Keeping it real.

Dumas: He ain’t know that shit was going down like that

Brandi: I know they just be looking for shit. Remember a couple of weeks ago, them folks talking conspiracy and shit. I’m like- oooo weee.

Dumas: that happen all the time. That be happen for a long time

Brandi: why he such center of attention?

Dumas: cause everybody in - it started all the way back with Wilt Chamberlain, Magic Johnson. 12/02/04 – 12/03/04 [CD-20, Track 5]

In another call, Dumas rapped to Mr. Ray a lyric he wrote about a “war with nations like Bush and hating niggas who hate him.” 1/22/05 – 2/12/05 [CD 24, Track 6].

T-shirts were a common way to promote a belief, a message, or support. In one call, Brandi told Dumas about a birthday party she attended. She recounted that Mr. Ray arrived wearing a coat with Dumas’s picture that said “Free Ray G.” In the call, Dumas laughed and was very clearly happy about this. He remarked, “that’s my baby boy!” 3/14/05 – 6/01/05 [CD 29, Track 3].

In another particularly mitigating call, Mr. Ray reminded Maurice that he was going to trial the following month. Maurice told him that he had some t-shirts made. Mr. Ray was adamant, “**Don’t wear them to my trial! Don’t wear that shit to my trial. Don’t wear no t-shirts, none of that. Wear something casual. Don’t wear no white t-shirts or nothing. For real! They already trying to paint niggas like they the mob and shit.**” Mr. Ray told Maurice to still get the t-shirts made and that he had heard that his family in Chicago had been wearing them. 9/12/06 [CD-80, Track 17]. Mr. Ray told Rose that he had told Maurice to “not be wearing ‘those t-shirts,’” referring to “Free Rob G” t-shirts that his family had made. 9/13/06 [CD-80, Track 18].

These calls were also relevant to demonstrate that Mr. Ray did not want to manipulate his Lowry Park jury by having his family and friends show up in court wearing the t-shirts.

Years later, Ciara commented to Mr. Ray that she was wearing her “Free Rob G” t-shirt. Mr. Ray told her that the only pictures he had on his wall were of “Free Rob G” and “Victim of the Ghetto.” 8/15/08 [CD-141, Track 15]. The fact that he did not have “stop snitching” or “live and die by the gun” pictures was mitigating and should have been presented and argued by trial counsel. *P Ex 786* (Photo of Mr. Ray wearing a shirt that said “Live and Die By The Gun”¹⁷⁰ taken from his MySpace page.)

Finally, had trial counsel investigated Mr. Ray’s juvenile police reports and obtained the police files in their entirety, they would have been able to rebut the State’s aggravating evidence with Mr. Ray’s written statements to the police from the 2001 fight at Overland High School and the 2002 riot at Overland High School where Mr. Ray was supportive of Security Officer Frank Dudley’s actions during the riot. Mr. Ray’s cooperation with law enforcement would have countered the effect of that “stop snitching” aggravating evidence.

Trial counsel were ineffective in their investigation and at trial for failing to rebut this inculpatory and damaging evidence against Mr. Ray.

Claim 396: Jail Calls: Failure to Adequately Investigate and Present Rebuttal Evidence to State’s Aggravated Evidence of Mr. Ray’s References to “Snitches”

The State presented evidence of Mr. Ray discussing witnesses as being “snitches,” needing to die, and that he couldn’t stand snitches. 4/21/09 pp 63-72. Sailor testified that the subject of Mr. Ray’s trial came up “all the time” between July 4th and June 20th. 4/21/09 p 77. Teresa Riley testified that Mr. Ray said “snitches don’t live long.” 4/22/09 p 113.

Trial counsel failed to minimize the impact of those statements by presenting evidence as to what the basis of Mr. Ray’s beliefs were with respect to the criminal justice system and his opinion about “snitches.” To Mr. Ray, “snitches” were witnesses who lied and manufactured evidence for their own benefit. A jail call between Mr. Ray and Teresa Riley would have corroborated his opinion and minimized the impact of the State’s evidence:

Teresa: I just put this in the Lord’s hands, you know I pray every night and all of that. If you all know anything, anything about this shit, tell. That’s don’t make you snitch, stitch or witch. Tell!

Rob: It make you a snitch if you lying about it. These mfers lying on me, lying on me!
9/24/05 [CD-4, Track 6]

¹⁷⁰ An idiom that Mr. Ray did not create and is likely rooted in biblical origins from the proverb “Put your sword back into its place. For all who take the sword will perish by the sword.” Matthew 26:52.

Given the State's damaging theme and evidence about Mr. Ray's comments about witnesses, trial counsel had an obligation to point out instances of Mr. Ray not referring to witnesses as "snitches" or in derogatory terms. In addition, the State argued in penalty closings:

What have you heard from Robert Ray that indicates any reflection, any empathy, any understanding since July 4th, 2004, for anybody else other than himself. 6/03/09 p 106.

Trial counsel had an obligation to present evidence of Mr. Ray expressing empathy to rebut the State's arguments of "lack of remorse."

The absence of derogatory terms regarding witnesses would have been relevant. The jail calls reflected that absence. In a call between Mr. Ray and Sailor, he talked about the "Chinese lady" that just stares at him and cries in court, referring to Christine Wolfe. At no time does he make a disparaging remark. 7/02/05 [CD-44, Track 6]. In a separate call a few days later, Mr. Ray told Sailor that the victims' family looked at him and one lady cried while the others look teary eyed. He remarked that the one uncle looked as though he was going to jump up and punch Mr. Ray. At no time does Mr. Ray make a disparaging remark. 7/05/05 [CD-44, Track 20]. In another call, Mr. Ray remarked to Sailor that the "Chinese lady," referring to Christine Wolfe, had lost so much weight and that the other mom always looked like she was just smiling. At no time did he make a disparaging remark. 8/09/05 [CD-50, Track 40]. In these calls, Mr. Ray's tone and demeanor was solemn. He was not angry, disrespectful or mocking.

In another call, Mr. Ray asked Sailor whether she saw "the sister," referring to Maisha Pollard, stare at him in court. He stated that she had blown "kisses" at him and that the whole time she was in the courtroom, she was smiling and making little comments. He told Sailor that Maisha would not take her eyes off him. Mr. Ray's tone was solemn and not angry in spite of Ms. Pollard's attempt to bait him. At no time did he make a disparaging remark. 7/07/05 [CD-44, Track 26].

In a call, Mr. Ray told Sailor that he had been in the Denver Post again. He told her it was just the victim's family complaining about how the "Aurora police were worthless, they didn't trust them, and they didn't have witness protection." He told her that the victims were talking badly of them. At no time did he make a disparaging remark. 7/24/05 [CD-41, Track 19]. In a call the same day but after the bond hearing where Maisha Pollard had testified, Mr. Ray told Sir Mario Owens:

Robert: you should have seen the damn girl. They letting her do all kind of...sitting there smiling and laughing at me and shit, like haha you going to jail, haha. Then she get up on the stand and just be hysterical as hell. You can't—I say she acting, but at the same time, her brother is dead. You should have seen her man.

Owens: and they just let 'em do that shit?

Robert: hell yeah. She was fucking good. Like she had that shit planned like she a fucking actor, man.

Owens: That's what I heard. 7/25/05 [CD-52, Track 17].

At no time did Mr. Ray refer to her as a snitch or personally attack her. His tone reflected that although he felt that she was "acting" on the stand, he expressed that given her brother's death he understood her position. This was mitigation as it reflected Mr. Ray's empathy to Ms. Pollard and also rebutted aggravating evidence.

In a call, Sailor told Mr. Ray that she was going to meet with her lawyer named Becky, with Dan DeRoche, newscaster, and the Rocky Mountain News. She told Mr. Ray that she was going to give the media an interview about how the State's tactics. Mr. Ray told her that the victim's family was pushing the media so hard, including Fox Live and world news. Mr. Ray stated:

Robert: yeah- to the world news. That's the family doing their thing. Don't blame 'em though, but it's just I didn't know nothing about P saying something to those people. That's why they looking at me so hard like that.

Sailor: ooo-weeee

Robert: They goin get it too. Believe me, they gonna do it. They trying to get national coverage. They going get it. Cause they inventing shit.

7/28/05 [CD-48, Track 5]. Again, Mr. Ray's statements that he did not "blame the family" for going to the media was empathy. In addition, Mr. Ray's statement denying knowledge of Perish's conduct was exculpatory. In a call between Mr. Ray and Monica Owens, he told her:

Robert: You ain't go to take off work, but come to my court. See how it's like a movie. How the family, they be mistreating my family bad. Calling them trash, beasts, mistreating them. Just dawging em out. And how hysterical they be. I understand you lost your son and your daughter. I pray every day they find who did that. But at the same time, who's to say if they find who did that that police won't be like, "we'll give you 10 years if you say you did it for him." Who's to say they ain't going to do that? Who ain't going to say yeah, I did it for him, and get their time knocked off? 8/03/05 [CD-47, Track 10].

As in the other calls, Mr. Ray did not make disparaging or threatening remarks. This call also provided evidence of Mr. Ray's ability to have empathy.

In another call, Mr. Ray commented to Sailor that the victim's family had shown up to his court date for sentencing on the POWPO charge. She asked whether the victim's family had clapped when the judge pronounced the sentence. He told her that he did not look back at them. At no time did he make a disparaging remark. 8/02/05 [CD-48, Track 27]. In a call with Sir Mario Owens, Mr. Ray told Owens that no one from his family had appeared at his POWPO sentencing but that the victims' family were there as they are at every court date. Again, there were no derogatory or threatening remarks. 8/04/05 [CD-49, Track 12].

In the course of general chitchat, Stephanie Clarke told Mr. Ray that it was a small world as her hair dresser had told her that Mr. Fields's mother and Sailor have gone to the same beauty salon. Stephanie told him that her hair dresser had said that Mr. Fields's mother told that to the detective and that the detective offered the beautician money to write down the license plate number of the car Sailor was driving but that the hairdresser had apparently refused to get mixed up in that. Mr. Ray's only comment was that he wondered why the police would want to know her license plate when they already knew what kind of car she drove anyway. Again, there were no derogatory or threatening remarks. 8/14/05 [CD-55, Track 3].

In another call, when Shekeenah told Mr. Ray that Sailor had mentioned that she had received a restraining order to not have contact with Brandi or Mia, Mr. Ray's only response was, "that's bad how low people will go." 8/15/05 [CD-58, Track 1]. Mr. Ray repeated to Shekeenah what Stephanie had told him about people trying to pay employees to write down the license plates of vehicles Sailor was driving. He elaborated to her that "dude's momma go to the shop and they all go to same shop. And she said they people tried to pay one of them people to write down the license plate." Shekeenah told him that "they say your sister-in-law is running your business." He responded, "She ain't running my business. That's her fantasy she running. Making all that trash up." 8/16/05 [CD-58, Track 2]. Again, no derogatory or threatening remarks.

In a call soon after one of Mr. Ray's court hearings, Mr. Ray asked Rose if there were really snipers out there. She responded that they were on the roof and that they were only there for Mr. Ray's case. He asked if they had guns. Rose replied that they were on top of the buildings and when they walked up, there was a guy in the bushes. She mentioned how they were in the security line and a female district attorney had entered with the family of the victim and said, "Well, we need to get them in there and can we jump in line?" Rose remarked that she

had said, “I don’t think so. We been standing in this line. They got to wait!” Mr. Ray’s only comment, “With her big booty, bald-headed self.” 8/19/05 [CD-58, Track 8]. Mr. Ray was likely disparaging one of the prosecutors; however, his remarks were hardly threatening or in line with what he would have said if the State’s portrayal of Mr. Ray had been accurate, *i.e.*, “cold, manipulative, angry all the time, serious.”

In a call, Mr. Ray asked Stephanie whether the victims’ family had been “looking at her all crazy,” referring to their behavior towards her at his court hearing. She told him she did not notice. He said that if he did not expect to see anybody, he did expect to see the victim’s family every time. Stephanie told him that she saw the mother and the girl walk by her. Mr. Ray said that one of them had lost a lot of weight. He said that he knew it was hard on them and that he prayed for them every night. 8/30/05 [CD-59, Track 2]. Mr. Ray did not disparage or insult them at all. In fact, Mr. Ray exhibited empathy towards them as he had in prior calls. In another call months later, Stephanie asked Mr. Ray if “their family,” referring to the victims’ family, were still coming to court. Mr. Ray simply told her that they “got up and spoke the last time they were in court.” 5/25/06 [CD-134, Track 1].

In a call, Mr. Ray told Maurice that there would be witnesses at his court the next day. Maurice told him that he wanted to see exactly who the witnesses were. Mr. Ray simply said, “watch them lie.” 9/12/06 [CD-80, Track 17]. Mr. Ray did not refer to them as snitches nor did he imply or suggest retaliation.

Several members of Mr. Ray’s family and friends were called to testify at the Lowry Park and capital trial, yet trial counsel failed to point out that they weren’t referred to as “snitches” or threatened.

Years later in a call, Mr. Ray told Ciara when she came into court to just be a lady as the “other side” was going to be “nosy” with her and that Ciara did not need to treat them “like an asshole.” He warned her they would try to ask her who she was in court for but that those were questions “beyond,” meaning not their business. 6/23/08 [CD-148, Track 1]. Of note, the State had noted this call in a pleading entitled DA-94-RR as intending to introduce as evidence against Mr. Ray:

On June 23, 2008, Robert Ray tells Sierra that his mother and Sir Mario Owens’ mother, Monica Owens, came to see him together on Saturday and he was able to talk to Sir Mario Owens.

In the call, he told Ciara that both his mom and Rio's mom had come to visit their sons at the same time so he was able to "holler at Rio and his mama for a minute." This was hardly nefarious. The call included Mr. Ray telling Ciara that he loved his lawyers and that he had a new investigator on his team who used to work for *Westword*. Mr. Ray remarked that this new defense agent "changed his career after having spoken to Mr. Ray's lawyers and believes Mr. Ray was being railroaded. *Id.*

In another call, Ciara told Mr. Ray that "Ol Girl," referring to Sailor, was pretty but that when she opened her mouth, "whoa!" Mr. Ray laughed. Ciara commented that Sailor had Tamika beat, likely referring to her use of profanity in court. 6/26/08 [CD-149, Track 21]. At no time did Mr. Ray disparage or make threatening remarks about Sailor.

In a call, Mr. Ray told Ciara that he just wanted her to see the three important witnesses, "her, him and him," likely Sailor, Todd and Johnson, and to see openings and closings. He told her that they would not know when they were coming in to testify due to security reasons. She told him that they had told Owens when witnesses were coming. Mr. Ray told her that no, "they (Owens) was in the blind" and that they would only tell Owens's lawyers, who were not supposed to tell them when witnesses were coming. 7/13/08 [CD-136, Track 10]. Mr. Ray did not sound upset or angry nor does he make any disparaging comments about the three witnesses that ended up providing the majority of the inculpatory evidence against Mr. Ray. This was mitigation and rebuttal to future dangerousness.

In a call, Mr. Ray told Ciara that one of the witnesses against him had picked up a pistol and "X" (ecstasy) case and was taken to jail, that the government had gotten him out of jail, that he had not gotten his car back but that they probably would get it back for him. Mr. Ray was referring to Jamar Johnson and was correct as Det. Fronapfel did assist Johnson in getting his car back from the police. Ciara asked whether Johnson's charges could be used to help Mr. Ray. He said "yes as anything bad is good but he wished Johnson had caught a homicide as that would be better." Mr. Ray commented that it just showed that in spite of Johnson still trying to play "nice," he was actually still involved in crimes. Mr. Ray remarked that one of Johnson's closest friends came to the jail. Mr. Ray said he did not know his name but this man was from New York. Mr. Ray was referring to Jamar Dickey, who was actually from New Jersey. 8/16/08 [CD-141, Track 29]. This call was relevant because no remarks about retaliation were made nor did Mr. Ray use the word "snitch." This was also relevant to future dangerousness.

These jail calls reflected the absence of disparaging or threatening comments about witnesses. Given the State's reliance on "threat of future dangerousness" for justification for the so-called "witness protection program," trial counsel should have presented evidence from these calls to negate the State's aggravating evidence and arguments. Their failure to investigate the jail calls and aggressively counter the weight of the State's evidence with Mr. Ray's exculpatory jail calls was ineffective and prejudiced Mr. Ray.

Claim 397: Counsel was ineffective in failing to adequately investigate and present mitigating evidence to counter the weight of a jail call where Mr. Ray discussed "snitches" coming to court.

No evidence of this kind was presented at sentencing.

At Mr. Ray's sentencing, Fronapfel testified about a jail call between Mr. Ray and Dumas on February 27, 2005 in which Mr. Ray talked to him about witnesses coming to Court to "snitch" on him. 5/26/09 pp 91, 94; *See also P Ex 928* (CD of jail call); *P Ex 928a* (Excerpted Transcript). The following was the only excerpt the jury heard:

Dumas: what is going on with your court shit?

Robert: man, look I got Harvey and shit though. They did another 6 months thing, you know what I mean. And I guess witnesses they know that. All these witnesses showing up in court ready to snitch.

Dumas: who?

Robert: all the damn witnesses.

Dumas: I'm saying what is they snitching, though?

Robert: Ready to tell what the fuck they know, what they think they know. Shit it just be scheduled again.

Dumas: what Harvey say?

Robert: "don't worry about." He "gonna eat it up"

Dumas: Brandi told me Tiny told her a bunch of people showed up at court and shit.

Robert: yeah

Dumas: Who is the fuckin people?

Robert: who the people? Just the people who was at the thing - at the park

Dumas: And they still saying, what they charging you with?

Robert: accessory. One motherfucker said- I got to read discovery. One motherfucker said he seen me do it. Another mfer said the victim is saying is was another dude who also got shot. See everybody's stories is different.

Dumas: long as he (Steinberg) say he "gonna eat it up," it's straight. I was just thinking about this shit 2/18/05-2/27/05 [CD 27, Track 11].

This call was admitted over defense objection. However since the call was admitted, trial counsel should have played the call for the jury in its entirety as it contained evidence that would have minimized the impact of this evidence.

In the call, Mr. Ray did not persevere about the witnesses nor did he sound angry. After Dumas's last sentence as referenced herein, the rest of the call was not played to the jury. In the rest of the call, Mr. Ray asked him whether he needed more money. This would have been evidence of Mr. Ray continuing to financially support Dumas and was also mitigation. They then discussed their body weight. Dumas told him that he had been buying a lot of protein powder so he could come home looking like Arnold "Schwarznigga." Joking banter occurred between the two. Mr. Ray started to describe who he looked like and Dumas immediately quipped, "Opie."¹⁷¹ Mr. Ray was good-natured about Dumas's teasing and described himself as looking like, "Stick man, like JJ out of *Good Times*," a popular television show in the 1970's. Dumas laughed. Emulating Dumas's remark about wanting to build muscles, Mr. Ray told him that he was going to buy himself a weight bench and get some steroids. Dumas told him not to and to just get stuff from nutrition store GMC. Mr. Ray commented that he was going to take steroids and asked why he could not take them. Dumas replied that the penis would shrivel up and counseled him just to take the protein. Dumas then told him that he loved him and would call back later. 2/18/05-2/27/05 [CD 27, Track 11]. The "normal" discussions between the two brothers and their banter would have countered the effect of Mr. Ray's "snitches coming to court" remark from this same jail call. Because trial counsel did not play the mitigation from this call, the jury was left with no other impression than that none existed. This was untrue.

Consistent with evidence that Mr. Ray was highly influenced by Dumas, in a later call among Dumas, Brandi, and Sailor, Sailor told Dumas that Mr. Ray had gotten a weight bench. When Dumas asked whether Mr. Ray had purchased steroids, Brandi replied that Mr. Ray was in a health store when Sailor had talked to him a few minutes prior to the call. 2/28/05-3/14/05 [CD 28, Track 2].

The importance of playing the entire call cannot be overstated. By failing to do so, trial counsel allowed the jury to see Mr. Ray through a very narrow, limited lens. The call and his conversation with his brother in its entirety would have greatly diminished the impact of the excerpt played and would have rebutted the State's other evidence and arguments that Mr. Ray "never joked," "was always serious," "was no-nonsense." This call was also mitigation.

¹⁷¹ An "Opie" is a nickname typically used by blacks to refer to any white male. This modern usage of "Opie" is likely derived from the character Opie Taylor from the Andy Griffith Show. www.urbandictionary.com .

With respect to the portion that was played for the jury, had trial counsel called Harvey Steinberg as a witness and introduced the exculpatory evidence he provided, it would have corroborated what should have been part of the defense theory: that Mr. Ray had been told his Lowry Park accessory case was weak and that he had hired a top-notch attorney in his mind to fight it.

With respect to the “snitch” comments, as noted herein, trial counsel’s failure to play the jail call with Mr. Ray explaining that to him, a “snitch” was someone who lied against him. Trial counsel’s indefensible failure to present that evidence became all the more prejudicial because of *P Ex 928*.

Claim 398: Counsel was ineffective in failing to adequately object and request a mistrial when the State elicited aggravating evidence that Mr. Ray believed the criminal justice system is racist and of copied rap lyrics in *P Ex 919*.

At sentencing Sailor testified that Mr. Ray did not like the police. She stated that she did not know whether Mr. Ray had described the police as “the biggest gang there is,” “but everybody had the same opinion about police.” *5/18/09* p 104. Over objection the State was allowed to present evidence at sentencing of Mr. Ray’s belief that the criminal justice system was racist. Sailor testified that Mr. Ray believed that the judicial system, the police, prosecutors and judges were racist. *5/18/09* p 109.

Q (By Mr. Hower) Actually, after he was arrested and been in custody from June 26 up to the present, does he ever describe the system, the judges, DAs and so on as being racist?

Mr. Ray objected because the court had ordered the source of that supposed evidence, a jail call, unavailable to the prosecution without prior notice to the accused. Trial counsel noted again that they had not listened to the calls. The court overruled the objection on the grounds that so long as the State did not specifically refer to the existence of the recording, it could use the evidence from the recordings, *i.e.*, Mr. Ray’s statements. Obviously, this meant that there were no restrictions on the State’s use of the evidence on the recordings at sentencing, and that the “prior notice” requirement was meaningless. Then:

Q (By Mr. Hower) Are you aware of Mr. Ray's attitude expressed to you about the judicial system, police, District Attorneys, judges and so forth?

A Yes.

Q What was that?

A You all don't like black people. You all are prejudice, you know. *5/18/09* p107.

Trial counsel examined Sailor briefly, eliciting that it was a common belief in her “community,” and that “everybody” in her circle had that belief, not just Mr. Ray. *Id.*, p 136.

Shortly thereafter, the court realized its error and struck the evidence. Mr. Hower feigned confusion and also blamed Mr. Ray’s counsel for the problem. Hower admitted having no good-faith basis for asking the question and offered no explanation for having done what he did, but insisted the violation of the order was “unintended.” Trial counsel’s only request for relief was that the court strike all of the jail call recording evidence. The court instructed the jury “that particular portion of her testimony is struck. You cannot consider it for any reason.” 5/18/09 pm pp 17-18.

Trial counsel’s failure to request substantive relief and to object on the grounds that the evidence violated Mr. Ray’s right to a fair and reliable sentencing, and his rights under the 1st and 14th Amendments, Colo. Const. art. II. § 3, 4, 25, and *Dawson v. Delaware*, 503, U.S. 159 (1992), was ineffective assistance of counsel. A person cannot be sentenced, much less executed, because he believes the criminal justice system is “prejudiced” or “racist.” *See also Zant v. Stephens* re: the prohibition of the use of constitutionally-protected conduct as reasons to execute a person.

The remedial instruction failed to cure the prejudicial impact. It was akin to telling the jurors to ignore the bomb which had just exploded in their midst.

Trial counsel also unreasonably failed to react to and request relief due to the court’s unexplained one-question reversal of its prior order. The scenario created the appearance that the court changed its order in order to allow one very prejudicial question and answer. While this circumstance, without more, may not suffice as grounds for recusal of a judge under *Crim. P. 21* and the due process clauses, any reasonable trial counsel would make a record on the situation and, in light of the several motions to recuse the judge already made, would have incorporated this with the prior motions and made such a motion. The failure to do so was ineffective assistance of counsel.

Further, trial counsel’s failure to request a mistrial of the sentencing hearing was unreasonable. The prejudice to Mr. Ray was enormous and the abbreviated instruction was hopelessly and obviously insufficient. The State should have been required to pay the price for its obviously deliberate violation of an order excluding the extremely prejudicial evidence.

Further, the court had admitted *P Ex 919* – a letter Mr. Ray had written in jail that set out rap lyrics by a well-known rap artist named Shyne. The court admitted these rap lyrics as rebuttal to mitigation and evidence of aggravating circumstances. 5/27/09 pp 60-62. The lyrics included a highly prejudicial passage where Shyne wrote, “I wanna be free wishing I can strangle all the jurors [sic] and prosecutors.” Trial counsel made no effort to exclude such prejudicial and irrelevant portions of the lyrics in Mr. Ray’s sentencing. Their failure to attempt to mitigate the damage of these lyrics was unreasonable and prejudiced Mr. Ray greatly. Trial counsel’s failure to object or move to exclude that evidence under *CRE 401-403*, the due process clauses and the 1st and 14th Amendments, Colo. Const. art. II. § 3, 4, 25, *Dawson v. Delaware*, 503, U.S. 159 (1992), and *Zant v. Stephens, supra*, was ineffective assistance of counsel. A person cannot legitimately be sentenced, much less executed, because he likes or copies song lyrics. The death sentence should be vacated because of the admission of this evidence for those reasons.

In light of the prejudicial Shyne lyrics and the trial court’s admission of Mr. Ray’s belief system that the criminal justice system was racist as relevant “aggravating evidence,” trial counsel should have pointed out the desperate measures the State had taken to secure an execution date for Mr. Ray. The State knew that the case against Mr. Ray was entirely circumstantial and built on incentivized witnesses. Post-conviction investigation has revealed the innumerable *Brady* and *Napue* violations related to these incentivized witnesses. The State's reliance on this evidence shows that it proposes and desires to execute Mr. Ray for a belief system that is supported by hundreds of years of experiences of millions of African-Americans and by an enormous collection of research data. In Mr. Ray's particular case, that belief was also justified by the coercive investigation tactics, *i.e.*, rounding up Mr. Ray’s family and friends through arrest or threat of arrest, threat of government seizure of their children, and police presence outside of their homes to name a few, and the *Brady/Napue* violations involved in the prosecution. Trial counsel's failure to rebut that evidence with evidence of the justification and firm factual basis for those beliefs was ineffective assistance of counsel.

Claim 399: Counsel was ineffective in failing to adequately investigate and present rebuttal evidence to copied rap lyrics in *P Ex 919*.

No rebuttal evidence of this kind was presented to the jury.

Mr. Ray incorporates the preceding section regarding Mr. Ray’s “belief system that the criminal justice system is racist” into this section.

The court admitted lyrics Mr. Ray had copied that were authored by a popular rapper named Shyne, as rebuttal to mitigation and as aggravating circumstances. 5/27/09 pp 60-62; *P Ex 919*. Trial counsel only objected on “relevance” grounds. *Id.* p 61. The court did not make a finding as to why this evidence was relevant but presumably it was, as the State argued, that Mr. Ray had “adopted these thoughts.” *Id.* p 62. The court admitted it only looked through it “quickly”. *Id.* p 62. Trial counsel were ineffective when they failed to address each lyric line by line and object as unfairly prejudicial under C.R.E. 403. The overwhelmingly prejudicial lyrics included:

- only the strong survive, weak niggas bleed and get found wit they fucking face down
- Stood death in its eyes and never blink, head shots ring threw my mink, went to war wit the realest killaz, killed friends over jelousy and envy, my heart is empty
- feeling invinsible, bout to take over the world, I can’t be stopped, not the feds or the fucking cops, not even 17 shots could put a end 2 this terror, Im gone live 4ever, cause Gangstaz don’t break, we just get plastic surgery and relocate to another state
- leave your Brains slumped on a fucking [illegible],
- leave your brains hanging out your fucking car window, any nigga snitching giving info
- every enemy I shank
- I wanna be free wishing I can strangle all the jurors and prosecutors but Im trapped with a bunch of losers

While the jury was presented *P Ex 919* Shyne lyrics as aggravating evidence against Mr. Ray, trial counsel failed to present evidence that a CD by Shyne, and numerous other rap albums containing an abundance of similar violent, arguably “antisocial” rap language, were found in Javad Fields’s vehicle.

Trial counsel’s failure to investigate resulted in them not even knowing this potentially critical fact. There was no tactic or strategy underlying the failure to present the evidence. That evidence would have more than entirely countered the aggravation; it would have demonstrated the widespread generational appeal of such music, countering the notion that Mr. Ray’s citing the lyrics was a reason to execute him. Assuming the State was correct that liking music with such lyrics is a reason to execute someone, the evidence would have also negated the State’s otherwise unchallenged evidence that Mr. Field had a uniquely admirable character.

The jury would have then been given the opportunity to “weigh” this evidence to determine how much value to give this otherwise prejudicial evidence.

Trial counsel was similarly ineffective in failing to present expert and lay testimony about the popularity and meaning of hip-hop lyrics in the cultures in which Mr. Ray and Mr. Fields lived.

The State conceded the importance of the jail calls. Prosecutor Hower stated in sentencing closing arguments,

I urge you to listen to all the CDs that have been given to you of his phone conversations. You know, I believe he said something in allocution about having to hear about his life and not be able to talk about it or something like that. Well, these are as close as you can get because he’s talking to people he knows, he’s talking to friends and family. To get some kind of insight, these may give you more than anything else. 6/03/09 pp 104-105.

Given the evidence and the State’s arguments, trial counsel should have presented evidence to minimize the damaging impact of the State’s evidence.

Trial counsel’s failure to listen to the jail calls prejudiced Mr. Ray greatly. The State made Mr. Ray’s choice and interest in music relevant at his sentencing. Trial counsel should have countered *P Ex 919*.

Trial counsel should have also used the calls to point out that rap artists and lyrics were an influence to many within Mr. Ray’s community, including himself, his family, friends, and even Javad Fields. In one call, Mr. Ray mentioned to Dumas that he was like “Jay Z,” a famous music producer. Mr. Ray clarified that he meant as a producer and not a rapper. Dumas then rapped out a lyric he wrote about war with nations like Bush, hating niggas who hate him. 1/22/05 – 2/12/05 [*CD 24, Track 6*]. In another call, Dumas referred to a famous rap star, telling an old friend, Vincent Diggins, “money over bitches. Tupac talk about that in 1996.” 2/12/05-2/13/05 [*CD 25, Track 2*]. In another call, Mr. Ray and Sailor discussed rappers Gucci Mane and Cassidy and their respective murder cases. Mr. Ray was incredulous that Gucci Mane could be charged with murder when the victim ran into Gucci’s house. Sailor remarked that if someone came into her house, she would use the gun. Mr. Ray told her that his “outside source” kept him posted on all the gossip on the rappers. Sailor asked if it was “Breath,” referring to Owens. Mr. Ray confirmed that it was. Sailor replied, “He be on that shit!” 7/22/05 [*CD-43, Track 99*]. In a call, Mr. Ray asked Teresa Riley to have Kenyatta send him lyrics to a rap song that Beanie Sigel wrote. 8/25/05 [*CD-61, Track 10*].

In another call, Mr. Ray asked Markeeta to get him some lyrics for various rappers, including Shyne, particularly Shyne's old CD. 9/01/05 [CD-62, Track 1]. Dumas asked Rose if Markeeta had copied lyrics he had asked for. 11/01/06 [CD-78, Track 1]. Dumas also asked Markeeta to obtain for him the *Dynasty* album and lyrics for *Philadelphia Freeway*, *State Property 2* and the "Chain Gang." Dumas talked about trying to put a rap company together. 10/25/06 [CD-78, Track 3]. Freeway, a rapper, was the inspiration for Mr. Ray's "Victim of Ghetto" tattoo.

Had trial counsel asked Dumas Brown why Mr. Ray bought the recording studio, he would have said that Mr. Ray bought it because Dumas wanted it, as he loved recording music. Dumas and Mr. Ray were both customers of Tyjuan Bennett's barbershop. A jail call reflected that it was Dumas who suggested that Mr. Ray take over Tyjuan Bennett's barbershop which led to the recording studio; in a call, Dumas remarked to Sailor that "Lil Robert" should see what was up with the barbershop and to see if Tyjuan wanted Mr. Ray to run it. Dumas mentioned to Sailor that a barbershop was the "real money." 2/13/05 – 2/18/05 [CD 26, Track 3]. A month later, Brandi told Dumas that Mr. Ray had said to think of a name for a studio. 3/14/05 – 6/01/05 [CD 29, track 5].

Trial counsel's failure to elicit mitigating and rebuttal evidence to the State's aggravating evidence from *P Ex 919* was ineffective assistance of counsel. Trial counsel had an obligation to vigorously defend Mr. Ray's life from any and all aggravating evidence. Their failure to do so greatly prejudiced Mr. Ray in his plea for a verdict of life.

The mitigation involving music would have been particularly powerful. It is poignant, heartfelt and convincingly shows Mr. Ray's sincerity and love. As with all of the jail calls evidence, the actual voices and sounds on the recordings are critical parts of the evidence, and provide a huge amount of mitigation aside from and in addition to the words spoken.

Because trial counsel never listened to the jail calls, they were unable to point out that Mr. Ray did not call the prosecutors any disparaging names, although the prosecutors were the subject of a significant amount of discussion. Given *P Ex 919* (Shyne rap lyrics) and Sailor's testimony that Mr. Ray thought everyone in the criminal justice system was racist, trial counsel should have admitted all the evidence they could in an attempt to rehabilitate Mr. Ray and to demonstrate that the State's version of Mr. Ray was one-sided.

The absence of derogatory or threatening comments by Mr. Ray was relevant rebuttal.

Further, in a call between Mr. Ray and Sailor, she remarked that she hated the jail people for hanging their calls up. Mr. Ray told her not to say that. He explained, “I don’t hate the judge, DA and all the people lying, even though they playing and gambling with my life. Just dislike them.” 7/28/05 [CD-48, Track 3].

His comments were mitigation. In addition, his comments would have rebutted *P Ex 919* and the State’s tactics to scare the jurors and taint Mr. Ray’s right to a fair trial by impartial jury. Trial counsel’s failure to present evidence, including the excerpts from these calls, to place Mr. Ray’s “belief system that the criminal justice system was racist” into context denied Mr. Ray’s due process, Confrontation Clause, heightened reliability, First Amendment, and Eight Amendment rights.

Claim 400: Counsel was ineffective in failing to adequately investigate and present rebuttal evidence to the “belief system that the criminal justice system is racist” through Mr. Ray’s concerns about an all-white jury.

No rebuttal evidence of this kind was presented to the jury.

Mr. Ray incorporates the preceding two sections regarding Mr. Ray’s “belief system that the criminal justice system is racist” into this section.

Trial counsel were ineffective in failing to present expert testimony and multiple research studies about the racial biases inherent in the United States justice system. This would have educated the jury that, whether Mr. Ray actually believed the system was racist or not, there is substantial empirical evidence to support that belief and it is joined by millions of people in the United States.

Additionally, trial counsel never placed Mr. Ray’s “belief system” into context. Relevant evidence of Mr. Ray’s concerns regarding the racial composition of jurors with respect to his and his family’s cases were reflected in his jail calls. His concerns would have explained why he felt the system was racist. His concerns would have countered the rap lyric admitted against him that referenced “strangling the jurors” in *P Ex 919*.

In one call, Rose told Mr. Ray that evidence had been presented at Percy Sr.’s trial that there had been a wire on him but that she only sat for a few minutes through the trial and left. Mr. Ray asked whether the jury had black and white people. She told him that there was only one black woman. 8/26/06 [CD-80, Track 1]. Mr. Ray told Rose that he wanted Aunt Linda, who is Caucasian, and Uncle James there so that “they can see like white people in the audience,”

referring to the jury. Rose told him that she was going to try to get people from her work to come as well. 9/09/06 [CD-80, Track 13]. It's not surprising given Mr. Ray's lack of trust in the system that he would want an all-white jury to believe he had at least one white person in his family supporting him. In another call, Mr. Ray wanted assurances from Rose that Aunt Linda and Uncle James, who had substance abuse problems, did not look worn out and "looked like normal people." 9/13/06 [CD-80, Track 18].

Given Mr. Ray's and his family's personal experiences and observations, they had no faith that Mr. Ray would have jurors that were representative of his community or race. Mr. Ray's own jury selection process in his Lowry Park trial confirmed their fears. In a call, Rose asked him what the potential jurors looked like. Mr. Ray replied, "Ain't none of them black." Rose remarked, "I knew it." Later in the call, Rose asked how many jurors were there and if any of them were black. Mr. Ray told her that there were 86 people and only one black juror but the prosecution had gotten rid of him. Rose commented that his trial was supposed to be a jury of his peers. 10/17/06 [CD-80, Track 27]. In another call, Dumas asked Rose how Mr. Ray's trial was going. She told him that they had picked a jury and "ain't none of them black." Dumas made a whistling noise. 10/17/06 [CD-78, Track 5].

A month before his capital case, Mr. Ray brought up to Ciara that he was about to have to sit in front of 500 to 1000 white people for 44 days straight. Ciara commented that she did not want to say anything and mentioned that she thought "Meek," referring to Tamika Groves, had received a jury summons. Mr. Ray laughed and commented that Tamika was going to get kicked out quickly and the deputies would walk her to the door and say, "You can go home, ma'am." They both laughed. As referenced herein, Mr. Ray would often joke or make light of things as a response to tense situations. Mr. Ray joked that Tamika could come in and disguise herself as a straight Republican and chant "Death! Death!" He said:

Robert: I think they got to come in the 3rd or 4th. I was in the thinking about it and my heart started beating fast, and I was like, did I just get nervous for a second?

Ciara: yeah, all them white folks staring at you and they all saying "guilty"

Robert: They going learn every move of me. I'm going to be in there 10 weeks after September, and before that 44 days—we going be there together about 4 or 5 months. They are going learn everything about me. Like, "He seemed nervous today, he seemed happy today, he sure looked happy when that black girl walks in (referring to Ciara), he smile a lot. They going to learn me so I got to give them something to learn."

Ciara: You be positive.

Robert: yeah

Ciara: every day. You try.

Robert: I want you there as much as you can be there without taking off work. 8/02/08 [CD-138, Track 22].

This call was relevant to his concerns about not having any jurors of the same race. It also reflected Ciara's good counsel to him and his request for her support while acknowledging she should not miss work to come to court. This was mitigation and rebutted the State's theme that Mr. Ray "used and manipulated" everyone.

In another call, Mr. Ray told Ciara that his lawyers had told him about the reporting jurors' racial composition and that so far out of 406 reporting jurors, only eleven were black. He told her that **one of his defense team members told him she could not believe the racist things potential jurors were saying in the questionnaires. Ciara told him she was reading comments and that one person had commented that Mr. Ray needed to "share the needle."** Ciara remarked about how upset that made her. Mr. Ray tried to laugh it off and told her that it did not bother him and that he "honestly" laughed at it. 8/06/08 [CD-138, Track 38].

Undoubtedly, racist comments and potential jurors wanting him to "share the needle" did bother him, but he tried to put on a brave face for Ciara.

In another call, when Rose asked Mr. Ray whether he was going to be sitting through the jury process alone, Mr. Ray answered, "yep. Me and 1,000 white people." 8/07/08 [CD-140, Track 2].

In a call, Mr. Ray confided to Ciara that he was nervous about starting his trial the next day. She thanked him for sharing his fears. He told her, "You are the only person I tell that to. My momma ask me if I was nervous I said no. What it is, if I feel comfortable in my clothes, I'm gonna be good. If I feel uncomfortable in my clothes, I'm gonna be so uncomfortable in there. Even though I know they style and they probably thinking I look all right, I will be like I feel like fucked up if my clothes ain't right, I'm gonna really feel fucked up. They be looking at me like, "this is the guy! That's him! He's a murderer!" and all this shit. **780 people about to be staring at me. All white people.** I'm kinda nervous baby." He then changed the subject and started singing Chain of Fools. He then brought up his fear again, "**I ain't worried about sitting in front of all these white people tomorrow. You think I'm just trying to be tough and shit?**" Ciara comforted him, "Yeah. And that's OK, but—it makes it hard for me when I be feeling low, when you know, I feel like—when you don't show any emotion, and you do on a rarity, but it

makes me uncomfortable when I feel shitty because I feel like I'm overshadowing what it is or I'm weak or I'm not strong enough. I don't want you to be like, "I can't fuck with you cuz you're not strong enough to handle this shit." So I struggle with it. That's all...I feel like I'm the weakest link." Mr. Ray reassured her that she was not. 8/10/08 [CD-140, Track 15]. Mr. Ray's fears humanized him.

In another call, Mr. Ray and Ciara discussed jurors lying about things to get off the jury. He told her that if a juror was going to lie, he did not want that juror. He told her that he would rather have the juror be honest. He anticipated what he would hear, "Thing is, if you wanna lie about it, I don't want you. I rather you have you tell the truth or not. "Black people, all niggers, all black people is guilty, black race is way more violent than the other race." Fuck that. Get away. "I hate gangs, drug dealers." Get the fuck out of here. I can't wait until opening statements, I love opening statements. Love that shit." Mr. Ray also recalled his Lowry Park trial where an old man and an old woman slept half of the day of jury selection. 8/11/08 [CD-140, Track 19].

In the evening the first day of jury selection, Mr. Ray told Ciara that his lawyers had told him that the judge had committed error, "They keeping jurors—there was this black lady came on. She was talking about how she couldn't give the death penalty. She start crying and all that shit. They automatically get rid of people who lean more towards not giving the death penalty. But people who say they would 100% give the death penalty, they keeping "em. Clearly ain't right. And all the black mf'ers that was coming on, the judge question them, the judge, it was – judge yelling, raising voice, pointing fingers, my lawyers was going back at "em, it was crazy in there. Police was going to have to break them up before they did anything with me. Mr. Ray described his and his team's feelings about jury selection:

Robert: There was no pretty girls. There was one pretty girl and she was a Columbine victim. She was in the school when it got shot up. I'm like, fuck no.

Ciara: Was she black?

Robert: White. Out of total, there was 2 black people out of like 18 today. And two Mexicans. Mexicans and the black people is gone. The one black lady, I think she know Rhonda (Fields), I think she know the victim's momma. She just—my lawyers do not like her at all. I don't like her at all either. I marked big, "I do not like her." They say she immediate death penalty.

Ciara: that's what I'm saying. She's, she's-half the morning

Robert: It's like everything she was saying, it just seems like it was too perfect to fit right in as a qualified juror. Saying like, she can use mitigation factors, to determine life or death, but she more for killing a mfer.

Ciara: y'all get rid of her?

Robert: We couldn't. It was like she knew just what to say to not get, to not have cause to get rid of her. I was like, she going to be one of my fucking jurors—NOT. Over my dead body. We're getting her off. 8/11/08 [CD-139, Track 2].

In a call the next day Ciara told him she did not want to go to jury selection as she would be uncomfortable as she could not speak out for Mr. Ray. He told her to get over herself, which was his way of wanting support in his courtroom, as he believed only his all-white defense team would be present. Ciara was African-American. 8/12/08 [CD-139, Track 5]. Mr. Ray told Ciara that the State had removed all black jurors except for one lady that he believed knew Rhonda Fields, was automatic death penalty, and was actively trying to stay on the jury. He commented that they had voir dired 48 potential jurors and there had only been about 4 or 5 black jurors. 8/12/08 [CD-139, Track 7]. Rose asked Mr. Ray how jury selection was going. He commented they were able to keep a young dude but the dude had gotten "beat up over the head." He dejectedly remarked, "Same old, Same old. Racist white people." 8/14/08 [CD-141, Track 11].

Monica Owens had experienced the predominantly white racial pool from her son's trial and shared her observations with Mr. Ray. In a call, Mr. Ray discussed his jury pool with Monica Owens. Mr. Ray told her that they only had gotten 15 jurors qualified out of 60 or 70 people. He said all the potential jurors had heard about the case and a lot of them said they would not be able to give him a fair trial. He remarked that they had only gotten two black people qualified and he believed one of the black jurors, a woman, knew the victim's family as she was "straight for the death penalty, ready to kill off top." He told her that the black juror's father was killed by gangbangers not too long ago. Mrs. Owens was surprised that those two black jurors were being kept. Mr. Ray agreed and explained that if jurors said that they would give the death penalty easily, the State would keep them but if jurors said that it would be hard to give the death penalty, the State would get rid of them. Mr. Ray stated his jury pool had been predominantly white, "So many white people coming in. **Can't we get some black people? I feel so happy when I see a black person walk in. Only 4 or 5 black people came in so far out of 70 people....I be the only black people in there.**" 8/17/08 [CD-141, Track 33]. A couple of weeks later, Mr. Ray and Mrs. Owens discussed the fact that neither he nor Owens had any black jurors on the panels. Mr. Ray remarked that between everyone thinking he was guilty and people having to work at jobs, all he was getting as potential jurors were "old retired white people." Mrs. Owens told him that that was exactly what happened with Owens's trial. Mr. Ray

told her that out of 200 jurors, there were only 10 black jurors yet only one was qualified and he believed that a juror, a black woman, knew the victim's family as she was saying all the right things to stay on the jury and appeared "mean." **When Mr. Ray began to tell Mrs. Owens how worn out he was from court, Mrs. Owens told him that was how Owens had felt, especially given the idea of listening to someone all day say they could kill him. Mr. Ray replied, "I know every word judge says, DA says. For some black people in there, I be praying they'll say they'll kill me. Just say you'll kill me. I rather have black people. I feel so much better when black people walk in courtroom. You got judge, lawyers, my lawyers, DAs be 15-16 white people and I am the only black person. Just one black person walk in, man, I just feel better."** Mrs. Owens said that Owens only had one black juror and he was an alternate. Mr. Ray remarked that at first he did not think he would get the death penalty but now, with this jury, he did not know. *9/04/08 [CD-145, Track 10].*

In another call, Mr. Ray told Mrs. Owens that today was the best day he had had during jury selection as they were able to qualify seven jurors and one of them was an older black lady that reminded him of her. *9/05/08 [CD-145, Track 15].*

In a call, Mr. Ray told Ciara about potential juror who was an African-American woman connected to a funeral home for blacks. Mr. Ray commented that her son had been in the jail with him before. Given that hardly any black jurors had been in the pool, Mr. Ray told Ciara, "I was begging for her to just say she'd kill me. She would not say it. They got rid of her because she said she couldn't kill me" and "It's like I be begging for them (black jurors) to say it, you know what I mean? It's crazy, ain't it? Black people would not do it. All the white people be like, "shit, fuck yeah, in a heartbeat." *8/18/08 [CD-141, Track 37].*

In another call, Mr. Ray told Ciara that court had ended early as there were eight potential jurors back to back who had said they would not give Mr. Ray the death penalty. Mr. Ray's voice and tone was excited. He told her about one potential juror who was returning on Friday who was really good. The potential juror had told them about having been on a drug case jury trial and that "all the white people" had said the defendant "looked guilty." The juror had held out for two days but then caved in. Mr. Ray told her that the juror sympathized with Mr. Ray and this juror knew the situation because Mr. Ray was in the proceeding with all white people. Mr. Ray told Ciara that he had hoped this juror would just be quiet so he could stay on the jury. Mr. Ray remarked, **"I ain't asking for no jurors, no black people that lean towards me and feel**

sympathy for me. I just want somebody who is fair and see through this bullshit. Right now, I ain't got that. All these goddamn white people. Out of 100 and some jurors, only had about 6 black people so far.” 8/20/08 [CD-141, Track 43]. Interestingly, the State had notified Mr. Ray and the court of its intent to use this call. (See DA-94-RR (5) CD-141-3 [sic] = On August 20, 2008, Robert Ray tells Sierra [sic] about the on-going jury selection and refers to the jurors as “all these goddamn white people”). The State notably left out the rest of his comments that placed Mr. Ray’s remark about “all these goddamn white people” into context. Whether it was an attempt to prejudice Mr. Ray’s all-white defense team against Mr. Ray is unknown. Nonetheless, given Mr. Ray’s fears of having no jurors of his same race and listening to days and days of jurors expressing racism and/or their willingness to sentence him to death, Mr. Ray’s comments were an honest expression of his collective experiences that stemmed back to his Lowry Park trial, and even reached as far back as his childhood in Chicago.

In another call, Mr. Ray told Ciara that he thought he was going to have a mistrial because of the insufficient numbers of qualified jurors. He told her that he hoped not. With resignation, he remarked that he just wanted to get this over with. Mr. Ray commented that another African-American was qualified today but he was a pastor from Texas who was also retired Navy, had killed a lot of people, and when it came down to “civic duty,” he would put Mr. Ray to death. Mr. Ray remarked that the only two black jurors qualified to date were “mean as hell.” 9/04/08 [CD-145, Track 12]. Four days later, Mr. Ray told Rose that he was tired today and they did not get any jurors qualified. 9/08/08 [CD-145, Track 20].

Mr. Ray’s comments were based on his personal experiences with the jurors. The State admitted *P Ex 919* (Shyne rap lyrics) to bias the jurors against Mr. Ray. Trial counsel had a duty to zealously counter the aggravating evidence against him to enable his purported belief system to be placed into context.

Trial counsel’s failure to do so was unreasonable and their inactions prejudiced Mr. Ray.

Claim 401: Counsel was ineffective in failing to object to and rebut the State’s penalty phase evidence admitted through Det. Fronapfel.

Through Fronapfel, the prosecution admitted multiple copies and transcripts of jail phone calls which had been disclosed late to trial counsel 5/27/09 am, pp 60 *et seq.* This was improper impeachment, since the actual witnesses whom the prosecution was impeaching had not had the opportunity to be confronted with their statements. Additionally, Fronapfel summarized or