S161399

SUPREME COURT COPY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CARL EDWARD MOLANO, Defendant and Appellant.	Supreme Court No. S161399 Alameda County Superior Court No. H38118

DEATH PENALTY APPEAL

APPELLANT'S OPENING BRIEF

Automatic appeal from a judgment of the Superior Court of the State of California, in and for the County of Alameda, Hon. Allan Hymer, Judge Presiding

WESLEY A. VAN WINKLE
Attorney at Law
State Bar No. 129907
P.O. Box 5216
Berkeley, CA 94705-0216
(510) 848-6250

Attorney for appellant,
CARL EDWARD MOLANO
by appointment of the
California Supreme Court.

DEATH PENALTY

TOPICAL INDEX OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

S161399

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	S161399
Plaintiff and Respondent,	)	Alameda Co. Superior Court No. H38118
vs.	)	
CARL EDWARD MOLANO,	)	APPELLANT'S OPENING BRIEF
Defendant and Appellant.	)	

INTRODUCTION

In the late afternoon of June 16, 1995, the nearly-nude body of a 34-year-old woman named Suzanne McKenna was discovered on the bathroom floor of her studio apartment in Hayward, California. A brassiere, shoestring, and pair of panties were wrapped around her neck, but her body was otherwise naked. The cause of death was strangulation. There were minor contusions on the body, but no physical evidence of rape or other sexual assault was found. Shortly before the body was discovered, neighbors saw a man generally matching appellant's description inside and in the area immediately outside the apartment, but no identification or arrest was made.

The case lay dormant for several years. Then in May, 2001, appellant's ex-wife, Brenda Molano, and their 13-year-old son, Robert Molano, went to the Eden Township substation of the Alameda County Sheriff's Department and made statements implicating appellant in the McKenna killing. As a result of these statements, the Alameda County Sheriff's Department reopened the investigation into the McKenna homicide, focusing on appellant's potential involvement in the killing. By early 2003, DNA from a tennis shoe discovered at the scene had been found to be consistent with that of Brenda Molano.

On March 19, 2003, Detective Sergeant Scott Dudek and Detective Edward Chicoine obtained a search warrant for blood and tissue samples, dental records and impressions, and shoes from appellant, who was then nearing completion of prison term for a 1997 spousal abuse conviction at San Quentin State Prison. Two days later, on March 21, 2003, Chicoine and Dudek traveled to the prison intending to execute the search warrant and interrogate appellant. On the way, the officers decided to try to trick appellant into waiving his *Miranda* rights.

In a tape recorded interview in a prison conference room, the detectives told appellant their true names but lied about their occupations and the purpose of the interview. They told appellant that they were sex offense investigators there to conduct a routine pre-release interview about his prior sex-crime convictions in preparation for his upcoming parole, when they were actually homicide detectives planning to interrogate him as a suspect in the Suzanne McKenna homicide case and also to execute a search warrant for biological and physical evidence in that case. They advised appellant of his rights in accordance with *Miranda v. Arizona* (1966) 384 U.S. 436. Appellant, tricked into believing that the interview

only concerned his prior sex crime convictions, waived his rights and agreed to answer the officers' questions.

Appellant answered questions related to his prior sex crime convictions and other matters for more than an hour. When the officers began asking about McKenna, appellant admitted to using drugs and having sex with her and also made a number of other damaging admissions. However, when questioning turned to McKenna's death and his possible role in it, appellant invoked his right to counsel and the interrogation was terminated.

Ten days later, on March 31, 2003, Dudek and Chicoine returned to San Quentin to arrest appellant for Suzanne McKenna's murder. Detective Chicoine later claimed that appellant had told them when they arrived at the prison that he was now willing to speak with them, but no recording of the statement was made, no mention of such a statement appeared in Chicoine's own written report, and the claim was also contradicted by the contents of a surreptitious recording the officers made of the conversation in the car on the way back to Eden Township station. In fact, the tape recording of that conversation actually shows that appellant once again invoked his right to counsel, though the transcript prepared by the district attorney's office shows this second invocation statement as "unintelligible." The tape also shows that after the second invocation the officers persisted in a process of "softening up" appellant, continuing to interrogate him with "Reid Method" psychological techniques to persuade appellant to talk.

Finally, in spite of two clear invocations of his right to counsel, appellant was taken into an interrogation room and given Miranda warnings. This time, appellant waived them and, in statements memorialized on audiotape and videotape, made more damaging

admissions, admitting to the killing of Suzanne McKenna but claiming the killing was accidental, a result of erotic asphyxiation which appellant said Ms. McKenna had requested during consensual sex.

Appellant was charged with the murder of Ms. McKenna and, while the crime of rape was not charged, a rape special circumstance was alleged. At trial, over defense objections, the court admitted appellant's recorded statements at the prison and at Eden Township station. The court also admitted evidence of appellant's two prior rape convictions to show a propensity to commit rape under Evidence Code section 1108, and also admitted irrelevant evidence of appellant's prior spousal abuse conviction, which neither involved sex nor a killing. At the conclusion of the guilt phase, the jury was instructed that it could infer a number of facts, including intent to kill, from all of these prior incidents, even though none of them had involved a killing.

The jury was also incorrectly instructed that it could only use evidence of prior consensual intercourse between appellant and Ms. McKenna to determine whether appellant reasonably believed Ms. McKenna had consented, when even an unreasonable belief in consent would have negated the specific intent required for rape felony murder and the rape special circumstance. The jury found appellant guilty of murder and also found the rape special circumstance to be true.

In the penalty phase, the defense moved in limine to prevent the prosecution from presenting evidence of the death of Ms. McKenna's sister, Patti Dutoit, which had occurred seven months after Ms. McKenna's death. Although Ms. Dutoit was an alcoholic with psychological problems who died of salicylate poisoning, and although the coroner did not rule the death a suicide, interview reports showed that family members believed she had

committed suicide because of her sister's death. The court permitted the prosecution to present evidence that Ms. Dutoit had died, but ordered the prosecutor to admonish the witnesses not to say that Ms. Dutoit had committed suicide or that her death was connected to Ms. McKenna's death because there was no evidence to substantiate such claims. The day after the ruling, the prosecutor presented Ms. McKenna's brother, who stated that Dutoit had committed suicide when she learned of the McKenna killing and that appellant was responsible for two deaths. The trial court denied the defense motion for a mistrial.

These errors, individually and cumulatively, deprived appellant of due process and a fair trial, as well as a reliable guilt and penalty trial, and the entire judgment in this case must be reversed. Appellant's recorded statements and his prior convictions were improperly admitted against him, and that evidence was the principal basis of his conviction and sentence of death. To make matters worse, the jury instructions permitted this evidence to be used for purposes that were constitutionally and logically improper. Finally, the testimony of McKenna's brother to the effect that appellant was responsible for not one but two deaths was a bell that could not be unrung. Even if the guilt phase errors were ignored, that error alone would compel reversal of the penalty judgment.

For the reasons set forth herein, appellant is entitled to a new trial.

STATEMENT OF THE CASE

An information filed on February 18, 2005, charged appellant CARL EDWARD MOLANO with one count of murder in violation of Penal Code section 187, subdivision (a), and further alleged that the offense was a serious felony within the meaning of Penal Code section 1192.7,

subdivision (c), and a violent felony within the meaning of Penal Code section 667.5, subdivision (c). (4CT 931.) The information further alleged as a felony-murder special circumstance that the murder was committed while appellant was engaged in the commission of the crime of rape. (Penal Code §190.2, subd. (a)(17)(C).) (4CT 932.)

The information also alleged that appellant had suffered three prior convictions: one conviction for inflicting corporal injury to a spouse or cohabitant with great bodily injury in violation of Penal Code section 273.5, subdivision (a); and two convictions for forcible rape in violation of Penal Code section 261, subdivision (2). (4CT 932-934.) In addition, it was alleged that each of these alleged prior convictions fell within the purview of Penal Code section 667.5, in that appellant had been sentenced to prison for the offense and did not remain free of prison custody for, and committed another offense within, five years following the conclusion of his prison term. (4CT 932-934.) It was also alleged that each prior conviction constituted a third strike offense within the meaning of Penal Code section 1170.12, subdivision (c)(2)(A), and section 667, subdivision (e)(2)(A), and a serious felony within the meaning of Penal Code section 667, subdivision (a)(1). (4CT 932-935.)

Four days later, on February 22, 2005, the district attorney's office formally notified the Superior Court of its intention to seek the death penalty. (4CT 936, 939.)

On April 5, 2005, appellant waived formal arraignment, pleaded not guilty to count one, and denied the prior conviction allegations. (4CT 941, 943-947.)

On June 16, 2005, appellant moved to set aside the information pursuant to Penal Code section 995 on the grounds that the magistrate

erroneously admitted testimony of his statements to investigating officers in violation of *Miranda v. Arizona*. (4CT 950-971.) Respondent filed an opposition on June 24, 2005, and a hearing on the motion took place on August 5, 2005. (4CT 972-988, 1001-1024.) After hearing argument from both parties, the court denied the motion. (4CT 1024.)

Jury selection commenced on June 26, 2007 and continued over 11 days, culminating on July 23, 2007. (7CT 1534, 1536, 1538, 1539, 1541, 1543, 1545, 1547, 1549, 1551, 1567.) Twelve jurors and five alternates were sworn on July 23, 2007, and opening statements began that day. (7CT 1567.)

The jury retired to consider its guilt-phase verdict on August 16, 2007. (7CT 1623.) On August 20, 2007, the jury returned a verdict finding appellant guilty of murder in the first degree and also found true the special circumstance allegation that the murder had been committed in the course of a rape, within the meaning of Penal Code section 190.2(a)(17)(C). (7CT 1627.)

Presentation of evidence at the penalty phase commenced on September 25, 2007. (7CT 1735.) Closing arguments occurred and jury instructions were given on October 4, 2007, whereupon the jury retired to being penalty deliberations. (8CT 1749.) On October 15, 2007, the jury returned a verdict fixing the penalty at death. (8CT 1757-1758.)

On February 21, 2008, the appellant filed a motion for a new trial. (8CT 1867-1892.) The people filed an opposition on February 26, 2008. (9CT 1893.) On February 29, 2008, the court denied appellant's motion for a new trial. (9CT 2078-2079.) At this time, the court also denied the automatic motion for modification of the death penalty pursuant to Penal Code section 190.4. (9CT 2079.)

Judgment and sentencing proceedings were also held on February 29, 2008. (9CT 2078-2081.) Pursuant to Penal Code section 190.3, the court imposed a sentence of death. (*Ibid.*) The court ordered appellant to pay a $10,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (b), and a $20 court security fee pursuant to Penal Code section 1465.8 (9CT 2080.) Appellant was awarded custody credits of 1,797 days. (*Id.*)

STATEMENT OF APPEALABILITY

This is an appeal from a judgment of death and is automatically appealable to the California Supreme Court pursuant to Penal Code section 1239, subdivision (b).

STATEMENT OF FACTS

I. THE GUILT PHASE

A. THE DEATH OF SUZANNE MCKENNA

In June 1995, 34-year-old Suzanne McKenna lived alone in a complex of small cottages on Vallejo Street in an unincorporated part of Hayward, California. (15RT 2154; 25RT 3318.) McKenna was a single woman, a waitress at Carrow's restaurant, and an alcohol and methamphetamine user. (12RT 1675, 1712-1714; 15RT 2129-2130, 2145-2146, 2170.)

Judy Luque had been Ms. McKenna's best friend since they attended Mount Eden High School together in the late 1970s. (12RT 1673.) On June 13, 1995, McKenna and Luque took a day trip to Lake Hogan with Luque's husband, Jeff. (12RT 1728.) At the lake, the two women drank wine or wine coolers, and McKenna snorted methamphetamine off a mirror.

(12RT 1728, 1767.) That was the last time Luque saw McKenna alive. (12RT 1676-1677.)

On the morning of June 15, McKenna's former neighbor, Paulette Johnson, who had recently moved out of the cottage next door, stopped by McKenna's cottage, and the women spoke on McKenna's porch for about half an hour before McKenna had to get ready for work. (15RT 2165-2166.) During that conversation, McKenna told Johnson that she had been bingeing on methamphetamine, but otherwise nothing seemed out of the ordinary. (15RT 2166, 2197-2081.) Before Johnson left the property, she saw McKenna leave for her waitressing job. (15RT 2167.)

1. June 16, 1995

At approximately 11:30 on the morning of June 16, Alameda County waste collector Robert Ocon found an empty purse, a plastic shopping bag containing a glass bottle, and an old cigar box inside a curbside bin of yard clippings near an apartment complex on Vallejo Street. (15RT 2091-2092, 2095, 2097, 2100.) Before emptying the bin, Ocon placed the other items inside the purse and left the purse on top of the compost bin. (15RT 2101.) Later that day, ten-year-old Ashton Sheets was playing hide-and-seek with other neighborhood children when they found the purse, some photographs, and a glass bottle containing amber liquid near the bins. (12RT 1661-1663.)

Early in the afternoon, Victor Perry was driving north on Western Boulevard in Hayward when he noticed items scattered on the right side of the road near a white van. (11RT 1627-1629, 1640, 1646.) Mr. Perry pulled over and retrieved several objects, including a woman's wallet and coin purse. (11RT 1629, 1632-1633, 1642-1643.) A medical card in the wallet belonged to McKenna. (11RT 1629.) Perry drove to a friend's house and

used the telephone to call a phone number he found in the wallet. (11RT 1631.) A woman answered his call, and he reported that he had found the items and left his pager number. (11RT 1631, 1634-1635.)

At 3:00 p.m., Jeff Luque was home alone when he received a call from McKenna's sister, Patti Dutoit. Patti was worried because someone had reported that McKenna's wallet had been found on Western Boulevard, and Patti couldn't get in touch with McKenna. (12RT 1741, 1758.) When Judy Luque got home from work about fifteen minutes later, Jeff told her about the call he had received from Dutoit. Judy Luque called McKenna's number and left a message on the answering machine. (12RT 1681-1682, 1742.) After Judy called McKenna's number twice more and got the answering machine, she and her husband drove to McKenna's cottage. (12RT 1683, 1742, 1760.)

The Luques arrived at McKenna's cottage at around 3:40 p.m. and parked behind McKenna's car, which was sitting in the driveway in front of the cottage. (12RT 1684-1685, 1691.) Judy[1] got out of the car, went to the front door, and knocked. (12RT 1686.) When there was no response at the front door, Judy walked around to the right side of the house. (12RT 1686-1687.)

McKenna's cottage was a studio apartment consisting of a living area, a kitchen, and a bathroom. (12RT 1719; 15RT 2151.) As she walked around the side of the cottage, Judy noticed that the bathroom window, which was usually open, was closed. (12RT 1687, 1724-1725.) The kitchen

---

[1]/ Because the Luques have the same last name, appellant will sometimes refer to Jeff and Judy Luque by their first names for the sake of clarity. For the same reason, appellant will also sometimes refer to appellant's wife and sons by their first names. No disrespect is intended.

door was near the bathroom window, but the blinds on the kitchen door were closed, so she could not see into the kitchen. (12RT 1688.)

Judy returned to the front of the house without knocking on the side door. (12RT 1688.) Again, Judy knocked on the front door. (12RT 1689.) She noticed that the Venetian blinds on a window at the front of the house were slightly open. (*Id.*) Through the blinds, she saw an unfamiliar man in the kitchen. (RT 1689-1690.) The man was a heavyset Mexican with brown hair wearing a blue Pendleton shirt. (12RT 1691.)

Judy turned to yell for Jeff and then turned back to the window and saw that the man had left the cottage through the side door. (12RT 1692-1693.) Judy was excited, swearing, and yelling loudly. (12RT 1746.) Her yelling startled Jeff, who ran around the side of the house and found the screen door swinging on its hinges. (12RT 1737, 1747.) Jeff saw a dark skinned man wearing a blue or grey Pendleton shirt walking away from him. He estimated that the man was approximately 5'8 tall and weighed about 150 pounds. (12RT 1748-1749.) The man appeared to be holding something in his hands. (12RT 1749.)

Jeff yelled for the man to stop, and when the man started running, Jeff ran after him. (12RT 1749, 1764.) Jeff followed the man to the end of the property and then lost sight of him. (12RT 1750.) Jeff then headed north and came upon a neighbor pruning in his yard. (12RT 1750-1751.) Jeff had stopped to explain the situation to the neighbor when a little girl came out of a house and said that she had seen a man run across the driveway. (12RT 1753.) Jeff and the neighbor went in the direction the girl indicated but did not see the man in the Pendleton shirt again. (12RT 1753.) However, Jeff found a pair of socks with individual toes draped over some bushes. (RT 1754.) Judy would later identify those socks as

having belonged to her friend, Suzanne McKenna. (12RT 1706.)

While Jeff was pursuing the man in the Pendleton shirt, Judy had returned to the side of McKenna's cottage and looked inside through the open kitchen door. (12RT 1696-1697.) She saw that garbage was strewn over the kitchen floor. (12RT 1696.) She stepped inside the kitchen, noticed a foul smell, and looked into the living area, which appeared to have been ransacked. (12RT 1967-1698.) Without entering the living area, Judy called out for Suzanne. (12RT 1699.) There was no response. (*Id.*) Judy went back outside, where she found Jeff was talking to a neighbor. (*Id.*) Another neighbor called 911, and Judy gave the dispatcher a description of the man she had seen. (12RT 1700.) While Judy waited outside for law enforcement to arrive, a little boy told her that he had found a purse in a dumpster down the street. (12RT 1701, 1703.) Judy asked the boy to get the purse, and when he returned with a black purse containing a black address book, Judy recognized the items as belonging to Suzanne. (12RT 1702-1703.)

Shortly thereafter, Alameda County Sheriff's Deputies Nelson and Powell arrived and began to search for the man the Luques had seen. (12RT 1704, 1776-1777.) When they failed to locate him, they began a search of McKenna's cottage. (12RT 1777-1778.) They first tried to enter though the front door but found it locked. (12RT 1780.) They found the side door open, though the screen door was closed but not latched or locked. (12RT 1780; 13RT 1857.) Inside, Deputy Nelson saw that the kitchen appeared to have been ransacked. (12RT 1780.) Continuing into the cottage, the deputies found the body of Suzanne McKenna lying on the bathroom floor. (12RT 1783.) Pieces of red and white cloth were wrapped around her neck and her face was purple. (12RT 1784.) Rigor mortis had

already set in. (12RT 1783.)

About half an hour after Nelson and Powell arrived on the scene, Sergeant Casey Nice arrived with his partner, Charles Greene. Nice took over as the lead investigator while Greene began to canvass the neighborhood. (12RT 1788; 16RT 17RT 2306, 2421-2422.) Nice assigned Powell to be the field evidence technician. (12RT 1781.)

Among the items taken into evidence at the scene were two black Reebok tennis shoes (size 10 ½), papers, photographs, McKenna's driver's license, the socks that Jeff Luque had found on the bushes, and McKenna's purse. (17RT 1789-1792, 1796-1797,1798-1799.) Patti Dutoit gave Greene the pager number Victor Perry had left with her, and Greene contacted Perry, who turned over the wallet and took Greene to the Western Boulevard location where he had found it. (17RT 2424-2427.)

Inside the cottage, a trail of fecal matter led from the living room into the bathroom. (12RT 1804.) A shoeprint with part of the word "Reebok" was found in the feces in the bathroom. (13RT 1866-1867.) Two containers of personal lubricant, a tin containing condoms, and an empty condom wrapper were recovered from the living area. (12RT 1805-1806; 13RT 1842-1850.) There was no sign of forced entry on any of the windows or doors. (13RT 1833-1837.) No latent fingerprints were found in the cottage. (13RT 1870.) No prints were recovered from the empty condom wrapper or either container of lubricant. (13RT 1876-1877.) A partial print was found on the doorjamb of the bathroom. (13RT 1874.) That print was treated with a fluorescent powder and photographed. (13RT 1874.) A partial print was recovered from an Early Times whiskey bottle. (13RT 1892-1893.) The following week, a crime scene technician returned to the apartment to dust the bathroom for latent fingerprints, and he found

two partial sets of prints on the bathtub. (16RT 2340-2341.) At around 11:00 p.m., Sergeant Greene called the coroner's office, and a coroner's deputy came for McKenna's body. (13RT 1831; 17RT 2430.)

2. The Autopsy

The following day, Dr. Clifford Tschetter performed an autopsy on McKenna's body. (13RT 1896.) Dr. Tschetter found that a bra, a pair of panties, and a length of leather material were wrapped around McKenna's neck. (13RT 1901-1902.) The bra was loose against McKenna's neck, and the panties were not knotted, but appeared to have been cinched to apply pressure. (13RT 1901-1902.) An abrasion and contusion around the neck corresponded with the width of the panties, and the color of the contusion suggested that pressure had been applied to the front of the neck. (13RT 1904.) Internal examination of the neck revealed areas of hemorrhage on the left wing of the hyoid bone, to the lower right of the hyoid bone, and to the right side of the thyroid cartilage. (13RT 1912.) Petechial hemorrhages in the eyes indicated that pressure had been applied to the jugular vein for three to four minutes until McKenna first became unconscious and then died. (13RT 1914, 1916.)

Beneath McKenna's right nipple, Dr. Tschetter found a series of red abrasions measuring two inches by one inch. Tschetter testified could have been caused by a blow or a bite. (13RT 1907.) Tschetter also noted contusions and abrasions on the forehead, on the right side of the mouth, on the left cheek near the chin, and a half inch purple contusion below the right shoulder, and a two centimeter by one centimeter abrasion on the right knee. (13RT 1905-1906, 1937; 15RT 2053.) Tschetter concluded that these abrasions were consistent with a blow or blows. (13RT 1907.) There were abrasions and fecal matter on the buttocks. (13RT 1908-1909.)

A toxicology screen indicated a blood alcohol level of .15% and 40mg/L of methamphetamine in her system. (13RT 1919, 1923.) Dr. Tschetter opined that while the injuries to McKenna's neck were fatal, neither the other injuries nor the drugs and alcohol in her system were sufficient to have rendered her unconscious or unable to resist. (14RT 1929.)

Dr. Tschetter took swabs from McKenna's vagina, anus and mouth for later testing. (13RT 1911.) He also removed and examined the vagina and the anus and found no evidence of trauma. (13RT 1910, 1917.) At trial, over defense objection, a physician's assistant offered her expert opinion that a lack of genital trauma does not necessarily mean that no rape was committed. (17RT 2508-2509.)

3. On-going Investigation

During the last week in June, Josef Kapper, the owner of the apartment building located at 21634 Vallejo Street, found a cigar box behind the mailboxes at that address. (12RT 1650, 1654.) Inside the box, Mr. Kapper found several items, including an employee identification card. (12RT 1655.) Believing that there was a connection between the cigar box and the murder that had occurred in the neighborhood approximately two weeks earlier, Mr. Kapper contacted the Sheriff's Department. (12RT 1654.) Ryan Silcocks, then a civil technician for the Sheriff, took possession of the box and its contents, which included McKenna's social security card, and turned them over to Sergeant Nice. (12RT 1956.)

Sergeant Nice conducted follow up interviews with the Luques and obtained hair, blood and print samples from them. (16RT 2312.) Based on the information provided by the Luques and McKenna's neighbors, Nice developed a list of possible suspects including Roland Lemmons, Richard

Castro, Michael Griffiths, and Bill Lewis. (16RT 2312-2314.) Nice collected blood, hair and print samples from those four men. (16RT 2312-2314.)

On June 22, various employees of the Sheriff's Department crime lab met with Sergeant Nice to discuss the evidence and investigative priorities. (17RT 2444-2445.) Criminalist Sharon Smith began examination and analysis the next day. (17RT 2443, 2447.) In 1995, the crime lab did not have the ability to make hair or fecal comparisons or to do DNA testing. (17RT 2446, 2449.) Smith conducted typing analysis on McKenna's blood and on the reference samples taken from William Lewis, Richard Castro, and Michael Griffiths, and she dried and froze a swatch patch of McKenna's blood. (17RT 2448, 2465.) Hair samples, including samples taken from McKenna's leg and a hairbrush found in her cottage and a hair found around McKenna's left middle finger, and fingernail clippings were not examined or analyzed. (17RT 2449-2451.) Smith examined the white underpants, and noted that they were not torn. (17RT 2451-2452.) She also collected some hairs from the underpants and tested them for the presence of blood and semen. (17RT 2452.) The underpants tested negative for semen and inconclusively for blood. (17RT 2452.) Smith examined the red bra, collected hairs and fibers found on it, and observed blood and apparent fecal stains. (17RT 2454.) Smith observed no semen on the bra. (17RT 2454-2455.) Smith examined the leather strap, and noted that it had hairs wound tightly around it. (17RT 2456.) Three of the hairs had root ends. (17RT 2457.) Smith tested a swab taken from the toilet seat at McKenna's cottage. The swab was positive for human blood, and using genetic marker typing, Smith compared the swab with the reference samples and concluded that both McKenna and Michael Griffith were potential donors. (17RT

2458.) Both shoes found near the scene tested negative for the presence of human blood. (17RT 2460-2461.) Smith also found sperm present in both the vaginal swab and slide, though only a very small amount was present. (17RT 2462-2463.) No semen was found on the oral or rectal swabs or slides. (17RT 2465, 2478-2479.)

In December, 1995, Ms. Smith prepared reference blood samples which were released to the FBI in early January. (13RT 1971; 17RT 2467.) When it could not be determined that any of these samples were present at the crime scene, the case went cold. (14RT 2023.)

B. NEW DEVELOPMENTS IN MAY, 2001

On May 17, 2001, Brenda Molano, appellant's wife, took her 13-year-old son, Robert Molano, to the Eden Township Substation of the Alameda County Sheriff's Department, where Robert made a statement to Sergeant Dudek and Detective Godweski. (16RT 2191, 2192, 2222, 2345). A few days later, Brenda returned and made a statement of her own. (16RT 2223.)

1. Statements of Appellant's Ex-Wife and Son

Robert Molano is the youngest son of appellant and Brenda Molano. (16RT 2191.) Robert's parents had met in high school in the 1970s, had two sons in the 1980s, and then married. (16RT 2191, 2225-2227.) In June 1995, the Molanos were living in a two-bedroom apartment in a complex adjacent to the development where Suzanne McKenna's cottage was located. (16RT 2192, 2160.)

As Brenda Molano got ready for work around 7:00 a.m. on June 16, appellant came into the apartment, nervous and shoeless. (16RT 2197-2198, 2230-2231.) Appellant told his wife that he had been at the "over the fence," which she understood to mean the complex of cottages nearby.

(16RT 2198-2200.) Because she had seen him socializing with them, Brenda knew that her husband was familiar with the women who lived in the cottage to the left of McKenna's, but she had never seen him with McKenna. (16RT 2202-2203.) Appellant told Brenda that he had been in one of the cottages partying with a man and a woman, when they got into an argument and the man killed the woman. (16RT 2203.) Appellant seemed upset and afraid. (16RT 2205.) A few minutes later, appellant left the house wearing tennis shoes, jeans, and a flannel jacket. (16RT 2207, 2209, 2235.) Brenda was upset by what her husband had told her and called in sick to work that day. (16RT 2206, 2236)

In the early afternoon, Robert was playing outside with friends when he saw his father jogging from the area of the neighboring cottages toward the back of the Molano's apartment complex. (16RT 2254-2256.) Like his mother, Robert knew that his father had friends who lived in the cottages and that he spent time socializing there. (16RT 2257-2260, 2278-2280.)

Approximately 20 minutes later, Robert and his friends became aware of the commotion associated with the crime scene and went to see what was happening. (16RT 2253, 2256.) After a while, they grew bored of watching and Robert went to a small storage unit behind his apartment to get his bike. (16RT 2267, 2261-2262.) As he opened the door of the unit, Robert was surprised to see his father, sweating and holding a white handled barbeque fork. (16RT 2264-2265.) Appellant threatened to kill his son if he told anyone he'd found his father in the storage unit. (16RT 2267-2268.) Robert left the storage unit and returned to his friends. (16RT 2269-2270.)

Around 4:00 that afternoon, Brenda was at home when a sheriff's deputy came to the door and told her that a suspect had been seen in a

neighboring apartment where someone had been killed. (16RT 2194, 2228, 2236.) Appellant returned home about three hours after the deputy left. When Brenda questioned him, appellant told her that he had returned to the cottage to wipe away his prints and had been seen when the dead woman's brother came looking for her. (16RT 2210, 2227.) Appellant then changed his clothes and cut his hair and his mustache, and Brenda and appellant then drove to the San Leandro Marina where he sank his jacket in the marina. 16(RT 2211-2213.) At the time, Brenda did not suspect that appellant was responsible for the death of their neighbor. (16RT 2214.)

2. Further Investigation

By May 2001, Kevin Hart, who had been the patrol supervisor on duty during the initial crime scene investigation, had become a sheriff's investigator. On May 17, he reviewed the reports generated after the interview of Robert Molano. (RT 162345.) Based on the content of those interviews, Hart sent items related to the McKenna investigation to Forensic Analytical Services, an independent criminalistics laboratory in Hayward, for examination. (16RT 2346, 2374-2375.) On May 17, the two Reebok tennis shoes found in McKenna's neighborhood were sent to Forensic Analytical. (15RT 2105; 17RT 2377-2378.) On May 18, Hart had the white bra, red panties, leather strap with hairs found on McKenna's body and the oral, rectal, and vaginal swabs taken during the autopsy sent out for testing. (15RT 2110-2113; 17RT 2378-2379.)

Hart also compiled a "six-pack" photographic lineup, which included a photograph of appellant. On May 18, Judy Luque viewed the photo lineup at Eden Township Substation and identified the photograph of appellant as the person she saw in McKenna's cottage in June 1996. (12RT 1707-17008; 16RT 2348-2354.) Hart then re-interviewed Brenda and

Robert Molano. (16RT 2354.) On July 3, 2001, Hart sent the cigar box, plastic picture wallet, and change purse that were found in McKenna's neighborhood to Forensic Analytical. (15RT 2113-2117.)

On September 19, 2002, Sheriff's Detective Edward Chicoine was assigned to conduct further investigation into the McKenna case. (14RT 1966-1967.) At that point, appellant was the primary suspect. (14RT 1968.)

When re-interviewed, Paulette Johnson's ex-girlfriend and former roommate, Carla Fleming, said she had seen appellant in the neighborhood several times and had once shared a beer with him while barbecuing outside her cottage. (15RT 2133, 2134-2136.) Johnson also knew appellant, frequently saw him in the neighborhood, and had visited him in his apartment on occasion. (15RT 2159-2160.) Once, McKenna told Johnson that Carl had hit on her. (15RT 2164.) Neither Carl nor McKenna ever mentioned the other to Johnson again. (15RT 2165.)

On November 13, 2002, Detective Chicoine submitted a DNA collection kit taken from Brenda Molano. (17RT 2381.) Forensic Analytical's DNA analyst, Lisa Calandro, compared human DNA extracted from the right Reebok tennis shoe with the reference sample collected from Brenda Molano and concluded that the likelihood that the contributor was someone other than Brenda Molano was "astronomically remote." (20RT 2932-2937; People's Exhibit 60-61.)

Calandro also analyzed the leather cord that was found around McKenna's neck and concluded that there was evidence of two contributors of DNA , one of whom was McKenna. (20RT 2943-2945.) Calandro analyzed the vaginal slide and swab collected during the autopsy, found very low numbers of sperm, and could not establish a DNA profile from the

sperm. (20RT 2950-2952, 2961.) Calandro was unable to opine when the sperm had been deposited, and she was unable to confirm whether any sperm was present in the red underpants found around McKenna's neck. (20RT 2951-2954.) No semen was detected on the rectal swab. (20RT 2956.) Though McKenna's fingerprints were found on various items recovered from McKenna's cottage, no latent prints belonging to appellant were found. (20RT 2969-2970.)

On March 21, 2003, Detective Chicoine went to San Quentin State Prison, where appellant was incarcerated for another offense, to serve a search warrant that authorized him to collect a buccal swab, blood samples, and other items from appellant. (14RT 1980.) The same day, the reference samples were delivered to Forensic Analytical. (14RT 2000.) After comparing the reference sample collected from appellant, Lisa Calandro testified that she could not exclude appellant as a contributor of the DNA found on the leather. (20RT 2948; People's Exhibit 62.)

3. Appellant's Statements

At trial, witnesses testified to the contents of two statements made by appellant. The first statement was made on March 21, 2003, at San Quentin State Prison, and the second was made on March 31, 2003, at Eden Township Substation. An audiotape of the March 21 and a videotape of the March 31 interview were played before the jury. (14RT 2005, 2016.)

a. March 21, 2003

On the morning of March 21, 2003, Dudek and Chicoine arrived at San Quentin State Prison dressed in sports jackets and ties. (14RT 1986.) They checked their weapons before entering the prison and were escorted to an interview room, which contained a long table and several chairs. (14RT 1986.) Appellant was then escorted into the room in restraints, which were

then removed for the interview. (14RT 1987.) Dudek and Chicoine did not tell appellant that they were there to investigation McKenna's death; instead, they told him that they were sex crimes investigators who were there to talk to him about his past crimes. (14RT 1988-1989.) Chicoine read appellant his Miranda rights. (14RT 1988.) Appellant willingly discussed his past, including the family life and his substance abuse problems (14RT 2029-2030), and his criminal history, including the three incidents discussed below (14RT 1990). However, when asked about Suzanne McKenna, appellant became nervous, and after some hesitation, he told the investigators that he had had sex with McKenna one day before her death. (14RT 1991-1996.) Appellant also told the officers that his former wife, Brenda, believed that he was responsible for McKenna's death (14RT 1994), and when the officers questioned him further, appellant insisted that he need to use the restroom immediately, and when he returned from the restroom, he ended the interview with the officers. (14RT 1997-1998.)

b. March 31, 2003

Ten days later, on March 31, 2003, Dudek and Chicoine again traveled to San Quentin Prison, this time with a warrant for appellant's arrest. (14RT 2007-2008.) They transported appellant to Eden Township Substation where they interviewed him in an interviewed room equipped with a covert camera and microphone system. (14RT 2009-2010.) A real-time monitor in another room allowed viewers to watch the interview with appellant as it was being conducted. (14RT 2011.) During the course of the interview, appellant told the officers that he and McKenna had gotten high, he on cocaine and alcohol and she on methamphetamine and alcohol, and had had consensual sex which had gotten out of hand and led to her accidental death. (14RT 2033-2034.) During the interview Dudek

contacted the District Attorney's office, and less than an hour later, Deputy District Attorney Andy Sweet and District Attorney's Investigator Lynne Breshears arrived at the Eden Township Substation. (14RT 2012-2013,; 15RT 2073.) They watched a portion of the interview being conducted by Dudek and Chicoine, then the officers left the interview room and Sweet and Breshears conducted their own interview of appellant, who told them that he and McKenna had consensual sex which led to her accidental death. (15RT 2075-2077; People's Exhibit 40.)

C. EVIDENCE OF PRIOR ACTS

During the guilt phase of appellant's trial, in addition to the facts stated above, the prosecution called twelve witnesses to testify to two rapes and a nonsexual act of violence committed by appellant.

1. March 30, 1982

On March 30, 1982, Anne Hoon was alone at the home she shared with her husband on a Navy base in Long Beach when appellant, an acquaintance of her husband's, came to her front door. (19RT 2861, 2865.) She invited him inside, and they talked for about 15 minutes before he left. (19RT 2867-2868.) During the conversation, she mentioned a cat she had when she lived at home with her parents. (19RT2867-2868.) Later that evening, at about 9:00 p.m., appellant returned to Hoon's home with a small striped kitten. (19RT 2868-2869.) She invited him inside again. (19RT 2869.) They sat in the living room, talking and looking at a photo album. (19RT 2869-2871.) After talking for a while, appellant put his arm around Hoon, which made her uncomfortable, and she asked him to leave. (19RT 2871.) Hoon went to the back of the apartment to get the cat, and appellant followed, raped, and choked her. (19RT 2872-2886.) After he left, Hoon called her niece for help and was later interviewed by members of the Long

Beach Police Department and examined at a hospital. (19RT 2888-2891.) The next day, appellant was arrested and gave a statement to Long Beach Police Department office George Fox. (19RT 2898-2899, 2901.) Fox testified that appellant said he and Hoon had had consensual sex (19RT 2902-2909), but he also admitted that he could not remember if he had used force against her. (19RT 2911-2912.) Two weeks later, appellant pleaded guilty to forcible rape. (20RT 2970; People's Exhibit 65.)

2. November 5, 1987

Mabel Lovejoy met appellant when he was a child living in Oakland. (18RT 2542-2543.) In the early morning hours of November 5, 1987, appellant knocked on Lovejoy's door. (18RT 2544, 2518.) Wearing her nightclothes, she answered and when he asked to use her bathroom, she let him into her home. (18RT 2544.) When appellant came out of the bathroom, he knocked Lovejoy to the floor and raped her. 18(RT 2546.) She did not struggle. (18RT 2547.) After completing the rape, appellant stabbed her in the back and attempted to choke her. (18RT 2549-2552.) Lovejoy protected her neck and fought appellant off, and appellant ran. (18RT 2551-2555.)

Lovejoy dialed 911 from her bedroom. (18RT 2555-2556.) She was taken to the emergency room at Highland Hospital. (18RT 2561; People's Exhibit 55.) The following day, an officer interviewed Lovejoy, who identified appellant by name and photograph. (RT 3026-3028.) Four days later, appellant was arrested (RT 3030-3031), and three weeks later he pleaded guilty to forcible rape. (RT 2971.)

At appellant's trial, a recording of the 911 call that Lovejoy made was played at trial (18RT 2558-2560; People's Exhibit 53), and a responding officer, a crime scene technician, and the treating emergency

room physician testified to the contents of their reports of that night. (18RT 2516-2529 2569-2579, 2530-2540.)

3. July 7, 1996

Brenda, Robert, and Christopher Molano, another of appellant's sons, testified about an incident that took place between Brenda and appellant about a year after the McKenna homicide. On June 7, 1996, appellant was home with wife and sons in their Vallejo Street apartment. (16RT 2215.) Appellant and Brenda were in their bedroom, on the bed, with the door between their bedroom and the living room closed. (16RT 2237.) The boys were playing videogames in the living room. (16RT 2294-2295, 2271.) Appellant had a history of alcohol and drug abuse, and had been a crack cocaine user for the previous 20 years (17RT 2412) and he was then on parole and had recently served 30 days in jail for testing positive for drug use. (16RT 2216.)

Appellant confided in his wife that he had begun to use again. (16RT 2216-2217.) When Brenda became upset, appellant grabbed her and choked her into unconsciousness. (16RT 2218.) When she woke, he choked her until she was unconscious a second time and tied and gagged her with scarves and a pillowcase. (16RT 2218.) When she regained consciousness, he choked her a third time, and again, she lost consciousness. (16RT 2219.) When she woke, she had been untied, and appellant was gone. (16RT 2219.) Brenda crawled into the living room, and told her oldest son, Christopher, to call 911. (16RT 2220, 2273.)

Brenda was transported by ambulance to Eden Hospital, treated in the emergency room, and released an hour and a half later. (16RT 2221: 17RT 2369-2370.) She made a statement to a Sherriff's deputy, and appellant was arrested and later pleaded guilty to corporal injury on a

spouse. (16RT 2222; 17RT 2417-2418; 20RT 2971; People's Exhibit 65.) In a statement to a probation officer, appellant stated that he had been under the influence of crack cocaine at the time of the incident, and that he had choked his wife because he was paranoid and thought she would call the police. (17RT 2411.) Brenda sought a divorce from appellant in 1999. (16RT 2222.)

D. EVIDENCE PRESENTED IN DEFENSE

After the conclusion of the prosecution's case, appellant presented no evidence in his defense. (20RT 3040.)

II. THE PENALTY PHASE

After a recess to accommodate the court's vacation, the penalty phase began on September 23, 2007. (25RT 3275.)

A. THE PROSECUTION CASE

In addition to the evidence presented during the guilt phase about the incidents involving Anne Hoon, Mabel Lovejoy, and Brenda Molano, the prosecution presented three relatives of Suzanne McKenna who testified about the impact of McKenna's death on their family.

The prosecution's first witness, fifty-one year old Ronald McKenna, testified that he was Suzanne McKenna's oldest sibling (25RT 3301), and that his wife, Karen, was the sister of Judy Luque. (25RT 3310.) He described Suzanne McKenna as a fun-loving and free-spirited woman who was generally close to her family (25RT 3304-3305) but estranged from her sister, Lori. (25RT 3315.) Ronald was aware that Suzanne had a history of trouble with drugs, alcohol, and depression. (25RT 3314.) Ronald McKenna and the rest of his family had a hard time dealing with Suzanne McKenna's death, and their sister Patti, a recluse who struggled with depression and alcoholism even before McKenna's death, committed

suicide in 1996. (25RT 3311, 3315.) Referring to appellant, Mr. McKenna testified that he had "lost two sisters because of this clown." (25RT 3311.)

Yvonne Searle, Suzanne McKenna's mother, testified that Suzanne was the youngest of the four children she had with her first husband, Dean McKenna. 25(RT 3317-3318.) In addition to Ronald McKenna, she had three daughters: Patti, Lori, and Suzanne. (25RT 3317-3318.) Patti was a recluse who lived with her mother and committed suicide seven months after Suzanne McKenna's death. (25RT 3319-3320.) Lori and Suzanne McKenna were estranged at the time of Suzanne's death because of a disagreement over a mutual love interest. (25RT 3315, 3319.) Searle also has a daughter, Jaime, with her second husband. (RT 3318.) Searle testified that Suzanne McKenna's family was devastated by her death and that the family unit was torn apart as a result. (25RT 3325.) Suzanne McKenna was cremated and her ashes spread in Lone Pine Cemetery, where her sister Patti's ashes were spread when later died. (25RT 3327-3328.)

Lori McKenna was the final witness for the prosecution, and she testified that she and Suzanne had been best friends as children. (26RT 3338.) As adults, the sisters became estranged and though they saw each other at family functions, they had no interaction with each other. (26RT 3340-3341.) After her sister's death, Lori McKenna chose the readings and the music for Suzanne's memorial service. (26RT 3345.) Lori testified that after Suzanne's death, Lori became more fearful, her family fall apart, and she struggled to talk her son Michael about what happened to her sister. (26RT 3349.)

B. THE DEFENSE CASE

During the penalty phase, the defense called a total of seventeen witnesses: six family members and friends; seven correctional officers who had known appellant during his previous incarcerations; a jail chaplain; a forensic psychologist; a neuropsychologist; and an expert in prison security.

1. Lay Witnesses

Dountes Diggs testified that his cousin was married to appellant's mother. (26RT 3361.) As young children, Diggs and appellant where neighbors, and they remained friends into their thirties. (26RT 3362, 3364.) When they were young, they played together, rode bikes, and listened to music. (26RT 3369.) Diggs testified that appellant, his mother, and his sister moved to New York for a period of time in the 1970s and then returned to Oakland. (26RT 3365-3366.) After appellant returned from New York, he and Diggs resumed their friendship. (26RT 3366.) The two men had "a really good time with each other"; theyrode bikes together, went to clubs, visited family members and even lived together for a period in the 1980s. (26RT 3368-3369.) They sometimes used recreational drugs and alcohol together. (26RT 3366.) Diggs described appellant as a good, kind, and helpful person. (26RT 3369-3370.)

Diggs also testified that appellant's brother, Ernest, is an alcoholic and appellant's sister, Cynthia, is a drug addict. (26RT 3367-3368.)

Ernest Molano, testified that he and appellant are half brothers who share the same mother. (26RT 3371-3372.) Appellant, Ernest, and their sister Cynthia were raised together, and all three have different fathers. (26RT 3372-3373.) They also had four other half siblings who did not live with them. (26RT 3373-3374.) As children, Molano and appellant had the last name "Hagerty" until their older half sister, Dolores, changed their

names to Molano. (26RT 3375-3376.) Their mother was an unemployed single parent who disciplined her children by hitting them with "anything she could get her hands on", including belts, extension cords and switches cut from trees. (26RT 3378, 3379-3380.) Their mother also yelled profanities at her children. (26RT 3380.)

Ernest testified that appellant had a loving relationship with his deceased step-grandmother, for whom he was a caregiver as an adult. (26RT 3386-3387.) As adults, appellant and his brother used cocaine and marijuana together. (26RT 3383.) Ernest Molano struggles with alcoholism. After three convictions for driving under the influence, he spent six months in rehabilitation but continues to drink. (26RT 3384.) His sister, Cynthia, had substance abuse problems until she went into a long-term rehabilitation program. (26RT 3384.) On cross-examination, Ernest testified that his mother was able to provide for the children and loved them. (26RT 3388-3389, 3391.)

Bonnie Alexis testified that she met appellant in 1981, when she was 27 years old. (27RT 3440.) They were friends until they began a romantic relationship that lasted from 1985 through 1988. (27RT 3441.) Appellant treated his young niece Bianca, his sister Cynthia's daughter, like his own daughter and was very close to Alexis's son. (27RT 3443-3445.) Alexis saw appellant almost everyday until he went to jail in 1985, after which they wrote each often. (27RT 3440, 3443.) In 1990, Alexis's mother died, and appellant's letters and phone calls helped her get through the grieving process. (27RT 3446-3447.) Alexis never saw Carl using drugs, though she was aware that he did. (27RT 3445.) After they stopped dating, Alexis and appellant remained friends until she moved to Reno in the mid-1990s and lost touch with him. (27RT 3442.)

Evelyn Horne testified that she met appellant in 1982, and the two became friends and developed an intimate relationship. (27RT 3458.) After their physical relationship ended they remained friends. (27RT 3458-3459.) Appellant's Oakland neighborhood was a low-income neighborhood where there was a lot of drug activity. (27RT 3462.) Horne never saw appellant use drugs other than marijuana. (27RT 3461.) Horne sold crack cocaine in the 1980s (27RT 3461, 3467), and while she sold to appellant's sister, Cynthia, who she believed to be a prostitute, she never sold to appellant. (27RT 3467-3468.) Appellant was encouraging and supportive when Horne left her abusive ex-husband. (27RT 3463.)

Horne testified that appellant treated his niece Bianca "like a little princess" (27RT 3475) and that appellant was helpful and caring to his mother. (27RT 3476.)

Ernestine Marshall testified that she knew appellant for approximately 30 years, though there was a long period during which she didn't see him. (27RT 3479.) She became reacquainted with appellant in around 2002, when appellant attended a karaoke party with Marshall's daughter, with whom he had had a relationship many years ago. (27RT 3480, 3485). Appellant attended family functions and went to church with her, and he helped her around her house, building a clothesline and shelves for her. (27RT 3481-3483.) Marshall testified that appellant was like a son to her, and he called her "Mom". (27RT 3481.)

Appellant's childhood friend Ronald McReynolds was five years old when the fourteen-year-old appellant became a big-brother figure in his life. (30RT 3717-3720, 3722.) Appellant and McReynolds lived in the same apartment complex, their mothers were friends, and appellant and his sister babysat McReynolds. (30RT 3718.) When McReynolds got older and

began having trouble at school and problems with his mother, appellant advised McReynolds and told him to do something positive with his life. (30RT 3719-3721.) McReynolds and appellant lost touch when appellant joined the Navy and moved to Southern California. (30RT 3725.) McReynolds credits appellant for playing a big role in McReynolds success later in life. (30RT 3723.)

Frank Agee testified that in 2005, he began serving as a jail chaplain at Santa Rita jail. (30RT 3704.) Appellant, who was a born-again Christian, was one of the first inmates to whom Agee ministered. (30RT 3704, 3706.) Agee met with appellant once a week for sessions lasting an hour and a half. (30RT 3704.) These visits continued from February, 2005, through May, 2005, when Agee moved out of the area, but the men maintained a correspondence through the time of trial. (30RT 3704-3705, 3707.) Agee assessed appellant's spiritual growth as genuine. (30RT 3709.) Agee testified that his relationship with appellant matured from a counseling relationship to a genuine Christian friendship. (30RT 3709.) Appellant is like a brother to Agee, and Agee cares very much what happens to him. (30RT 3712.)

2. Correctional Officers

The defense also called seven correctional officers who had supervised appellant during his previous incarcerations within the California Department of Corrections and Rehabilitation (CDCR). CDCR inmates with work assignments are rated by their supervisors, who complete work supervisors' report forms every three months. (28RT 3520.) These reports ask supervisors to rate workers' performance in ten categories on a scale of one to five. A "one" rating indicates excellent work and a "five" indicates unsatisfactory work. (28RT 3522, 3537; Defendant's Exhibits I-

P.) The report form also allow the supervisor to provide narrative feedback. (28RT 3524.)

Retired corrections officer Wendall Quigley worked at CDCR's Correction Training Facility (CTF) in Soledad in 1982, and though he did not remember appellant, based on work supervisor's reports that he completed, he testified that appellant worked for him as a shipping clerk outside of the main prison. (28RT 3547-3550; Defendant's Exhibit L.) At the time, Quigley noted that appellant was an outstanding asset and recommended him for a pay raise.[2] (28RT 3550-3552.) Retired officer Effie Gandy testified that she also worked at CTF, where appellant was a clerk typist for her in 1983. (28RT 3557-3558.) Gandy gave appellant an overall rating of average, and found appellant to be knowledgeable and good at taking direction. (28RT 3559-3560; Defendant's Exhibit N.)

Corrections Officer Bryan Kingston, who supervised appellant at the California Correction Center in Susanville, testified that appellant worked under his supervision in 1988. (28RT 3540-3542.) Though Kingston had no independent recollection of appellant at the time of trial, he testified that the supervisor's reports he completed on appellant stated that appellant was exceptional in each category. (28RT 3543.)

Lieutenant William Watts was an assignment lieutenant at CTF who had daily contact with appellant between 1991 and 1994 when appellant served as Watts' clerk and runner. (28RT 3518-3519.) Watts testified that appellant's work for him was excellent and that appellant got along with staff and other inmates very well. (28RT 3526.) Each report completed by

---

[2]/ Appellant was making $0.40 an hour, and Quigley's recommendation was for a $0.05 hourly increase. (RT 3552.)

Watts indicated that appellant was doing exceptional work during his time in Soledad. (28RT 3521-3534; Defendant's Exhibit I.)

Ron Higginbotham worked as assistant manager of the dairy at CTF, where appellant worked as his clerk in 1992. (29RT 3602-3605; Defendant's Exhibit P.) Though Higginbotham had little recollection of appellant, a report he completed for appellant indicated that appellant had done a good job. (29RT 3607.)

Corrections Officer Conception Aguilar supervised appellant in the culinary department at CTF in 1999. (28RT 3536.) Aguilar completed one supervisor's work report for appellant before appellant was transferred to another job, and Aguilar found appellant to be a good, dependable worker who got along well with other inmates. (28RT 3537-3538.)

In 1999, Officer Mark Elias was the search and escort officer at CTF, where appellate worked as his photo clerk. Appellant was responsible for taking pictures of incoming inmates. (29RT 3595; Defendant's Exhibit Q.) Elias testified that appellant was a model inmate and a fast learner who never complained. Elias enjoyed working with appellant. (29RT 3597.)

By stipulation, the defense offered work supervisor's reports completed by five other correction officers. (28RT 3554; Defendant's Exhibit M.) Each report rated appellant's performance at excellent or average. (28RT 3554.)

3. Expert Witnesses

The defense also presented the testimony of three expert witnesses: a clinical and forensic psychologist (26RT 3395-3439); a neuropsychologist (27RT 3608-3697); and an expert on prison security and inmate classification (28RT 3561-3592).

Psychologist Dr. Rahn Minagawa was retained by the defense to evaluate the long-term effects of appellant's social history on his development, but because of the unavailability of many of appellant's family members and social history documents, Minagawa had limited information about appellant's history, much of it provided by appellant himself. (26RT 3404, 3424, 3426, 3427, 3429-3431.) Minagawa testified that appellant was born on Travis Air Force base in 1956 and was one of nine children of a Puerto Rican mother, Maria Quinos. (26RT 3410-3411.) Appellant's mother's children were fathered by at least four different men. (26RT 3414.) The man listed as appellant's father on his birth certificate, Joseph Bennett, denied paternity of appellant. (26RT 3414.) Appellant was raised with his brother Ernest and his sister Cynthia, but had little contact with his other six siblings. (26RT 3413.) Appellant grew up in poverty, with a single mother who was verbally and physically abusive. (26RT 3414-3416, 3430-3431.) Appellant began to use alcohol when he was 12 years old and cocaine when he was a teenager. (26RT 3417.) Ernest and Cynthia also began to abuse drugs and alcohol as children. (26RT 3419.) Minagawa testified that potential long-term effects appellant's chaotic upbringing include addiction, dependence, and psychological disorders, including depression. (26RT 3422.)

Board certified neuropsychologist Myla Young was retained by the defense to conduct neuropsychological testing of appellant, which was administered over the course of two sessions while appellant was being held at the county jail awaiting trial. (29RT 3615-3617.) At trial, Young testified that at the time of her testing, appellant's IQ was 85, which is significantly lower than appellant's two previous IQ scores and indicates

deteriorating intellectual functioning. (29RT 3640-3642.)[3] Young also found that appellant suffers from significantly impaired attention. (29RT 3644, 3646.) Young testified that appellant's mildly impaired verbal memory indicates damage to the hippocampus and frontal lobe. (29RT 3650.) In addition, appellant's executive functioning is severely impaired, indicating a limited ability to conceptualize and plan. (29RT 3666.) Appellant's cognitive flexibility is also significantly impaired, indicting diffuse brain dysfunction. (29RT 3667-3668.) In addition to the testing she administered, Young reviewed a single-photon emission computed tomography image of appellant's brain and opined that the image, which showed structural damage to appellant's brain, confirmed damage to the same areas of the brain indicated by the neuropsychological testing. (29RT 3672-3674.) Based on her assessment of appellant, Young testified that he should be able to function well in structured environments. (29RT 3671.)

Former warden of San Quentin State Prison Daniel Vasquez provided testimony as an expert in prison security and inmate classification. (28RT 3565, 3868.) Vasquez testified that if sentenced to life without the possibility of parole, appellate would be classified as a Level IV inmate and housed in one of California's maximum security prisons, from which no inmate has ever escaped. (28RT 3569, 3572.) Level IV inmates can possess personal property, such as a television, books, a radio and family photos and are allowed to have limited visits and attend worship services and departmentally approved classes. (28RT 3576-3580.) As an inmate serving a life sentence, there is no possibility that appellant would receive a classification lower than Level III. (28RT 3575.)

---

[3]/ According to testing administered by the Department of Correction, appellant's IQ was 109 in 1982 and 94 in 1998. (29RT 3641.)

ARGUMENTS

I. APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE ADMISSION INTO EVIDENCE OF STATEMENTS APPELLANT MADE AFTER OFFICERS TRICKED HIM INTO WAIVING HIS MIRANDA RIGHTS, AFTER HE THEN TWICE INVOKED HIS RIGHT TO COUNSEL, AND AFTER A PROCESS OF "SOFTENING UP" INITIATED BY THE OFFICERS DURING A CAR RIDE TO THE STATION FOLLOWING THE SECOND INVOCATION

Introduction and Summary: On March 21, 2003, Alameda County Sheriff's deputies Detective Sergeant Scott Dudek and Detective Edward Chicoine traveled to San Quentin State Prison to interview Carl Molano, who was then serving a prison sentence for spousal abuse. The interrogation, conducted in an interview room at the prison, was recorded on audiotape.

The detectives told appellant their true names but lied about their occupations and the purpose of the interview. They told appellant that they were sex offense investigators there to conduct a routine pre-release interview about his prior sex-crime convictions in preparation for his upcoming parole, when they were actually homicide detectives planning to interrogate him as a suspect in the Suzanne McKenna homicide case and also to execute a search warrant for biological and physical evidence in that case. They advised appellant of his rights in accordance with *Miranda v. Arizona* (1966) 384 U.S. 436. Appellant, tricked into believing that the interview only concerned his prior sex crime convictions, waived his rights and agreed to answer the officers' questions.

Appellant answered questions for more than an hour– questions

about his childhood, his family, his two prior rape convictions, and the conviction for spousal abuse for which he was then serving time. When the officers began asking about McKenna, appellant admitted to using drugs and having sex with her and also made other damaging admissions. However, when questioning turned to McKenna's death and his possible role in it, appellant invoked his right to counsel and the interrogation was terminated.

Before leaving the prison, Dudek and Chicoine advised appellant that if wanted to make a further statement he would have to initiate contact with the officers. Appellant then asked for the officers' business cards and agreed to notify his "counselor" if he wanted to contact them.

Ten days later, on March 31, 2003, Dudek and Chicoine returned to San Quentin to arrest appellant for Suzanne McKenna's murder. Chicoine later testified that appellant had told the officers that he was ready to talk to them but that Chicoine told appellant to wait until later. However, unlike nearly all other communications between the officers and appellant that day, this exchange was neither recorded nor reflected in the officers' written report and was inconsistent with statements the officers later made on tape.

The officers then drove appellant to Alameda County Sheriff's Eden Township Substation (ETS) in San Leandro. The officers had previously placed a tape recorder in their car's front passenger side seat to record any statements appellant might make in the car.

Once in the car, Sergeant Dudek immediately attempted to engage appellant in discussion about the murder, asking appellant if he had any questions about the charges against him and telling him that his ex-wife had provided investigators with inculpatory information. At this point,

appellant again invoked his right to counsel. However, Sergeant Dudek continued to use "softening up" techniques to persuade appellant to talk about Suzanne McKenna's murder, telling appellant that his arrest was "gonna be a fairly big deal in the newspaper" and that appellant's family "want[s] to hear something from your mouth" about his role in McKenna's death. Appellant said nothing further about Suzanne McKenna's death during the car ride.

Upon arrival at Eden Township Substation, the audio recorder was turned off. Detective Chicoine later testified that after exiting the car appellant once again indicated that he wanted to talk to the officers about McKenna's death, but was again told to wait until they were inside. As with the previous statement in which Chicoine claimed appellant had indicated a willingness to talk, this exchange was also not recorded.

Upon entering the substation, appellant was taken to an interrogation room equipped with audio and visual recording devices. Sergeant Dudek and Detective Chicoine again interviewed appellant. Appellant was again read his *Miranda* rights but was not asked whether he waived those rights. In response to the officers' questioning, appellant stated that he had engaged in consensual sex with Suzanne McKenna that culminated in her accidental death.

Immediately after this interview, two representatives of the district attorney's office interviewed appellant in the same room. Appellant was again informed of his *Miranda* rights, waived them, and made a statement which was substantially the same as the statement he had just given to Sergeant Dudek and Detective Chicoine.

Prior to appellant's trial, the defense moved in limine to suppress the statements appellant made on March 21 and March 31 on the grounds that

the investigating officers' deliberate use of deception rendered appellant's waiver invalid and that the officers had refused to honor appellant's invocation of his right to counsel.

At the hearing on the motion, the court heard testimony by Detective Chicoine and audiotapes of the March 31 ride from San Quentin to ETS and Chicoine and Dudek's interview of appellant at ETS. After the hearing, the prosecutor announced that he did not intend to introduce evidence of appellant's statement in the car during transport to the substation.

The court ultimately ruled that appellant's statements made at San Quentin State Prison and at the Eden Township substation were admissible. The audiotape of the March 21 San Quentin interview and the videotapes of both the March 31 interviews were played for the jury and admitted into evidence. After hearing appellant's statements and related testimony, the jury convicted appellant of murder and found the charged rape special circumstance to be true.

Appellant submits that the trial court erred in admitting these three statements and that reversal is required. The law enforcement officers in this case repeatedly, intentionally, and flagrantly ignored appellant's Fifth and Fourteenth Amendment rights by engaging in impermissible, coercive tactics in order to trick appellant into waiving his rights and then refusing to honor his repeated invocations of the right to counsel.

Moreover, even if Detective Chicoine's less than credible testimony regarding appellant's supposed reinitiation at San Quentin State Prison on March 31 were to be accepted at face value, as a matter of law appellant did not reinitiate contact with these officers. Appellant remained continuously in custody from the time of his March 21 invocation of the right to counsel, and the *Edwards* presumption that further post-invocation statements are

involuntary was not only never rebutted but does not even appear to have been considered by the court. The officers' refusal to honor appellant's repeated invocations of his right to counsel, coupled with their use of affirmative misrepresentations, coercion, and an impermissible "softening-up" process, rendered appellant's subsequent *Miranda* waivers involuntary. The admission of the three statements was therefore error, and because the admission of the statements severely prejudiced the defense case, the error compels reversal. A more detailed discussion follows.

A. FACTUAL BACKGROUND

1. Appellant's March 21 Statement

The killing of Suzanne McKenna occurred in June, 1995. In March, 1997, appellant pled guilty to a charge of inflicting corporal injury upon a spouse and began serving a prison term for that offense. (People's Exh. 65.) In 1999, his spouse, Brenda Molano, filed for divorce. (16RT 2222.)

In May, 2001, Brenda Molano and her 13-year-old son, Robert Molano, went to the Eden Township substation of the Alameda County Sheriff's Department and made statements implicating appellant in the McKenna killing. (16RT 2191, 2192, 2222, 2223, 2345.) As a result of these statements, the Alameda County Sheriff's Department reopened the investigation into the McKenna homicide, focusing on appellant's potential involvement in the killing. Sheriff's deputies re-interviewed various witnesses and sent numerous items of physical evidence to Forensic Analytical Services, an independent criminalistics laboratory in Hayward, for examination. (16RT 2346; 17RT 2374-2375.) By September 19, 2002, when Detective Edward Chicoine of the homicide unit was assigned to conduct further investigation into the case, appellant had become the primary suspect in the McKenna investigation. (14RT 1966-1968.)

In March, 2003, Chicoine and Detective Sergeant Scott Dudek, who was then head of the homicide unit, learned that forensic tests of the physical evidence in the McKenna case were mostly inconclusive. However, DNA evidence found on a tennis shoe discovered at the scene was consistent with that of Brenda Molano. (3RT 309.)

On March 19, 2003, Chicoine and Dudek obtained a search warrant permitting them to take blood and tissue samples, dental records and impressions, and shoes from appellant, who was then housed at San Quentin State Prison. (14RT 1979-1980.) Two days later, on March 21, 2003, Chicoine and Dudek traveled to the prison intending to execute the search warrant and interrogate appellant. (3RT 311; 14RT 1985.)

The officers' interview of appellant had been arranged with the help of a liaison at the prison. However, because the officers did not want appellant to know the nature and purpose of the interview, they did not provide the liaison with any information regarding their intentions. (3RT 312, 408-409; 14RT 1984.) In addition, before arriving at the prison, Dudek and Chicoine decided to lie to appellant about the nature and scope of the interview in the hope that he would waive his rights and agree to speak to them. (3RT 420-421.)

Upon arrival, Dudek and Chicoine were taken to an interview room in the prison. The room was approximately 15 by 20 feet and contained a table and several chairs. (3RT 313-315; 14RT 1986.) Appellant was then escorted into the room in restraints, which were removed once he was inside the interview room, and the door to the room was locked from the outside. (3RT 314-315, 14RT 1987.)

Dudek and Chicoine introduced themselves to appellant, repeatedly telling him that they were sex crime investigators who had come to

interview him about his prior convictions for sexual offenses in view of his upcoming anticipated release from prison.[4] In fact, Dudek and Chicoine were homicide investigators who had come solely to interview appellant about Suzanne McKenna's death and to execute the warrant for physical and biological evidence.[5] (3RT 316; 14RT 1985, 1989.)

4/ According to Chicoine, at the time of the March 21 visit the officers understood that appellant was due to be released from prison in two weeks' time. (3RT 427.) Although not part of the record on appeal, appellant's prison records at that point listed a scheduled release date of August 13, 2003. His earlier records showed an expected release date of April 14, 2003, but this had been rescheduled due to an earlier parole violation.

5/ At the hearing, Chicoine initially testified that part of his responsibility actually was to investigate registered sex offenders. He testified as follows:

> We introduced ourselves, and we told him that we were there to interview him, and we gave him a ruse that we wanted to talk to him about the sexually related crimes. We knew that he had been in custody for a crime and that he had sexually related crimes in the past, and I personally told him that we were 290 investigators, which are sexual offenders investigators, that we wanted to see where his head was at, because we knew that he would be returning to our community soon and that we wanted to interview him, and that we would be talking about crimes in the past and things he's done.

(3RT 315-316.)

Chicoine admitted that this representation was what he described as "a ruse," but he claimed on direct examination that "everything that I did tell him was the truth." Chicoine stated that one of his jobs in the unit at that time was to investigate Penal Code section 290 cases. (3RT 316-317.)

However, on cross examination, Chicoine admitted that by March, 2003, both he and Dudek were actually assigned to the homicide unit, not the sex crime unit. Chicoine testified that "[i]n 2002, Sergeant Dudek changed jobs to the homicide unit, so then he took over the homicide unit. A couple months after that, I also came into the homicide unit." (3RT 402.) When Chicoine joined the homicide unit, Dudek assigned appellant's case to Chicoine and continued to work that case as Chicoine's partner. (*Ibid.*)

The officers read appellant the *Miranda* warnings. (3RT 317-318; 14RT 1989.) Appellant asked the officers if his failure to answer any of their questions would affect his parole date, and they assured him that it would "absolutely not" affect his parole in any way. (3RT 317; People's Pretrial Exhs. 3 and 3A [p.2, ln. 10].)[6] Appellant signed the waiver form (People's Pretrial Exh.1; 3RT 320-321; Defense Pretrial Exh. A), but before making any statement to the officers, he asked Chicoine and Dudek whether they conducted similar investigations in connection with everyone who was required to register as a sex offender. (People's Pretrial Exhs.3 and 3A [pp. 2-3].)

Chicoine stressed to appellant that the interview was a routine matter and implied that its purpose was to aid the officers in determining which sex offenders were likely to reoffend and thus might be likely suspects in future sex crime investigations. Chicoine told appellant that he interviewed "every single sex registrant that comes across my desk . . ." (People's Pretrial Exhs. 3 and 3A [p. 2, ln. 25]) including appellant, about past crimes and future plans. In addition, Chicoine told appellant that as a sex

---

[6]/ There are discrepancies between People's Pretrial Exh. 3, the tape recording of the March 21 custodial interrogation, and People's Pretrial Exh. 3A, the transcript of the interrogation which was prepared by the district attorney's office. There are also discrepancies between People's Pretrial Exh. 4, the recording of the ride between San Quentin and San Leandro, and People's Pretrial Exh. 4A, the transcript also prepared by the district attorney's office. With the exception of one discrepancy discussed in detail herein, most of these discrepancies are minor.

Citations in the text are to the recordings themselves as understood and transcribed by appellant's counsel. However, to assist the reader in locating the point in the interrogation where particular statements were made, petitioner includes citations to the page number of the transcript where the corresponding statement appears. Where there are differences between the two, appellant submits that it is the text herein, rather than the district attorney's transcription, which accurately sets forth the words spoken during the interrogation.

offender, "you're going to be [in my file] for life" but "the goal . . . is to stay in the files and off my desk" because "those are the guys I'm going after." (People's Pretrial 3 and 3A, at p.3.)

For over an hour, appellant answered officers' questions about his childhood, family history, employment history, and prior convictions. (3RT 321-322; see generally People's Pretrial Exh. 3.) The officers asked, and appellant answered, questions concerning his prior conviction for rape in Long Beach in 1982. (3RT 321-322.) Then they discussed his prior conviction for rape in 1987. (3RT 322.) Following this, the officers inquired about the spousal abuse incident for which he was then serving a sentence. (3RT 323.) During this time appellant was cordial and forthcoming. (3RT 322.)

The officers then asked appellant whether he remembered a neighbor of his who was killed around the same time as the spousal abuse incident. (3RT 325.) Appellant said he couldn't remember the name but he did remember somebody being killed. (People's Pretrial Exhs. 3 and 3A [p. 34].) The officers showed him a drivers' license photograph of Suzanne McKenna. (People's Pretrial Exhs. 3 and 3A [p. 36].) Appellant recognized the photograph and referred to McKenna as "Sue." (*Ibid.*; 3RT 326-327.) Appellant acknowledged McKenna had been a neighbor and acquaintance with whom he drank alcohol and used drugs. He recalled that he had smoked crack cocaine while McKenna smoked methamphetamine. (3RT 327; People's Pretrial Exh. 3A at p. 37.) Appellant recalled that at the time of McKenna's killing his parole officer had asked him about her. (People's Pretrial Exh. 3A at p. 36.)

When asked whether he had ever had a sexual relationship with McKenna, appellant said that while they were high on drugs they had a one-

time sexual encounter that included oral sex and "regular" missionary-style intercourse in McKenna's studio apartment. (3RT 327-328; People's Pretrial Exhs. 3 and 3A [p. 40].) He recalled that this had occurred between one and three days before her death. (People's Pretrial Exhs.3 and 3A [pp. 28-39].) He denied having rough sex with McKenna, and he denied hitting or biting her. (*Id.* at pp. 40-41.)

Then Dudek asked, "What do you think happened to her? Did you hear any word on the street? Did you have anybody, any of your friends or anybody else thinking it was you . . . because of your history?" (*Id.* at pp. 42-43.) Appellant stated that his wife believed that he was involved in McKenna's death. (*Id.* at p. 43.) When pressed on why she thought that and whether he had told her anything about the killing, appellant told the officers that he had to go to the restroom. (*Ibid.*) Then appellant said he had told his ex-wife, Brenda, that he knew what happened to Suzanne McKenna. (*Id.* at p. 44, ln. 2; 3RT 328-329.)

Immediately after making this statement, appellant insisted that he needed to go to the restroom and said it was an emergency. (3RT 330; People's Pretrial Exhs.3 and 3A [p. 44].) According to Chicoine's testimony, appellant became "extremely nervous" and had "an alarmed look on his face." (3RT 329.) Chicoine tried to convince appellant to remain for 45 seconds to finish his previous answer, but appellant said he was going to soil himself if he did not use the restroom. (3RT 331: People's Pretrial Exhs. 3 and 3A [p.44].) He was then permitted to leave the interview room to go to the restroom. (*Ibid.*) The officers stopped the tape recording and then re-started it five minutes later when appellant returned. (*Ibid.;* 3RT 331.)

Upon his return to the interview room, appellant stated, "I

understand where this is leading to, this conversation and I would rather not say anything else until I have a public defender . . ." (People's Pretrial Exhs. 3 and 3A [p. 44]; 3RT 332.) Chicoine later testified that he had understood appellant's statement to be a clear invocation of his *Miranda* rights. (3RT 423.) Accordingly, the officers terminated the interview. (People's Pretrial Exhs. 3 and 3A [p. 44]; 3RT 330-332.)

After the termination of the interview, the officers executed the search warrant. (People's Pretrial Exhs. 3 and 3A [p. 45]; 3RT 333.) This was the first time they had mentioned to appellant that they had a warrant for evidence in the McKenna case. (3RT 333.)

After taking appellant's shoes and informing him of the other requirements of the warrant, including the collection of blood and tissue samples and a dental impression, Sergeant Dudek told appellant, "bear in mind, if you wanna talk to us again, you have to initiate the contact." (People's Pretrial Exhs. 3 and 3A [p. 45].)

Appellant then asked for the officers' business cards and agreed that if he wanted to initiate contact, he would notify the guards "or my counselor or the captain or something." (People's Pretrial Exhs. 3 and 3A [pp. 45-46].) Detective Chicoine later testified that at this point in the interview he had understood appellant to say that "he really did want to tell us what happened, but before he did that, he wanted to talk with a counselor. And the way he said it was like a psychologist or a religious type counselor. And then he said after talking to him he would give us a call." (3RT 336.) [7]

7/ Detective Chicoine's testimony about appellant's statement regarding his counselor and really wanting to tell the officers what happened is not supported by the tape recording itself. According to the audio recording made in the interview room at San Quentin, after appellant invoked his right to counsel the only discussion was of the items on the search warrant and the following exchange:

While the biological samples and dental impression were being

---

DUDEK: Bear in mind if you wanna talk to us again, you have to initiate the contact. Do you understand that? So, if you say . . . go home, and you sleep and you say, "You know what, I wanna continue . . ."
APPELLANT: Do you have a card?

DUDEK: I think I do.

CHICOINE: Yeah, we'll give you that.

DUDEK: So just remember that we, you have to initiate, you have to get a hold of the . . . the guards here and say, "You know what, I wanna talk to the . . ."

APPELLANT: Or my counselor or the captain or something.

DUDEK: Yeah. Yeah. OK? Okay, we are now... officially you have been advised, Carl has been advised and we're gonna go back off tape at 11:03 a.m.

(People's Pretrial Exhs. 3 and 3A [pp. 45-46].)

Within the California Department of Corrections and Rehabilitation, a correctional counselor is a member of prison staff who works with inmates on issues relating to classification, parole planning, prison programs, and correctional treatment. The correctional counselor works under the supervision of a sworn peace officer. (See http://www.calhr.ca.gov/state-hr-professionals/pages/9662.aspx.) The captain oversees the safety, classification, discipline and care and treatment of inmates in his program unit. (See http://www.calhr.ca.gov/state-hr-professionals/ pages/9646.aspx.) Guards, or correctional officers, however, are responsible only for security, discipline, and transportation of prisoners. (See http://www.calhr.ca.gov/state-hr-professionals/pages/9662.aspx.)

Appellant's statement regarding a "counselor or the captain" was in response to Dudek's advice that he let a "guard" know if he wanted to initiate contact with Chichoine and Dudek. Appellant was explaining that the more appropriate prison staff members for him to contact if he wanted to get in touch with the officers would be his correctional counselor or the captain rather than a guard. Contrary to Chicoine's testimony, appellant did not mean that he wanted to speak with a psychologist or chaplain, nor did appellant ever say anything to the effect that "he really did want to tell [the officers] what happened" or that he "would give [them] a call" after talking with his counselor.

obtained, the officers separately spoke with correctional staff and gave them what Chicoine described as "a basic overview of what had occurred in the room, so that they would have an idea of what they needed to do for security reasons or other reasons . . . and then they [would] reclassify him per their guidelines." (3RT 338.) The officers did not arrest appellant or have him placed on a "felony hold" at the prison, but left with the understanding that prison staff "would place him in a more secure situation, because of the possibility of [a] criminal complaint coming down in the future." (*Id.* at 339.)

a. Appellant's March 31 statements

A complaint charging appellant with McKenna's homicide was filed on March 27, 2003, and on March 31, 2003, Chicoine and Dudek returned to San Quentin to take custody of appellant and transport him by car to Eden Township Substation. (3RT 340-341.) Before they entered the prison, the officers decided to place an audio recorder in the car. (3RT 346.) They initially tried to conceal the recorder, but when they found that it was too large to hide, they placed it on the front passenger side seat. (3RT 347-348.)

Chicoine later testified that the officers entered the prison and encountered appellant in the "receiving area" where he had been brought by correctional staff in anticipation of the Alameda County officers' arrival.[8]

---

[8]/ There are discrepancies between People's Pretrial Exh. 3, the tape recording of the March 21 custodial interrogation, and People's Pretrial Exh. 3A, the transcript of the interrogation which was prepared by the district attorney's office. There are also discrepancies between People's Pretrial Exh. 4, the recording of the ride between San Quentin and San Leandro, and People's Pretrial Exh. 4A, the transcript also prepared by the district attorney's office. With the exception of one discrepancy discussed in detail herein, most of these discrepancies are minor.

(3RT 342.) Chicoine testified that in an unrecorded exchange in the receiving area, appellant told officers "that he had been meaning to call us, [and] that he had already talked to a counselor." (3RT 342-343.) Detective Chicoine further testified that on March 21, appellant "had mentioned that he wanted to talk to us, but he wanted to talk to counselor first . . . , when he came up and he mentioned this to me, [] I just figured it was a continuation of what he had said before, that he talked to this guy, and he did want talk to us . . . ." (3RT 344.) Chicoine later prepared a report about his March 31 contact with appellant in the prison, and while he noted the time and the fact of the arrest, he made no mention of this exchange. (See Defense Pretrial Exh. C.)

The officers then took appellant from the prison and transported him to Eden Township Substation by car, a ride that took approximately forty minutes. (3RT 350.) Sergeant Dudek drove, Detective Chicoine sat in the back driver side seat, and appellant, who was wearing waist chains and leg irons, sat in the back passenger side seat, directly behind the audio recorder. (3RT 348-349, 350.) The tape recorder was apparently turned on soon after they entered the car as Sergeant Dudek settled into the driver's seat, and according to the recording, within moments Sergeant Dudek began to talk to appellant.

DUDEK: Any questions or anything Carl?

Citations in the text are to the recordings themselves as understood and transcribed by appellant's counsel. However, to assist the reader in locating the point in the interrogation where particular statements were made, petitioner includes citations to the page number of the transcript where the corresponding statement appears. Where there are differences between the two, appellant submits that it is the text herein, rather than the district attorney's transcription, which accurately sets forth the words spoken during the interrogation.

APPELLANT: I'm in limbo.

DUDEK: You're in limbo?

APPELLANT: About my case.

DUDEK: Is that a good thing or a bad thing being in limbo?

APPELLANT: I don't know.

Appellant did not elaborate, and after a few moments of silence, Sergeant Dudek tried again:

DUDEK: Know what's going on or no?

APPELLANT: No, run it down to me.

CHICOINE: You're going to be arraigned. (Unintelligible)

APPELLANT: What's it look like I'm facing?

DUDEK: What's it look like you're facing? Um, you know, obviously we can't tell one way or the other, but I don't know. You understand the charge, right?

APPELLANT: Um hmm.

Again, there was a period of silence, after which Sergeant Dudek continued:

DUDEK: I've seen better, I seen worst. That's a pretty chicken shit answer but . . . I mean, obviously we'd like to have an explanation but we're not in that position because, uh, like you said the other day, you'd like to give an explanation then we're gonna give you another opportunity once we get to our station, that's kinda where we're at right now. And obviously you know, we're a little bit more at liberty to tell you some things that we didn't tell you the other day that we can tell you now. That'll come out if you want it to. But you kinda

hold the, you - you're kinda in control here right now to say 'yeah, go ahead and tell me' or ' I don't give a shit I'll find out sooner or later' so . . .

APPELLANT: Tell me.

DUDEK: Huh?

APPELLANT: Tell me.

DUDEK: I'm sorry I'm half deaf as it is.

APPELLANT: I said you can tell me.

DUDEK: Alright. Does that mean you want to talk to us again or that means you just wanna...? Let me explain what's gonna go on now and then maybe it'll both answer our questions. You're gonna go back, we're gonna put you in a interview room, we're gonna read you your rights again, we're gonna go over the fact that we were out to talk to you a week ago, ten days ago actually it is now, and at that point you talked to us a little bit and then you said hey at this point here you want to talk to your counselor you wanted to talk to whatever and - and we'll go over that again. If at that point you say I want to know a little bit more, I want to talk to you about it a little bit more, then we'll go from there, and that's where we're at, OK?

APPELLANT: All right.

DUDEK: Even if it's one-sided and you say 'hey I want to talk to you' and you don't say nothing, you got to tell us 'I want to have the conversation be more of a two-sided conversation,' because I think that's only fair to us and you been in the system, you know what I mean? I'm not here to clown you like I told you the other day, you know. I think it's only right that you say 'yeah, let's go ahead, I want to hear what's up', and then once you give us that, if that's what you decide at one point, again, 'you know what, I've heard enough' and then we stop again. So, I think truthfully, and you know

this too and you even said it, that you know you, I think you did want to go on with a little bit more and I think there's probably stuff that you do want to share with us that we may not know about, but ultimately, you know the bottom line is to is, is ultimately there's always a story behind everything. And unfortunately when it comes down to the charging part of it where we're at, this is kinda a one shot deal here. You get your opportunity to say 'this is where we're at', or 'let's see how it shakes out' and then that's a decision you, Carl Molano, the, the 46, 47 year old dude's gotta make. I can't, Scott or Ed can't do that for you, you gotta do it on your own, you know what I mean?

APPELLANT: Right now, . . . (Unintelligible.)

DUDEK: I'll be more than happy and so will Ed, we'll be more then happy to share exactly you know how this story even started. Why are we at this point after so many years. And - and - you know a lot of that has to do with - with your family and - and - and -and it's only fair that you know that. Cause you are gonna know and- and my credibility and Ed's credibility with you is gonna mean everything as far as this goes. If you think I'm a big bull-shitter and horse's ass, and you think he is, there's no sense of us even going any further, you know what I mean? If you're gonna find that what we tell you is ultimately you know, we're not bull-shitting you so--

APPELLANT: No, you guys have been straight up.

DUDEK: I mean we're trying to be that way cause this is what we do. You gotta do what you gotta do, we gotta do what we gotta do, you know what I mean? And - and I was up front with you when I said the other day, I said, I mean, I know Susie's not an angel or wasn't an angel you know what I mean? And there could be some other factors but that's - and like Ed said there's two sides of every story. You know what I mean and I mean. You could tell right where we're going. We obviously talked to a bunch of people and

somebody, you know, and quite frankly you know we talked to your ex-old lady. She told us some stuff and we talked to some other people, so, um, it's kinda - kinda where we're at.

APPELLANT: I ought to be arraigned Wednesday and assigned a--

DUDEK: Naw, you'll probably just be arraigned, they'll ask you your financial status, more than likely you'll be assigned a PD your next court appearance, but you could get one right off if you go on something like this, I'm not sure, probably you will, actually.

APPELLANT: Can I ask you a question?

DUDEK: Sure.

APPELLANT: They'll assign me a PD [public defender], right?

DUDEK: Right.

APPELLANT: I can sit down and talk with my [public defender] first and then talk with you all?

DUDEK: Yeah.

APPELLANT: Can I do that?

DUDEK: Yeah, that's one of your options and that's why we're here, you know.

APPELLANT: I would, I would feel more comfortable.[9]

---

[9]/ At the hearing, Chicoine initially testified that part of his responsibility actually was to investigate registered sex offenders. He testified as follows:

> We introduced ourselves, and we told him that we were there to interview him, and we gave him a ruse that we wanted to talk to

> DUDEK: Ok. If you're gonna go through that, formally when we get to the tape, we're gonna say 'Carl Molano, you understand you're being charged with this' and then we're gonna go through the rights thing again, [and] it's at that time, you know, you can say 'hey let me talk to my PD and then I'll talk to you again,' but you know, but that's entirely up to you. We're here only to do shit on the up and up. If we don't do it on the up and up then we might as well throw it away right now, you know what I mean?

(People's Pretrial Exh. 4A pp. 1-4 .)

After a period of silence, Sergeant Dudek again began to attempt to engage appellant in conversation. He asked about appellant's "4.0 whiz kid" daughter; appellant's oldest son, Carl Molano, Jr., who was then in

---

> him about the sexually related crimes. We knew that he had been in custody for a crime and that he had sexually related crimes in the past, and I personally told him that we were 290 investigators, which are sexual offenders investigators, that we wanted to see where his head was at, because we knew that he would be returning to our community soon and that we wanted to interview him, and that we would be talking about crimes in the past and things he's done.

(3RT 315-316.)

Chicoine admitted that this representation was what he described as "a ruse," but he claimed on direct examination that "everything that I did tell him was the truth." Chicoine stated that one of his jobs in the unit at that time was to investigate Penal Code section 290 cases. (3RT 316-317.)

However, on cross examination, Chicoine admitted that by March, 2003, both he and Dudek were actually assigned to the homicide unit, not the sex crime unit. Chicoine testified that "[i]n 2002, Sergeant Dudek changed jobs to the homicide unit, so then he took over the homicide unit. A couple months after that, I also came into the homicide unit." (3RT 402.) When Chicoine joined the homicide unit, Dudek assigned appellant's case to Chicoine and continued to work that case as Chicoine's partner. (*Ibid.*)

prison[10]; a friend who had put money on appellant's account in prison; and appellant's drawings. (People's Pretrial Exh. 4A pp.4-5, 6-7.) He told appellant that "Robert [appellant's 17-year-old son] played a family key role in this as far as where we're at right now, and I just don't want it to be a mind blower for you when it comes out." (*Id.* at p. 4.) He went on to say that Robert "[h]as had a lot of problems over the years because of this," referring to McKenna's death. (*Ibid.*) Dudek also told appellant that there would be news coverage and asked if there was anyone appellant would like notified about appellant's alleged involvement in McKenna's death so that they wouldn't hear about it for the first time on the evening news. (*Id.* at p. 5.) In response to Dudek, appellant gave short answers of no more than a few words and did not elaborate on any subject.

Finally, after another period of silence, appellant asked, "[i]f I want to get this over with as soon as possible, who do I talk to? The PD or the DA?" (*Id.* at p. 7.) Dudek questioned appellant about his reason for wanting to get things over as soon as possible, asking appellant if he wanted to have time to have a life after prison and if he wanted to make amends with his children. (*Id.* at pp. 8-9.) Dudek then told appellant that his family "want[s] to know why and they want to hear something from your mouth." (*Id.* at p. 9.) Appellant did not make any other statements to the officers for the duration of the ride. The audio recording ended as the car arrived at the substation. (*Ibid.*)

At the suppression hearing, Detective Chicoine testified that in an unrecorded statement in the substation parking lot, appellant told him that he wanted closure, he wanted to get this over with, and that he knew that a

---

[10]/ Carl Molano, Jr., is appellant's son from a previous marriage and was in prison in New York at the time of the interrogation.

public defender would tell him not to talk to the officers. (3RT 357.) He further testified that Sergeant Dudek told appellant not to talk anymore until they were inside and appellant had been read his rights once more. (*Ibid.*). Once inside the substation, appellant was taken into at ten-by-ten foot interrogation room which was equipped with video and audio recording devices. (3RT 360.) Appellant's wrist restraints were removed, and he was seated between Sergeant Dudek and Detective Chicoine. (3RT 361.)

At the suppression hearing, Detective Chicoine testified that after Sergeant Dudek read appellant his rights, appellant expressed his desire to tell his story to the officers and the district attorney. (3RT 368.) In fact the exchange regarding appellant's rights went as follows:

DUDEK: Carl, today is March 31, 2003, the time is approximately 2:20 p.m. and, uh, before we even get to where we're going: ten days ago on March 21, 2003, Det. Chicoine, who is in the room here with me, and I went out to San Quentin prison. Correct?

APPELLANT: Correct.

DUDEK: And we had an interview with you at that time, correct?

APPELLANT: Correct.

DUDEK: At that point and at a certain point in the interview you told us, uh, you were advised of your Miranda rights prior to the interview and at some point in the interview you told us that you wanted to invoke your Miranda rights and you wanted to, uh, consult with an attorney before you talked to us, is that correct?

APPELLANT: Correct.

DUDEK: OK. At some point from the transportation from San Quentin prison, today, to us, we're at the Eden Township

Substation, San Leandro - you know that, right?

APPELLANT: Uh-huh.

DUDEK: At some point there, you then told us you wanted to talk to us and . . . and hear what we had to say . . . and . . . and . . . and, uh, didn't want your attorney present anymore. Correct?

APPELLANT: I didn't have an attorney present.

DUDEK: That's what I mean. That's what I mean. You know, you . . . you . . . you said that you wanted to talk to us and you understood you were now waiving your rights to have an attorney present, is what I meant to say. If I didn't make that clear and...and that's kind of where we're at right now. If that's correct then I want to go ahead and re-read your rights so you understand em again so that at any point you can go ahead and invoke your rights again. Do you follow me?

APPELLANT: Oh, in case I do wanna talk to an attorney?

DUDEK: Correct.

APPELLANT: OK

DUDEK: So I have to tell you . . . you had your rights read on the 21st.

APPELLANT: Right.

DUDEK: At some point you told me, "Stop, I wanna talk to an attorney."

APPELLANT: Right

DUDEK: On the trip over here you said, "Now, I wanna talk to you for a little while." I wanna make sure that's clear and then I'm gonna read you your rights again. So you know we can talk because you approached us to talk to us but then at a

point you can always--you're not giving up your rights. I'm just gonna re-advise you that at uh, this interview point you can again say, "No, stop, I wanna . . .

APPELLANT: Stop, I wanna to–

DUDEK: You understand that?

APPELLANT: Right.

DUDEK: OK. Is that correct?

APPELLANT: That's right.

DUDEK: Is that accurate, what I said?

APPELLANT: That's right. Yeah.

DUDEK: Is it . . . it may be a little confusing. So you've freely given up your rights at this point here and then I'm gonna advise . . . you . . . you . . . you approached us is the only thing I'm getting to. Is that correct?

APPELLANT: Uh-huh.

DUDEK: Without any promises from us or anything. Correct?

APPELLANT: Correct.

DUDEK: OK. So at this point, I'm gonna re-advise you of your rights and then we can start talking again. Okay? You have the right to remain silent. Do you understand that?

APPELLANT: Yes.

DUDEK: OK. Anything you say may be used against you in a court. Do you understand that? You have the right to have–

APPELLANT: Yes.

DUDEK: --presence of an attorney before and during any questioning. Do you understand that?

APPELLANT: Yes.

DUDEK: If you cannot afford an attorney, one will be appointed for you free of charge, before any questioning, if you want. Do you understand that?

APPELLANT: Yes.

DUDEK: OK. March 31. We want to tell you how we got to where we're at. OK?

APPELLANT: OK.

DUDEK: Uh, if you want to start and then I'll start or vis-a-versa. It's up to you.

CHICOINE: Uh, well, basically, we talked to your ex-wife.

APPELLANT: Uh-huh.

DUDEK: And, uh, she said some stuff. So, uh, you know I don't want to get into great detail.

(People's Pretrial Exhs.5 and 5A [p. 3].)

The officers then told appellant that his son Robert had issues like bed-wetting as a result of appellant's involvement in McKenna's death. (People's Pretrial Exh. 5 and 5A [p. 3-4].) After questioning appellant about his crack cocaine dependence, Sergeant Dudek asked, "I think you understand it's important for Susie's family to have some kind of closure here, correct? We're here because why? Because we want to help you get some closure but more importantly we want Susie's family to get some closure, too." (*Id.* at p. 7.)

Appellant replied, "what I would like, you know I can talk to you guys, I can even talk to the DA, you know, uh, with my public defender there or whatever, right, and after I say what I have to say, just asked to be sentenced . . ." (People's Pretrial Exhs.5 and 5A [p. 8].) After the officers explained to appellant that they had no control of the charges, trial, and punishment he might receive, appellant asked, "Can I sit down with the DA?" (*Id.* at p. 9.) Dudek then left the room and contacted Deputy District Attorney Andy Sweet, who agreed to come to Eden Township Substation to interview appellant. When Dudek returned, he told appellant, "[I]t's gonna be 30 minutes, 40 minutes [until Sweet arrives]. You're not gonna leave here until you talk to him." (*Id.* at p. 11.)

Appellant then told the officers that on the day of her death he had smoked rock cocaine while Ms. McKenna smoked methamphetamine in her apartment. (*Id.* at p. 12.) Appellant said that when both of them were high, they had engaged in consensual sex which became rough. (*Id.* at pp. 13-15.)

Sergeant Dudek then asked, "And at one point, you're on top of her, does she ask you to choke her?" (People's Pretrial Exhs.5 and 5A [p. 16].) Appellant responded, "Yeah." Appellant told the officers that he couldn't remember if he had choked the victim with her bra or her panties. (*Id.* at 16.) Appellant said that the victim had asked him to choke her harder. (*Ibid.*). Sergeant Dudek asked, "You say the, uh, bra and panties didn't work, it wasn't tight enough. Did you use something else?" Appellant replied, "Not to my knowledge, no." (*Id.* at p. 17.) Sergeant Dudek told appellant that Ms. McKenna was found with something around her neck. "Scarf?" appellant guessed. (*Ibid.*). He was told that the object around her neck was a shoelace. (*Ibid.*)

Appellant told the officers that when he realized that McKenna was dead, he took her into the bathroom and tried to clean up, possibly with bleach. (People's Pretrial Exhs.5 and 5A [p. 18].) Appellant told the officers that he then ran from the house, discarding his shoes, liquor bottles from the victim's apartment, and her purse as he ran. (*Id.* at pp. 21-22.) Appellant said that when he returned to the victim's house the next day to see if he had left anything behind, he was seen by someone visiting the house and ran to hide in the storage unit behind his apartment. (*Id.* at p. 22.) Throughout the interview, appellant insisted he had not raped McKenna but that the sex had been consensual. (*Id.* at p. 25.)

Deputy district attorney Andy Sweet and district attorney's investigator Lynne Breshears then arrived and the officers left the interview room to brief Sweet and Breshears about the investigation and their interrogations of appellant. (3RT 373.) Sweet and Breshears entered the interview room and introduced themselves to appellant. Sweet administered the Miranda warnings and appellant waived his rights and agreed to talk to them. (People's Pretrial Exhs. 6 and 6A [p. 4].)

In response to Sweet's questions, appellant agreed that he had invoked his right to counsel previously but said he had changed his mind because he was tired and wanted closure. (People's Pretrial Exhs. 6 and 6A [p. 4].) Appellant told Sweet and Breshears that on the night of McKenna's death, he and McKenna had gotten high together and that she had initiated sex with appellant. (*Id.* at pp. 7-8, 17.) Appellant stated that during the consensual sexual encounter and at McKenna's request, he had choked McKenna with an article of her clothing during rough sex play. (*Id.* at pp.7-10.) Appellant admitted to returning to the victim's home in an attempt to clean the scene and remove any fingerprints, but he repeated his statement

that he did not rape McKenna. (*Id.* at pp. 11, 13,16.) Appellant was then taken to Alameda County Jail in Santa Rita and booked. (3RT 378.)

Prior to appellant's trial, the defense moved in limine to suppress the statements appellant made on March 21 and March 31 on the grounds that appellant's Fifth and Fourteenth Amendment rights had been violated by the investigating officers' deliberate use of deception to obtain a waiver and statement from appellant and by their failure to observe appellant's invocation of his right to counsel. (4RT 578-593; 6CT 1386-1389.)

The court held a hearing on the motion. The court heard testimony from Chicoine (3RT 301-515), during which the court listened to the audiotape of the March 31 car ride and portions of Dudek's and Chicoine's interview of appellant at ETS.[11] (See 3RT 448-469.)

The defense argued that when the officers approached appellant on March 21 and falsely claimed to be sex crime investigators who wanted to conduct a routine pre-release interview with him, they employed the kind of deceit and trickery this is strictly prohibited by *Miranda v. Arizona*, *supra*, rendering that statement involuntary. (4RT 578-590.) Noting that the alleged March 31 "reinitiation" at San Quentin about which Chicoine testified was neither recorded nor memorialized in Chicoine's subsequent report, nor even alluded to at any point during any recorded conversation, the defense argued that the audiotape of the car ride to San Leandro showed

---

[11]/ Audiotapes of the March 21 interview at San Quentin and the March 31 car ride and interviews at ETS with Dudek and Chicoine and representatives of the district attorney were admitted into evidence, and corresponding transcripts were marked for identification. It is clear from the record that the audiotape of the car ride and portions of the audiotape of the ETS interview with Chicoine and Dudek were played during that the hearing. However, because the portions played in court were not transcribed, it is not clear what portions of the tapes were played during the hearing. It is also unclear whether the judge was following along in the relevant portions of the transcripts as portions of the tapes were played.

that it was the officers who reinitiated with appellant during the car ride in violation of *Edwards v. Arizona* (1981) 571 U.S. 477. (4RT 581-582, 589-590.) The defense also argued that appellant's March 31 statements were involuntary under a totality of the circumstances analysis, pointing specifically to the "softening-up" process in which Sergeant Dudek engaged during the trip from San Quentin. (4RT 583.)

Acknowledging that appellant made a valid invocation of his right to counsel on March 21, the prosecution argued that there was no *Edwards* violation because appellant initiated the conversation with the officers at San Quentin on March 31. The prosecution argued that appellant's alleged statement on March 31 that he wanted to talk to the officers and his March 21 request for the officers' business cards were evidence of his intent to reinitiate. (6CT 1499-1500, 4RT 568-570.) In addition, relying on appellant's statement during the March 31 interview by Sweet and Breshears that it was his own decision to answer their questions, the state argued that appellant's statements on March 31 were the result of voluntary waiver of his rights rather than coercion by the officers. (6CT 1494-1505; 4RT 577.) In the alternative, the prosecution argued that even if appellant's statements taken on March 21 and during the car ride on March 31 were obtained in violation of *Edwards, supra,* the statements at Eden Township Substation were made after a valid waiver at the substation and were therefore admissible under *People v. Bradford* (1997) 14 Cal.4th 1005.[12] (6CT 1494-1505.)

The court ultimately ruled that appellant's statements made at San

---

[12]/ *Bradford* held that the admissibility of any statement, including one made after a prior *Edwards* violation, turns on whether waiver is knowingly and voluntarily made, which after an invocation, requires reinitiation by the suspect.

Quentin State Prison on March 21 and at the substation on March 31 were admissible (4RT 600-601), but withheld ruling on appellant's statement made during the car ride and the unrecorded statements at San Quentin and in the parking lot of Eden Township Substation. (4RT 600-601.) The prosecutor then announced that he did not intend to introduce evidence of the unrecorded statements or appellant's statement during transport to the substation. (4RT 644.)

With respect to the March 21 statement, the court ruled that "the appropriate *Miranda* admonition was given and that the defendant expressly waived after it had been given. . ." (4RT 600.) Responding to defense arguments that the waiver was vitiated "by the [officers'] ruse about discussing sex registration laws," the court ruled that in addition to mentioning sex registration laws, Detective Chicoine had also told appellant "that they wanted to talk about some of your past crimes which could well have alerted the defendant that this event was fair game." (*Ibid.*)

With respect to the March 31 statement, the court found "there was a voluntary initiation by the defendant of subsequent statements." (4RT 601.) The court first focused on the officers' post-invocation act of handing appellant a business card to permit him to contact them later, and found this was permissible under *People v. Sapp* (2003) 31 Cal.4th 240, 268-269.[13] The court then found as follows:

> I find that there are numerous indications in the subsequent statement of the defendant and the various interrogations to substantially corroborate the statement under oath of the sheriffs of the statement that was not recorded at San Quentin, that the defendant basically communicated that he knew that

---

[13]/ The point pages in *People v. Sapp* to which the court referred discuss the ruling on voluntary initiation. The discussion of the fact that the officer had given his card to the defendant in *Sapp* following Sapp's invocation is at page 264.

> they would be coming back and he meant to call them and that he wanted to talk to them and that he wanted to get the whole thing over with. And I find that most particularly in the statement that you referred to Andy Sweet during the arguments, I find that even if they were not under the authority of the Bradford case, which as a trial court, I'm bound to follow that any conduct of Sergeant Dudek in his statements in the trip down from San Quentin to ETS were not so psychologically compelling that they would have overborne Mr. Molano's free will. And in fact is belied be the sheriff's officers preventing Mr. Molano from making his statement until after he had been given his Miranda rights, and he was perfectly free once given those Miranda rights to reaffirm that he wanted an attorney or that he wanted to remain silent. So under either analysis under voluntary reinitiation, or under voluntariness analysis, I believe that Mr. Molano was given his Miranda rights at ETS and that by continuing talking as pointed out that he impliedly waived those rights, and therefore will find that the subsequent statement to the officers and the subsequent statement to District Attorney Sweet were legal and voluntary. So that's my ruling.

(4RT 601-602.)

The audiotape of the March 21 San Quentin interview and the videotapes of the March 31 Eden Township substation interviews were played for the jury and admitted into evidence. (14RT 2005, 2016; 15RT 2080.) After hearing appellant's statements, the jury convicted appellant of first degree murder and found the charged rape special circumstance to be true.

B. LEGAL STANDARD

The Fifth Amendment, which applies to the states by virtue of the Fourteenth Amendment (*Mallory v. Hogan* (1964) 378 U.S. 1, 6), provides

that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Constitution, Amendment 5.)

In *Miranda v. Arizona*, *supra*, 384 U.S. at p. 479, the United States Supreme Court held that "an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." (*Edward v. Arizona* (1981) 451 U.S. 477, 482.) In addition, the court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires that any custodial interrogation must be preceded by advisement to the suspect that he has the right to remain silent and the right to the presence of an attorney. (*Ibid.*)

This requirement attaches only in the case of "custodial interrogation," that is "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning. . . ." (*Miranda, supra,* at p. 478.) This custody or deprivation of freedom requires that the suspect is under the control of authorities in a manner which "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.)

In order to invoke the right to counsel, an accused must make an unambiguous request for counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459.) In *Davis,* the United States Supreme Court clarified that, "although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer would understand the statement to be a request for an attorney." (*Ibid.,* internal citations omitted.)

Of course, an accused may also choose to waive his *Miranda* rights and speak with authorities without the presence of a lawyer so long as he

does so voluntarily, knowingly and intelligently. (*Miranda v. Arizona, supra,* 384 U.S. at pp. 444-445.) The test of validity of an accused's waiver of his *Miranda* rights has been explained by the U.S. Supreme Court as follows:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

(*Moran v. Burbine* (1985) 475 U.S. 412at p. 421, quoting *Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

It is the state's burden to prove by a preponderance of evidence that there was a valid waiver of the accused's rights. (*Colorado v. Connelly* (1986) 479 U.S. 157at p. 168.) There is a presumption that the accused did not waive his rights, and "the prosecution's burden [to prove waiver] is great." (*North Carolina v. Butler* (1979) 441 U.S. 369at p. 373.) "[A] valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained." (*Miranda v. Arizona, supra,* 384 U.S.at p. 475.)

In addition, "any evidence that the accused was threatened, tricked, or cajoled into waiver will, of course, show that the defendant did not voluntarily waive his privilege." (*Miranda v. Arizona, supra*, 384 U.S. at p. 476; *People v. Honeycutt* (1977) 20 Cal.3d 150, 160.) When police attempt to convince a suspect to waive the right to counsel prior to reading the *Miranda* warnings, a subsequent waiver of the right to counsel is

involuntary as a matter of law. (*People v. Enriquez* (1977) 19 Cal.3d 221, 237-238.)

If an accused does in fact invoke his right to counsel, "the interrogation must cease until an attorney is present." (*Miranda v. Arizona, supra*, 384 U.S., at p. 474.) The invocation of the right to counsel also operates as an invocation of the right to silence and creates an absolute bar to further questioning. "[A]n accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare v. Michael C., supra,* 442 U.S., at p. 719.)

"Interrogation" includes both direct questioning and its "functional equivalent." (*People v. Boyer* (1989) 48 Cal.3d 247, 273) "That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely [from the suspect's perspective] to elicit an incriminating response from the suspect. . . ." (*Rhode Island v. Innis* (1980) 446 U.S. 299, 301.)

Once an accused has invoked his rights and interrogation ceases, subsequent waiver "cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights." (*Edwards v. Arizona, supra*, 451 U.S.at p. 484.) Instead, absent a break in custody, further interrogation may take place only if an attorney is present, unless "the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* at p. 485.)

Once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," and unless there has been a break in custody, "it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." (*Arizona* v. *Roberson* (1988) 486 U.S. 675, 681; see also *People v. Thomas* (2012) 54 Cal.4th 908, 926 .) As Justice White later explained, "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." (*Michigan v. Mosley* (1975) 423 U.S. 96, 110, n. 2, White, J., concurring in result.)

The *Edwards* presumption of involuntariness following the invocation of the right to counsel creates a "heavy burden [] on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (*Edwards, supra*, 384 U.S., at p. 475.) This is true even when the defendant again waives his *Miranda* rights and his statements might otherwise be deemed voluntary under traditional standards:

> *Edwards* sets forth a 'bright-line rule' that all questioning must cease after an accused requests counsel. (Citation omitted.) In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'– explicit or subtle, deliberate or unintentional– might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. (Citation omitted.)

(*Smith v. Illinois* (1984) 469 U.S. 91, 98.)

A suspect's responses to further questioning cannot be used to cast doubt upon the adequacy of his initial request. (*Smith v. Illinois* (1984) 469 U.S. 91, 97-99.) The courts have consistently held that "any discussion with the suspect other than that 'relating to routine incidents of the custodial relationship' must be considered a continuation of the interrogation." (*Christopher v. Florida* (11th Cir. 1987) 824 F.2d 836, 845; citing *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045.) While "the police may make routine inquiries of a suspect after he requests that they terminate questioning, such as whether he would like a drink of water, . . . they may not ask questions or make statements which 'open up a more generalized discussion relating directly or indirectly to the investigation,' as this constitutes interrogation." (*Ibid.*)

Even when further communication is initiated by the accused, the burden remains upon the prosecution to show that subsequent events indicate a valid waiver of the Fifth Amendment right to have counsel present during the interrogation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044.) To carry this burden, the prosecution must show that "the purported waiver was knowing and intelligent" and the waiver must be "found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." (*Ibid.*; *Edwards v. Arizona, supra,* 451 U.S. at 486, n. 9.) The question of whether the communication was initiated by the accused is separate from the question of whether the accused voluntarily, knowingly, and intelligently waived the right to counsel, and "clarity of application is not gained by melding them together." (*Ibid.*)

An appellate court reviewing a lower court ruling on the voluntariness of a confession may not simply defer to the trial court's

findings of fact but "must undertake an independent and plenary determination as to whether defendant's confession was truly voluntary." (*People v. Montano* (1991) 226 Cal.App.3d 914, 930; *People v. Mattson, supra*, 50 Cal.3d, 854, fn. 18; *Miller v. Fenton* (1985) 474 U.S. 104, 109-118.)

An appellate court applies the de novo standard of review to a trial court's granting or denial of a motion to suppress a statement under *Miranda* (see, e.g., *People v. Bradford* (1997) 14 Cal. 4th 1005, 1033; *People v. Crittenden* (1994) 9 Cal.4th 83, 128), and it scrutinizes for substantial evidence the resolution of a pure question of fact. (See generally, *People v. Louis* (1986) 42 Cal. 3d 969, 985-987.)

C. DISCUSSION

On March 21, officers approached appellant and intentionally lied to him in order to trick him into waiving his Miranda rights and making a statement about a homicide they were investigating. The waiver appellant gave on that date was procured under the ruse that he was talking to sex crime investigators conducting a routine pre-release evaluation of inmates required to register as sex offenders under Penal Code section 290, when in fact the officers were homicide investigators who intended to try to deceive appellant into talking about the McKenna homicide. The officers' deception rendered appellant's waiver involuntary and his statements on that date inadmissible against him. (*Miranda v. Arizona, supra*, 384 U.S. at p. 476; *People v. Honeycutt, supra,* 20 Cal.3d 150, 160.)

However, the denial of appellant's Fifth and Sixth Amendment rights did not end there. After falling victim to the officers' lies and making damaging admissions, appellant unequivocally invoked his right to counsel. Because there was no break in custody or reinitiation by appellant, the

Edwards presumption of involuntariness continued to apply to all future waivers and statements after March 21. When the officers came to transport him ten days later on March 31, appellant plainly did not reinitiate the contact; instead, the officers came to get him. Thus, the officers were not permitted to conduct further interrogation at that point.

Moreover, instead of having him returned to his usual cell after he invoked his right to counsel on March 21, the officers instead prevailed on prison staff to place appellant in what Detective Chicoine euphemistically called "a more secure situation" where he remained for another ten days. His placement in "a more secure situation" effectively punished appellant for invoking his right to counsel and helped coerce him into later agreeing to speak with officers.

Since appellant never reinitiated contact with the officers for the purposes of *Edwards,* since there was no break in custody, and particularly since appellant was placed in a more restrictive form of custody after his invocation, any further custodial interrogation of appellant was a direct violation of the *Edwards* rule. However, the officers' disregard for appellant's rights became even more egregious.

In the conversation which Sergeant Dudek initiated in the car during the return trip to Alameda County, appellant *again* invoked his right to counsel. Like his previous invocation, this invocation was deliberately and pointedly disregarded as officers proceeded to engage in impermissible "softening up" tactics meant to overcome appellant's unequivocally stated choice to exercise his right to counsel. Because the record demonstrates repeated, flagrant, and systematic violations of appellant's constitutional Fifth and Fourteenth Amendment rights to counsel and to silence, the

admission of appellant's three statements was in error, and those errors compel reversal.

1. The Officers' Affirmative Misrepresentations About Their Interrogation of Appellant Rendered His March 21 Waiver Involuntary

Before initiating contact with appellant on March 21, the interrogating officers by their own admission developed a "strategy" (3RT 420) to lie to appellant in order elicit a waiver of his *Miranda* rights and obtain a statement about Suzanne McKenna's death. Their "ruse," as Chicoine described it, included affirmatively misrepresenting the officers' true occupations and the nature, subject matter, and scope of their planned interrogation. (3RT 421.)

At least twice before he agreed to talk with the officers, these officers told appellant "we want to talk to you about some of your past crimes and some of the sex registration laws and things like that." (People's Pretrial Exhs. 3 and 3A [p. 1]). Appellant was informed that the officers were sex offense investigators who needed information about his past sex offenses in order to judge whether appellant would be a sexual offender whom the officers would supposedly need to watch closely and "go after" in the future. (People's Pretrial Exhs. 3 and 3A [p.3].)

This "strategy" was a deliberate attempt to trick appellant into waiving his *Miranda* rights by misleading him into believing that the questioning was part of a routine pre-release evaluation of sex offenders (3RT 412-413; People's Pretrial Exh. 3), would be limited to previously adjudicated sex offenses, and that his cooperation would result in less scrutiny by police officers in the future. Under the plain language of

Miranda and this court's decision in *Honeycutt*, this deception vitiated the waiver.

a. The officers' use of lies and deceit to obtain Appellant's Miranda waiver vitiated the waiver.

The U.S. Supreme Court's fundamental aim in designing the *Miranda* warnings was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." (*Miranda v. Arizona, supra*, 384 U.S. at 469.) A waiver of Fifth Amendment rights must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Fare v. Michael C., supra,* 442 U.S. at 725.)

The court in *Miranda* expressly condemned police deception and trickery designed to induce a waiver. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (*Miranda v. Arizona, supra*, 384 U.S. at p. 476.) The lies told by the officers constitute precisely the kind of trickery the U.S. Supreme Court condemned in *Miranda* and differ by orders of magnitude from the kind of omissions and tacit or inadvertent misrepresentations this and other courts have permitted in the past.

Appellant has not found a single published case in which law enforcement officers who were investigating a crime instead falsely represented to the defendant that they wanted to speak to him for an administrative or other purpose in order to obtain a waiver of his *Miranda* rights. In *Colorado v. Spring* (1987) 479 U.S. 564, the United States

Supreme Court held that mere silence by law enforcement officers about some possible subjects of interrogation does not constitute the sort of "trickery" that *Miranda* condemns, but expressly left open the question whether, and under what circumstances, affirmative misrepresentation by the police about the scope of their investigation might invalidate a Miranda waiver." (*Id.* at 576, fn. 8.) However, in so stating, the court drew a distinction between mere silence and cases in which it had previously held that affirmative misrepresentations by interrogating officers rendered statements involuntary. (See, *e. g., Lynumn* v. *Illinois* (1963) 372 U.S. 528 [misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary]; *Spano* v. *New eYork* (1959) 360 U.S. 315 [misrepresentation by the suspect's childhood friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary].)

One of this court's recent precedents (*People v. Tate* (2010) 49 Cal.4th 635, 684) appears to have departed from *Miranda's* explicit prohibition on trickery to obtain a waiver. *Tate* relied on a line of cases holding that the use of deceptive statements during an interrogation does not invalidate a confession unless the deception is of a type "reasonablely likely to procure an untrue statement." (*Ibid.; See, e.g., People v. Carrington* (2009) 47 Cal.4th 145, 172; *People v. Jones* (1998) 17 Cal.4th 279; see *People v. Thompson* (1990) 50 Cal.3d 134, 167.) However, for the reasons set forth below, appellant submits that *Tate* is factually distinguishable from this case. Appellant further respectfully submits that, to the extent *Tate* can be read as applying a rule drawn from cases dealing with deception employed during an otherwise lawful interrogation to a case

involving deception employed to obtain a *Miranda* waiver, the case was in error on that point.

b. *People v. Tate* is distinguishable from this case.

In *People v. Tate, supra,* this court found that a deception by investigators to obtain a waiver of *Miranda* rights was not reasonably likely to induce a false statement after officers, whom defendant knew to be homicide investigators, said they were investigating a car theft in which a woman was hurt when in fact they were investigating a murder resulting from the car theft. (*Id.*, 49 Cal.4th at pp. 682-685.) This court began its analysis by noting as follows:

> At the outset, we agree with the trial court that the evidence indicates defendant was not ignorant, when he twice heard and waived his Miranda rights, about the nature of the officers' investigation. They told him they were investigating the stolen vehicle in which he had been arrested, and they indicated a lady had been "hurt" in the incident. Thus, he understood the matter was more serious than mere car theft. Nor, it appears, was he misled by any ambiguity in the officers' use of the word "hurt" rather than "killed." Recognizing that he was in the "homicide" division, he specifically asked the officers if this was so, and they indicated it was. He must certainly have understood that the injury at issue was fatal.

(*Id.,* 49 Cal.4th at pp. 682-683.)

This court then observed that in *Colorado v. Spring*, *supra*, the United States Supreme Court had found that merely failing to tell a Mirandized suspect of all possible areas of interrogation did not violate the Fifth Amendment, but expressly left open whether and under what circumstances affirmative misrepresentations by the police about the scope of their investigation might vitiate a *Miranda* waiver. (*Id.*, 49 Cal.4th at p.

684, citing *Colorado v. Spring*, *supra*, 479 U.S. at p. 576, n. 8.)[14] This court then relied upon *Spring's* footnote 8 and its own precedents, in *People v.*

---

[14]/ This case is also quite different from the fact pattern in *Colorado v. Spring*. In that case, the defendant was arrested by agents of the Bureau of Alcohol, Tobacco, and Firearms after they bought illegal firearms from him in an undercover operation. The defendant waived his Miranda rights, and the agents questioned him about the illegal firearms transactions that had led to his arrest and then asked if he had ever shot anyone. The defendant said that he had "shot a guy once." Nearly two months later, the defendant was interrogated by Colorado law enforcement personnel about a Colorado murder and made incriminating statements connecting him to that offense.

Although statements from the ATF interrogation were never used against him at trial, the defendant argued that the first interrogation was illegal because he was not warned in advance that he would be questioned about crimes other than illegal firearms transactions, and that the second interrogation had been fruit of the poisonous tree. The Supreme Court rejected the contention, holding that there was no requirement that a suspect be advised of all possible subjects of interrogation prior to waiving his Miranda rights. (*Spring, supra*, 479 U.S. at pp. 571-572.)

Spring is obviously distinguishable from this case on many grounds. First, in *Spring* the officers had no intent to deceive the defendant with a ruse in order to trick him into waiving his rights. Here the officers intentionally tricked appellant by concocting what they acknowledged was a "ruse" or "strategy" to mislead him into waiving his rights. Second, in *Spring,* the defendant was under arrest and charged with firearm offenses, and knew he was under investigation for a crime at the time he signed the *Miranda* waiver. Here appellant did not even know he was the subject of a criminal investigation, but thought the officers wanted to speak to him about *past* sex crimes because they were required to monitor his *future* behavior as a registered sex offender. Third, in *Spring* the defendant was aware of the agency for whom the investigators worked, whereas here the homicide detectives disguised their true occupations and pretended to be sex crime investigators. Fourth, while in *Spring* the defendant does not appear to have invoked his right to counsel when the subject matter changed from firearm offenses to "shooting" someone, here appellant invoked his right to counsel after an hour of chit-chat as soon as he realized that the officers wanted to question him about the McKenna murder. Thus, it is clear that appellant would not have waived his Miranda rights if he had any inkling what the officers had come to talk to him about. Fifth, in *Spring*, the statements from the ATF interview were never used against him, only the statements from the second interview, where he clearly was aware that he was being investigated for the Colorado murder and once again waived his Miranda rights. Here all the statements made after the deceit-induced waiver and prior to the invocation were admitted against appellant.

Jones, supra, 17 Cal.4th at p. 299 and other cases cited previously, for the proposition that the use of deceptive statements during an interrogation does not invalidate a confession unless the deception is "of a type reasonably likely to procure an untrue statement." (*Ibid.*) Applying these rules to the case before it, this court in *Tate* held that the deception in that case– which amounted only to informing the suspect that the victim in a car theft incident was "hurt" when she was really dead– did not vitiate the *Miranda* waiver.

As an initial matter, and as noted above, *Tate* is readily distinguishable from the instant case on its facts. In *Tate* it does not appear that the officers formulated a plan to intentionally deceive the defendant in order to obtain a *Miranda* waiver. By contrast, in this case the officers admitted that they employed an intentional "ruse" to get appellant to waive his rights. Furthermore, in *Tate* the defendant knew he was speaking to homicide investigators in the homicide department of the police station and also knew the specific crime about which he was being interrogated. Indeed, the only real "misrepresentation" in *Tate,* if it can be called that, was with regard to whether the victim had been merely "hurt" or actually killed. However, as this court noted, even if the defendant had a right to know the crime for which he was being investigated, the fact that he was speaking to homicide investigators should have tipped off the defendant as to what the charge was likely to be. Clearly, in that situation, the defendant knew who he was talking to and the specific offense the officers were investigating, and should have known from the fact he was speaking to homicide investigators in the homicide unit that the officers were investigating a homicide.

By contrast, the officers in this case lied to appellant not merely about the scope of their investigation but even about their identity as homicide detectives. They affirmatively misrepresented themselves to be sex crime investigators and told appellant that they were merely performing a routine evaluation of persons who had been convicted of sex crimes in the past and were now nearing release from prison in order to determine whether they needed to keep an eye on them in the future. They led appellant to believe he was being questioned only about prior convictions for sex crimes as part of a routine pre-release evaluation. Unlike the situation in *Tate*, where the homicide victim was at least identified and described as "hurt," the homicide victim in this case was never even identified as a subject of the interrogation. The first oblique mention of Suzanne McKenna did not occur until an hour into the interrogation, and then only as a matter-of-fact question regarding whether appellant recalled that there had been a homicide in the neighborhood around the time of the spousal abuse incident for which he was then completing his sentence.

Unlike the defendant in *Tate*, appellant was completely misled as to the purpose and potential consequences of his waiver. Based upon the representations made to him by the officers, appellant reasonably believed he was waiving his *Miranda* rights solely for the purpose of answering questions about his prior sex crime convictions, not about a homicide for which he had never been charged, nor about any incident involving Suzanne McKenna. Appellant would have been fully justified in concluding that his waiver only permitted the officers to use against him statements he made about the prior convictions which might expose him to prosecution on an additional charge related to one of those past convictions. The misrepresentations vitiated the waiver because petitioner was entirely

misled about the scope of the interrogation, the target offense under investigation, the nature of the offense itself, the identities of the officers to whom he was speaking, and the potential consequences of speaking with them. If this was not the sort of "trickery" and deceit that *Miranda* held would vitiate a waiver, then such a thing does not exist.

The trial court's conclusion that the mention by the officers of appellant's "past crimes" was sufficient to inform appellant of the scope of the investigation was not merely unreasonable but completely absurd. In the context of the March 21 discussion, any reasonable person in appellant's situation would have understood that the officers' numerous references to section 290 and sex offender registration meant that they were there to talk to him about his prior convictions for sex crimes, not new crimes under investigation for which he had never been charged, and certainly not homicide offenses which had nothing to do with registration as a convicted sex offender.

c. To the extent *Tate* applied a rule designed to test the admissibility of confessions induced by false statements to a situation involving deception employed to obtain a waiver of *Miranda* rights, the case was wrongly decided.

Appellant also respectfully submits that to the extent this court in *Tate* interpreted *Colorado v. Spring* as permitting affirmative misrepresentations as long as they were not reasonably likely to induce false statements, this court's interpretation was incorrect.

First, appellant notes that it is not entirely clear from *Tate* whether this court actually intended to or did hold that trickery or deceit employed to induce a waiver of *Miranda* rights is acceptable unless "the deception is of a type reasonably likely to procure an untrue statement." (*People v. Tate, supra*, 49 Cal.4th 684.) This court's discussion focused on the fact that

Spring had left open the question of whether affirmative misrepresentations to obtain a waiver are permissible, but noted that two cases cited in *Spring's* footnote 8 as well as prior decisions of this court had held that deception during *interrogation* does not invalidate a confession. (*Ibid.*) Thus, *Tate* does not squarely state that trickery or deceit to obtain a *waiver* of *Miranda* rights is acceptable.

However, to the extent that *Tate* can be read as permitting police misrepresentations to obtain waivers as long as the deception is unlikely to induce false statements, the case misapplied a rule which this court originally devised many decades before *Miranda* in order to determine the admissibility of allegedly coerced confessions. The rule never applied to waivers of *Miranda* rights, is flatly inconsistent with *Miranda* and this court's own decision in *Honeycutt*, and if applied to waivers of *Miranda* rights, the rule violates the clear language of *Miranda* itself.

Once again, the United States Supreme Court held in *Miranda* that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (*Miranda v. Arizona, supra*, 384 U.S. at p. 476.) The high court has never created an exception to this rule for deceptions that are unlikely to result in false statements. In *Spring*, which this court discussed in *Tate*, the United States Supreme Court held only that mere *silence* by police officers about one of the crimes under investigation did not constitute the "trickery" that *Miranda* held would vitiate a waiver. The high court in *Spring* expressly left open the question whether "affirmative misrepresentation by law enforcement officials *as to the scope of the interrogation*" would invalidate a Miranda waiver. (*Colorado v. Spring*, *supra*, 479 U.S. at 576, fn. 8; emphasis added.) The fact that the court left

the question open indicates that in a proper case, the court very well might find that intentional misrepresentations as to the scope of an interrogation would vitiate a waiver. Nothing in *Spring* backed away from the *Miranda* prohibition on trickery, cajolery, or threats to obtain a waiver. Moreover, the court did not so much as hint that it might make a difference in the result if the affirmative misrepresentations made to obtain the waiver were not likely to produce a false statement. Furthermore, unlike the situation in this case, in *Spring* and *Tate* the officers did not intentionally deceive the defendant as to the purpose and scope of the interrogation, and it was therefore unnecessary in either case to address the question of whether affirmative misrepresentations vitiated a waiver.

Appellant has attempted to trace the source of the rule discussed by this court in *Tate* and believes that this court derived the rule, not from any United States Supreme Court case, but rather from a line of coerced confession cases that appear to be descended from this court's decision in *People v. Castello* (1924) 194 Cal. 595, a case decided nearly 40 years before *Miranda.*

In *Castello*, this court was asked to reverse a conviction of theft because police had induced confessions from the defendants by falsely telling them that they knew of people who had seen them in the act of stealing. This court reviewed such venerable authorities as *Greenleaf on Evidence* and permitted the statements to stand, stating as follows:

> The rule as to confessions induced by deceptive methods or false statements is fully stated in the following paragraph:
>
> "The fact that a confession was procured by the employment of falsehood by a police officer, detective, or other person does not alone exclude it; nor does the employment of any artifice, deception or fraud exclude it, if the artifice or fraud

> employed was not calculated to procure an untrue statement. Neither does the fact that a confession was obtained by a promise of secrecy render it incompetent, if there was no motive to produce a false statement." (16 C. J., p. 729.)[15]
>
> "The object of all the care which excludes confessions which are not voluntary, is to exclude testimony not probably true 'but where, in consequence of the information obtained from the prisoner, the property stolen, . . . or any other material fact is discovered, it is competent to show that such discovery was made conformable to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there.'" (1 *Greenleaf on Evidence*, 16th ed., sec. 231, p. 369.)

(*People v. Castello, supra*, 194 Cal., at p. 602.)

As the foregoing demonstrates, at the time *Castello* was decided this court was concerned only with whether deceptions during *interrogation* would affect the admissibility of a confession. This court was not concerned with *Miranda* waivers at all; no such thing as a *Miranda* warning or waiver would exist for nearly four decades. Indeed, this court in *Castello*

15/ This court's citation to "C.J." referred to volume XVI of the 1918 edition of the venerable legal encyclopedia *Corpus Juris*. The relevant portion of the note cited by *Castello* stated that "The fact that a confession was procured by the employment of falsehood by a police officer, detective or other person does not alone exclude it; nor does the employment of any artifice, deception, or fraud exclude it, if the artifice, deception, or fraud employed was not calculated to procure an untrue statement." The note cited only 19th and early 20th Century cases from other states and Ontario, Canada, and appellant therefore assumes *Castello* was the first California case to apply the rule.

was not even concerned with whether confessions were voluntary or coerced, but merely whether their contents were trustworthy. For this court in *Castello*, whether statements might have been obtained through threats, trickery, deceptions, or even the third degree itself was of no consequence. This is unsurprising in view of the fact that at the time this court adopted its rule permitting police trickery and deception during interrogations, the United States Supreme Court had not yet articulated the required warnings officers must administer prior to custodial interrogations. Only decades later did the United States Supreme Court begin to focus its attention on whether the requirements of the Fifth and Sixth Amendments required that defendants be given warnings and an opportunity to invoke or waive their rights in order to level the playing field. Only in 1963 did the *Miranda* decision require that suspects be advised of their rights before interrogation, and only then did the United States Supreme Court condemn obtaining waivers of those rights through threats, deception, and cajolery.

However, as noted above, *Miranda* itself explicitly condemned trickery, cajolery, and deception by law enforcement officers employed in an effort to obtain a waiver of a suspect's rights. Neither *Castello* nor its progeny have any application to the analysis of the voluntariness of waivers of *Miranda* rights because no such rights yet existed when that case was decided. To the extent that *Castello's* rule permitting statements to be admitted in spite of police deceit and trickery during interrogation was extended by *Tate* to also apply to waivers of *Miranda* rights, that extension was expressly forbidden by *Miranda* itself and violates the Fifth and Fourteenth Amendments.

Certainly, nothing in *Colorado v. Spring* supports a conclusion that affirmative misrepresentations to obtain waivers are only impermissible if

they are reasonably likely to induce a false statement. Quite to the contrary, in *Spano v. New York*, one of the two cases the United States Supreme Court cited in *Spring's* footnote 8, the United States Supreme Court observed that

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

(*Spano v. New York*, *supra*, 360 U.S. at pp. 320-321.)

In short, contrary to the implication of *Castello*, it is not merely the likelihood of false or untrustworthy statements that render affirmative misrepresentations by law enforcement officers improper. Instead, *Miranda, Spring,* and *Spano* indicate that such affirmative misrepresentations implicate other important civic values. Among other concerns, such misrepresentations constitute a form of misconduct by officers that society seeks to discourage, they are likely to overbear the will of suspects and therefore produce involuntary confessions, and they constitute a kind of unfairness that shocks the conscience and brings law enforcement and the justice system into disrepute because the principle of due processes requires a commitment by the state to treat its citizens fairly.[16]

---

[16]/ The United States Supreme Court has long recognized that when government brings to bear "the awesome power of the state" against an individual, it has an obligation to play fair. (*Brewer v. Williams*, (1977) 430 U.S. 387, 409 (Marshall, J., concurring.) "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." (*Brady v. Maryland* (1963) 373 U.S. 83, 87); "For my part I think it a lesser evil that some criminals should escape than

All of these dangers are present here. Unlike the situation in *Spring* where officers merely remained silent about one of the crimes they were investigating, the officers in this case committed egregious affirmative misconduct. They intentionally misrepresented to appellant not only what they were investigating but even who they were. They concealed the fact that they were homicide investigators investigating the McKenna killing and instead told petitioner they were sex crime investigators conducting a routine pre-release evaluation. They did so for the sole purpose of persuading appellant to waive his *Miranda* rights and talk to them. This is precisely the kind of "trickery" that *Miranda* expressly proscribed.

Indeed, if police officers are to be permitted to lie and misrepresent the entire purpose of the interrogation in order to obtain a waiver, it is difficult to see what purpose is served in administering warnings and obtaining a waiver. The whole point of advising a suspect of his rights and obtaining a waiver is to ensure that a suspect makes a voluntary, knowing, and intelligent decision regarding whether or not to waive his rights and talk to officers. When police officers lie in order to obtain a waiver, a subsequent statement by the defendant will be suppressed precisely because the police falsehood means that the statement was not voluntary, knowing, or intelligent. (See, e.g., *Escobedo v. Illinois* (1964) 378 U.S. 478 [confession excluded when police lied to suspect, telling him that his lawyer didn't want to see him].)

---

that the Government should play an ignoble part." (*Olmstead v. United States* (1918) 277 U.S. 348, 470, Holmes, J., dissenting). The courts' duty to formulate proper standards for law enforcement is "an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." (*Sherman v. United States*, (1958) 356 U.S. 369, 380, Frankfurter, J., concurring.)

Furthermore, it is clear from the record that appellant would *not* have waived his *Miranda* rights if he had actually been told who the officers were and what they were investigating. After the officers had tricked appellant into admitting he had sex with McKenna and began to focus on her homicide– i.e., when appellant suddenly had an inkling of what they were actually investigating– appellant immediately invoked his right to counsel and terminated the interrogation. (3RT 330-332, 423.) Plainly, neither the waiver nor the statement were voluntary.

Moreover, in addition to trickery and deceit, appellant's waiver is also tainted by evidence of police coercion. In obtaining this waiver, Chicoine plainly implied that there might be consequences for failing to cooperate. While appellant was reviewing the waiver form, he asked Chicoine whether routine evaluations like the one in which he thought he would be participating were "for everybody now? All the sex registrants?" (People's Pretrial Exhibits 3 and 3A [p. 2].) The following exchange ensued:

> Dudek: For Alameda County this is our normal procedure.
>
> Chicoine: I listen to every single sex registrant that comes across my desk. Every single one and I'm constantly on the phone. I have two files full.
>
> Dudek: When he stepped out[,] like I told you [,] it's a hot topic.
>
> Chicoine: Ok, it is. As of right now it's becoming even more of a hot topic. Here's one of the things that I do just so you know, is that, you know, especially when you're out there, your whole goal in life is you wanna stay in my file. I mean you're gonna be there for life any how.
>
> Appellant: You'll be there for life anyway?

> Chicoine: Right. But you wanna stay [i]n the filing cabinet.
>
> Appellant: Yeah.
>
> Chicoine: If you're causing a problem or if I'm getting called or whatever else, then its put in a red file and it sits on my desk, and I have 4 or 5 of them on my desk at any time. And those are the guys that I'm looking for. Those are the guys that I'm going after. So, you the goal...objective is to stay in the files and stay off my desk. Correct?

(People's Exhibit 3A, pp. 2-3.)

Chicoine's lies about his supposed practices in sex crime investigations not-so-subtly threatened appellant that if he failed to cooperate and talk to the officers, appellant could end up in one of Chicoine's imaginary "red files" and become one of the "guys I'm going after" in the future and potentially for the rest of his life. (People's Pretrial Exh. 3A [p. 3].) Apart from the fact that all these representations by Chicoine were lies made solely to deceive appellant into signing a waiver form, these statements implied negative consequences for appellant if he chose not to speak to the detectives and therefore were also coercive. These statements, made in response to appellant's questions as he was reviewing the waiver form in order to induce him to waive his rights, rendered the waiver involuntary for this separate reason.

Accordingly, the trial court erred in admitting appellant's March 21 statement into evidence. The statements appellant made on March 21 were neither voluntary nor admissible. They resulted from precisely the kind of trickery and coercion the United States Supreme Court condemned in *Miranda v. Arizona*. To the extent that this court's decision in *Tate* can be read as requiring a showing of a "reasonable likelihood of false statement"

before police deception will vitiate a waiver, that decision is inconsistent with United States Supreme Court precedent and must be clarified or abandoned. Reversal is required on this basis alone.

2. After Appellant's Unequivocal Invocation of His Right to Counsel on March 21 All Further Interrogation Was In Violation of Appellant's Fifth and Fourteenth Amendment Rights, Rendering All of Appellant's March 31 Statements Inadmissible

As noted in the previous section, after appellant admitted to having had sexual intercourse with the victim shortly before her death and realized from the nature of the questions that the officers' purpose was to trick him into revealing incriminating information about the McKenna killing, appellant unequivocally invoked his right to counsel. As required by *Miranda* and *Edwards*, the officers terminated the interview. (3RT 332-333.)[17]

From that point forward, federal constitutional principles prohibited any further questioning of appellant unless one of three conditions occurred: (1) appellant's attorney was present (*Edwards v. Arizona, supra*, 451 U.S. at p. 484-485); (2) there was a break in custody sufficient to dissipate the inherently coercive effect of custody (*Maryland v. Shatzer* (2010) 559 U.S. 98, 130 S.Ct. 1213, 1222-1225; *People v. Storm* (2002) 28 Cal.4th 1007, 1023-1024); or (3) appellant himself reinitiated communication with officers. (*Edwards, supra*, 451 U.S. at p. 484-485.)

---

[17]/ Under *Davis v. United States, supra*, 512 U.S. at p. 459, an unambiguous invocation of the right to counsel is one that a "reasonable police officer . . . would understand . . . to be a request for an attorney." Detective Chicoine testified that he understood appellant's March 21 invocation to be a request for an attorney. (3RT 333.) It is undisputed that this was an invocation of the right to counsel.

It is clear that neither of the first two conditions are applicable here. The record shows conclusively that no defense counsel was present at any of the four interviews[18] of appellant on March 21 and March 31, 2003. With respect to the second condition, appellant was also continuously in custody during the ten-day period between the March 21 invocation of the right to counsel and March 31, the day Chicoine and Dudek arrived to transport appellant to the station. Thus, there was no break in custody. Indeed, as appellant will discuss below, appellant's custodial status was actually changed for the *worse* after his invocation of the right to counsel, thereby applying additional coercive pressure on him to change his mind and speak to the officers.

Contrary to the officers' later contentions, there was also no evidence of reinitiation to overcome the *Edwards* presumption that appellant's subsequent statements were involuntary. Although Detective Chicoine testified that appellant had reinitiated a conversation with the officers when they came to pick him up at the San Quentin Reception Center, as a matter of law this did not constitute an initiation of contact by appellant. Appellant was in continuous custody. The officers came to get him; he did not go to them.

The district attorney argued, and the trial court appeared to believe, that it was somehow significant that on March 21, after being told that if he wanted to speak to the officers he would have to initiate the contact, appellant asked for the officers' business cards. This fact is completely meaningless. Whether appellant possessed or asked for business cards does

---

[18]/ The initial interview, by officers Chicoine and Dudek, took place at San Quentin on March 21. On March 31, for purposes of the present analysis, there were 3 interviews: (a) during the transport from San Quentin to ETS, (b) at ETS by Chicoine and Dudek, and (c) at ETS by deputy district attorney Andy Sweet and investigator Lynne Breshears.

not even begin to suggest that he initiated further contact with the officers. Appellant did not call the officers or otherwise attempt to contact them. His next contact with them occurred not as a result of anything appellant did, but because the officers obtained an arrest warrant, came to the prison, placed him under arrest, and transported him to Eden Township Station. None of this was appellant's idea. Because he remained in continuous custody– indeed, an even more restrictive and coercive form of custody at that– the *Edwards* presumption of involuntariness continued to apply to him.

Moreover, and contrary to the ruling of the trial court (4RT 601-602), Chicoine's testimony regarding appellant's unrecorded, supposed "reinitiation" statement in the Reception Center is simply not credible. Chicoine's testimony is severely undermined not only both by the subsequent tape-recorded statements of the various parties but also by Chicoine's own written report, which makes no mention whatsoever of any such reinitiation at San Quentin's Reception Center. It is simply inconceivable that a highly experienced detective like Chicoine, with more than two decades of experience at that point, would have failed to mention in his report that a suspect who had once cut off questioning and invoked his right to counsel had later reinitiated communications if such a thing had actually happened.

Chicoine's testimony is further undermined by the fact that on several points his claim that appellant reinitiated communications at the Reception Center is inconsistent with the content of the tape recordings. As will be explained in more detail *infra*, the tape recording makes clear that Dudek initiated the conversation by asking appellant it he had any questions. As a matter of law, this was interrogation. (*Rhode Island v. Innis*

(1980) 446 U.S. 299, 301 ["'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely [from the suspect's perspective] to elicit an incriminating response from the suspect']; *People v. Boyer* (1989) 48 Cal.3d 247, 273 ["interrogation" includes both direct questioning and its "functional equivalent"].) However, when appellant took the bait and asked questions, Dudek then asked whether appellant was waiving his rights and now wanted to speak to him. That contradicts Chicoine's claim that appellant had previously reinitiated communications.

Furthermore, as will be discussed in more detail below, even if appellant *had* made the supposed reinitiation statement that Chicoine claimed he had made, no further incriminating statements were made between that point and the moment in the car ride when appellant *again* invoked his right to counsel. However, the fact that Chicoine lied on the stand in claiming that appellant had reinitiated contact at the Reception Center is significant because it severely undermines the credibility of Chicoine's testimony in other respects.

Of course, even after appellant had once again clearly invoked his right to counsel, the officers ignored the invocation and engaged in an impermissible and unrelenting campaign designed to "soften up" appellant in order to elicit a waiver and statement from him on March 31. For these reasons, appellant's subsequent waiver and statements on March 31 were involuntary and were obtained in clear violation of his Fifth Amendment rights.

A more detailed discussion of each of these points follows.

a. There was no break in custody sufficient to allow further police-initiated interrogation.

Appellant was incarcerated at San Quentin State Prison at the time of his initial interrogation on March 21, 2003, and he remained incarcerated there until he was arrested 10 days later, on March 31. (3RT 309, 358.) As a matter of law, there was no "break" in custody sufficient to defeat the *Edwards* presumption of involuntariness.

Before fully analyzing the circumstances pertaining to the March 31 contact between appellant and these two officers, it bears repeating that once an accused has invoked his right to counsel, all interrogation must cease, and a subsequent waiver of the right "cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights." (*Edwards v. Arizona, supra*, 451 U.S. at p. 484.) Once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," and unless there has been a break in custody, *Edwards* creates a presumption that "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' of custody and not the purely voluntary choice of the suspect." (*Arizona v. Roberson*, (1988) 486 U.S. 675, 681; see also *People v. Thomas* (2012) 54 Cal.4th 908, 926 .) This is true even when the defendant again waives his *Miranda* rights and his statements might otherwise be deemed voluntary under traditional standards.

> *Edwards* sets forth a 'bright-line rule' that all questioning must cease after an accused requests counsel. (Citation omitted.) In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'– explicit or subtle, deliberate or unintentional– might otherwise wear down the accused and persuade him to incriminate himself

> notwithstanding his earlier request for counsel's assistance. (Citation omitted.)

(*Smith v. Illinois* (1984) 469 U.S. 91, 98.)

Further, a suspect's responses to further questioning cannot be used to cast doubt upon the adequacy of his initial request. (*Smith v. Illinois* (1984) 469 U.S. 91, 97-99.) Even when the initial request is ambiguous or equivocal, all questioning must cease, except inquiry strictly limited to clarifying the request. (*United States v. Fouche* (9th Cir. 1985) 776 F.2d 1398, 1405, *after remand*, 833 F.2d 1284, 1287 (1987); *United States v. Nordling* (9th Cir. 1986) 804 F.2d 1466, 1470.)

As set forth above, appellant unambiguously invoked his right to counsel on March 21 and was transported by the officers on March 31. During the interim, he remained incarcerated at San Quentin State Prison. Thus, appellant was continuously in custody from the time he invoked his right to counsel on March 21 until the time he was reinterrogated at Eden Township Station.

The United States Supreme Court recently decided a case that is instructive on the question of whether and under what circumstances law enforcement officers may recontact a prison inmate who has previously invoked his right to counsel. In *Maryland v. Shatzer, supra*, a detective tried to question a prison inmate named Shatzer, who was incarcerated in state prison on unrelated charges, about his alleged sexual abuse of his son. (*Id.* at 1215.) The suspect invoked his right to counsel and the interrogation was terminated. Shatzer was released back into the general prison population and the sexual abuse case about which the detective sought to question him was closed. (*Id.* at 1216.) Two and a half years later, another detective reopened the case and again attempted to interrogate Shatzer, who

was still incarcerated. (*Ibid.*) This time Shatzer waived his rights and made inculpatory statements. (*Ibid.*)

The United States Supreme Court found that the two-and-a-half year break between the invocation and the police-initiated interview was sufficient to render *Edwards* inapplicable. However, the court felt it necessary to prescribe some minimum "bright-line" period of time which must follow an invocation of the right to counsel in order to constitute a "break" in custody in the case of a person who is already incarcerated in a jail or prison. The court held that a when an accused is incarcerated on other charges, a 14-day period between invocation and police initiated contact is required to terminate the *Edwards* presumption of involuntariness. (*Id.*, 130 S.Ct. at p. 1223.)

In this case, only ten days passed between appellant's unequivocal invocation of his right to counsel on March 21 and his interrogation on March 31, 2003, and during that time, appellant remained continuously incarcerated at San Quentin State Prison. Under *Shatzer,* these facts alone are enough to show that there was no break in custody sufficient to allow further questioning without the presence of counsel or reinitiation by appellant. While appellant believes that the trial court was both wrong and unreasonable in accepting Detective Chicoine's perjured testimony about appellant's alleged statement at the Reception Center, the *Edwards* presumption of involuntariness continued in full force as a matter of law on March 31 and was not rebutted by the prosecution. Indeed, there is no indication in the court's ruling or the previous discussion with counsel that the court ever considered the *Edwards* presumption or understood that the people had the burden of overcoming it.

Shatzer is a 2010 case that had not yet been decided when the trial court ruled on the defense motion in limine. However, this does not alter the analysis. *Edwards* itself held that the presumption continues to exist until there is a break in custody. *Shatzer* merely limited the presumption to 14 days in the case of persons who were continuously incarcerated on other charges at the time of the invocation. Thus, even without *Shatzer's* clarification that permits prison inmates to be re-interrogated after 14 days, the officers could not again *Mirandize* or interrogation appellant because the *Edwards* presumption that arose from his March 21 invocation continued in full force.

Moreover, even without the *Shatzer*, there are additional reasons for concluding that there was no break in custody in this case. Detective Chicoine testified at the suppression hearing that upon leaving the prison on March 21, the officers had a conversation with correctional staff about the nature of the allegations against appellant, and this caused appellant's transfer to "a more secure situation" within the prison in anticipation of a criminal complaint against appellant. (3RT 339.) At the hearing, Chicoine testified as follows:

> DISTRICT ATTORNEY: Now, after Molano was no longer in your presence, did you give any– make any suggestions to any of the correctional staff with regard to Mr. Molano's classification?
>
> CHICOINE: We told them a basic overview of what had occurred in the room, so that they would have an idea of what they would need to do for security reasons or other reasons and that was about it, and then they will reclassify him per their guidelines.
>
> DISTRICT ATTORNEY: Did you attempt to place any sort of a hold on Mr. Molano on March 21st, 2003?

CHICOINE: No.

THE COURT: Let me ask you a question, you said that you spoke to a security officer and that this was for a classification purpose?

THE WITNESS: We spoke to Officer Lemos who is the liaison, and it was so that he understood what was going on with an inmate that he was in charge of.

THE COURT: All right. In speaking to him, did you have any understanding with that officer that Molano would or would not be reclassified in terms of his security status?

THE WITNESS: Yes.

THE COURT: And what was that understanding?

THE WITNESS: The understanding was that standard procedure– they would place him in a more secure situation, because of the possibility of a criminal complaint coming down in the future.

THE COURT: Did you have any knowledge as to whether that would entail a loss of privileges?

THE WITNESS: No.

(3RT 338-339.)

The fact that appellant's custodial status was made "more secure" at Chicoine's behest after the March 21 interrogation is significant for purposes of the *Shatzer* analysis. In *Shatzer*, one of the factors the court felt justified permitting reinitiation of interrogation by police at least two weeks after the invocation of the right to counsel was that incarceration for prison inmates is unlike detention for custodial questioning by an otherwise free suspect because, for inmates, incarceration is their normal routine. As

explained by Justice Scalia:

> Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population [following interrogation], they return to their accustomed surroundings and daily routine– they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

(*Maryland v. Shatzer*, *supra*, 130 S.Ct.at p. 1224.)

In this case, appellant was *not* returned to his "accustomed surroundings and daily routine" but was instead placed in "a more secure situation" as a result of Chicoine's and Dudek's conversation with Officer Lemos at the prison. Thus, far from being returned to his former routine, appellant's surroundings and routine were substantially altered for the worse after his invocation of the right to counsel. (See page 43, fn. 9, above.) Only a remarkably naive person, and certainly not an experienced homicide detective like Chicoine, could fail to understand that at San Quentin, or indeed at any prison, a "more secure" situation is a euphemism for heightened security and a consequent loss of privileges. Whether Chicoine wanted appellant to be placed in this "more secure situation" or whether it was, as he testified, the prison's "standard procedure," the effect was increased pressure on appellant to talk. Appellant was effectively in Chicoine's and Dudek's constructive custody from March 21 until they delivered him to Eden Township station on March 31. More significantly, from appellant's perspective the transfer to "more secure" conditions was effectively a punishment for his invocation of the right to counsel.

Under Title 15 of the California Code of Regulations, sections 3335

and 3377.2(b)(5)(A), the options for a "more secure situation" for appellant when Chicoine spoke to prison staff on March 21 were either administrative segregation or "Control A Custody." Either of these classifications would have restricted appellant's movement and privileges, resulting in a loss of contact visits and family visits, restricted access to property, heightened supervision, and restricted participation in programing and work. (Cal. Code. Regs., tit. 15, §§3170.1(f), 3177(b)(2), 3190(t), 3377(2)(B), 3372(C). However, it appears more likely that appellant was placed in administrative segregation.

Control A Custody is required under the regulations for inmates on whom a "felony hold" has been ordered. (California Code of Regulations, Title 15, section 3343.) Since Chicoine testified that he did not have a "hold" placed on appellant (3RT 338), appellant presumably would not have been placed in Control A Custody but in administrative segregation. In prison argot, administrative segregation is known as "AdSeg" or "the Hole."[19] Even if Chicoine had not specifically known what administrative segregation was, it requires no imagination for a highly experienced officer

---

[19]/ Section 3343 of Title 15 of the California Code of Regulations sets forth the conditions of administrative segregation. Notably, inmates in administrative segregation are not permitted to have contact visits with visitors, may only receive one hour of yard time per day for five days a week, their phone calls may be restricted, they may have limited access to institution programs and services, and they are subject to daily cell inspections.

Under section 3343, inmates can be placed in administrative segregation for up to ten days before they must be given a hearing before the institutional classification committee. Based on Chicoine's testimony, appellant was picked up exactly ten days after being placed in a "more secure situation," suggesting that appellant was picked up by the officers on March 31 because on that date he would have been required to have a hearing in order to remain in administrative segregation. (The warrant for his arrest had been issued four days earlier, on March 27, 2003.)

to understand that, far from being restored to what *Shatzer* described as his "accustomed surroundings and daily routine," appellant's circumstances took a decided turn for the worse when he was placed in a "more secure situation" following his invocation.

The fact that appellant was subjected to "a more secure situation" after his invocation also sent appellant a powerfully coercive message: we are throwing you in the hole until you change your mind and agree to talk to us. From appellant's point of view, he was being punished for invoking his right to counsel and refusing to speak. The change in his custodial status instigated by Detective Chicoine put pressure on appellant to waive his right to counsel and talk. Thus, apart from the fact that even under *Shatzer*, the *Edwards* presumption of involuntariness would continue to attach for another 14 days after he invoked his right to counsel, the coercive pressure of the more restrictive conditions of confinement would have independently vitiated any subsequent waiver.

b. Appellant did not reinitiate contact with officers.

Detective Chicoine testified that when the officers first encountered appellant in the prison's "receiving area," appellant stated "I want to talk to you now," and told the officers that "he had been meaning to call us and that he had already talked to a counselor." (3RT 343.) Detective Chicoine testified, "I just figured it was a continuation of what he had said before . . . I believe[d] that he was reinitiating – he wanted to reinitiate the talks that we had talked with him before." (3RT 344.)[20] As noted above, the

[20]/ As previously noted, the tape recording of the March 21 interview indicates that appellant told the officers he would contact a correctional counselor or the captain if he wanted to reinitiate contact with the officers (People's Pretrial Exh. 3), but made no mention of a psychologist or other religious or therapeutic counselor. The most charitable interpretation of this testimony is that Detective

evidence in this case does not support Chicoine's self-serving testimony regarding appellant's change of heart in the receiving area. Detective Chicoine testified that at the time of the suppression hearing he had worked in law enforcement for 24 years and during that time had received training on writing accurate police reports which document all important facts. He further testified that writing police reports was a regular part of his duties during his more than two decades in law enforcement. (3RT 391-392.) Chicoine also testified that after arresting appellant at San Quentin Prison on March 31, he prepared a report memorializing his contact with appellant on that day. (3RT 458; Defense Pretrial Exh. C.) With regard to the contact in the reception center, Chicoine's report states as follows:

> [Appellant] had previously invoked his right to an attorney during an interview with Detective Sergeant Dudek and I, on 3/21/03. At that time, Molano told us that he intended to call us and tell us everything about his involvement with Suzanne McKenna's murder, but said he wanted to have a counseling session with his psychologist first.[21] Dudek explained to Molano that we would not be able to contact him, and that if wanted to tell us anything regarding the crime, he would have to contact us.
> On 3/31/03 about 1300 hours, Dudek and I arrested Molano at San Quentin State Prison, pursuant to the arrest warrant [issued on March 27, 2003]. Dudek and I transported Molano to the Eden Township

---

Chicoine innocently misunderstood appellant's reference to contacting a correctional counselor or the captain as a request to speak to a psychologist. However, in view of the numerous discrepancies between Chicoine's recollections, on the one hand, and the tape recordings and his own written report, on the other, coupled with his admission that he had intentionally lied to petitioner in order to get him to waive his Miranda rights on March 21, appellant submits that his testimony on this point was another lie intended to persuade the judge to admit appellant's statements into evidence and was unworthy of belief.

[21]/ As previously noted, the tape recording of the 3/21/03 interview makes clear that in fact appellant did not say (a) that he wanted a counseling session with a psychologist, or (b) that he intended or or wanted to tell the officers anything further about Suzanne McKenna. (See pp. 13-15, fn. 4, above.)

Substation, in San Leandro, for processing."

(Ibid.)

Detective Chicoine's contemporaneous report made no mention whatsoever of any conversation with appellant inside the reception center on March 31, much less a conversation in which appellant volunteered to the officers that he had spoken with a counselor and now wanted to talk to them. Certainly, if appellant had actually made a statement revoking his previous invocation of the right to counsel in the reception center, a seasoned, experienced homicide detective would have noted such a significant event in his report. The absence from the report of any indication of this conversation severely undercuts the credibility of this admitted liar.

Perhaps more significantly, only a few lines later, Chicoine's report makes it very clear that at the time he left San Quentin with Dudek and appellant, he did not believe that appellant had yet reinitiated contact with the officers. Chicoine's report states that "[d]uring the drive, Molano asked questions regarding his case. Because Molano was re-initiating contact with us, with the potential of revealing details of his involvement in McKenna's murder, Dudek explain to him that we would hold off from discussing any information we had or he had, regarding the case, until we re-read him his rights at ETS." (Defense Pretrial Exh. C.) In short, his own contemporaneous report indicates that Chicoine did not understand appellant to be reinitiating contact until after he was being transported in the car.

However, even this portion of the report is contradicted by the officers' own audio recording of the conversation. There is nothing in the

tape recording that substantiates Chicoine's testimony that appellant initiated contact or expressed a willingness to talk. Instead, the recording makes it clear that, contrary to Chicoine's report and testimony, it was *Dudek* who initiated the conversation with *appellant* in the car. (People's Pretrial Exhs. 4 and 4A [p.1].) Indeed, the recording shows that Sergeant Dudek began to question appellant within moments of entering the car. Dudek initiated the conversation in the car by inviting questions from appellant, a technique that nevertheless constitutes interrogation under *Rhode Island v. Innis*, and then asking appellant direct questions. Even after appellant took the bait and asked Dudek to explain what he was "facing," the conversation was dominated by Dudek, who was plainly trying to persuade appellant to waive his rights and talk. By appellant's count, appellant spoke only 88 words during the entire conversation, whereas Dudek spoke 1,063. The recording– though not the district attorney's transcript– also shows that Sergeant Dudek refused to discontinue questioning even after appellant again invoked his right to counsel.

The recorded exchange from the time the officers and appellant entered the car until appellant's second invocation follows:

DUDEK: Any questions or anything Carl?

APPELLANT: I'm in limbo.

DUDEK: You're in limbo?

APPELLANT: About my case.

DUDEK: Is that a good thing or a bad thing being in limbo?

APPELLANT: I don't know.

DUDEK: Know what's going on or no?

APPELLANT: No, run it down to me.

CHICOINE: You're going to be arraigned, hopefully on Wednesday.

APPELLANT: What's it look like I'm facing?

DUDEK: What's it look like you're facing? Um, you know, obviously we can't tell one way or the other, but I don't know. You understand the charge, right?

APPELLANT: Um-hmm.

DUDEK: I've seen better, I seen worst. That's a pretty chicken shit answer but . . . I mean, obviously we'd like to have an explanation but we're not in that position because, uh, like you said the other day, you'd like to give an explanation then we're gonna give you another opportunity once we get to our station, that's kinda where we're at right now. And obviously you know, we're a little bit more at liberty to tell you some things that we didn't tell you the other day that we can tell you now. That'll come out if you want it to. But you kinda hold the, you . . . you're kinda in control here right now to say 'yeah, go ahead and tell me' or ' I don't give a shit I'll find out sooner or later' so...

APPELLANT: Tell me.

DUDEK: Huh?

APPELLANT: Tell me.

DUDEK: I'm sorry I'm half deaf as it is.

APPELLANT: I said you can tell me.

DUDEK: Alright. Does that mean you want to talk to us again or that means you just wanna...? Let me explain what's gonna go on now and then maybe it'll both answer our questions. You're gonna go back, we're gonna put you in a

interview room, we're gonna read you your rights again, we're gonna go over the fact that we were out to talk to you a week ago, ten days ago actually it is now, and at that point you talked to us a little bit and then you said hey at this point here you want to talk to your counselor you wanted to talk to whatever and - and we'll go over that again. If at that point you say I want to know a little bit more, I want to talk to you about it a little bit more, then we'll go from there, and that's where we're at OK?

APPELLANT: All right.

DUDEK: Even if it's one-sided and you say 'hey I want to talk to you' and you don't say nothing, you got to tell us 'I want to have the conversation be more of a two-sided conversation', because I think that's only fair to us and you been in the system, you know what I mean? I'm not here to clown you like I told you the other day, you know. I think it's only right that you say 'yeah, let's go ahead, I want to hear what's up', and then once you give us that, if that's what you decide at one point, again, 'you know what I've heard enough' and then we stop again. So, I think truthfully, and you know this too and you even said it, that you know you, I think you did want to go on with a little bit more and I think there's probably stuff that you do want to share with us that we may not know about, but ultimately, you know the bottom line is to is, is ultimately there's always a story behind everything. And unfortunately when it comes down to the charging part of it where we're at, this is kinda a one shot deal here. You get your opportunity to say 'this is where we're at', or 'let's see how it shakes out' and then that's a decision you, Carl Molano, the, the 46, 47 year old dude's gotta make. I can't, Scott or Ed can't do that for you, you gotta do it on your own, you know what I mean?

CHICOINE: Right now there's a story being told that doesn't have your side. You know what I mean.

DUDEK: I'll be more than happy and so will Ed, we'll be more then happy to share exactly you know how this story

even started. Why are we at this point after so many years. And - and - you know a lot of that has to do with - with your family and - and - and -and it's only fair that you know that. Cause you are gonna know and- and my credibility and Ed's credibility with you is gonna mean everything as far as this goes. If you think I'm a big bull-shitter and horse's ass, and you think he is, there's no sense of us even going any further, you know what I mean? If you're gonna find that what we tell you is ultimately you know, we're not bull-shitting you so–

APPELLANT: No, you guys have been straight up.

DUDEK: I mean we're trying to be that way cause this is what we do. You gotta do what you gotta do, we gotta do what we gotta do, you know what I mean? And - and I was up front with you when I said the other day, I said, I mean, I know Suzie's not an angel or wasn't an angel you know what I mean? And there could be some other factors but that's - and like Ed said there's two sides of every story. You know what I mean and I mean. You could tell right where we're going. We obviously talked to a bunch of people and somebody, you know, and quite frankly you know we talked to your ex-old lady. She told us some stuff and we talked to some other people, so, um, it's kinda - kinda where we're at.

APPELLANT: I ought to be arraigned Wednesday and assigned a–

DUDEK: Naw, you'll probably just be arraigned, they'll ask you your financial status, more than likely you'll be assigned a PD your next court appearance, but you could get one right off if you go on something like this, I'm not sure, probably you will, actually.

APPELLANT: Can I ask you a question?

DUDEK: Sure.

APPELLANT: They'll assign me a PD [public defender], right?

DUDEK: Right.

APPELLANT: I can sit down and talk with my PD [public defender] first and then talk with you all?

DUDEK: Yeah.

APPELLANT: Can I do that?

DUDEK: Yeah, that's one of your options and that's why we're here, you know.

APPELLANT: I would, I would feel more comfortable.

DUDEK: Ok. If you're gonna go through that, formally when we get to the tape, we're gonna say 'Carl Molano, you understand you're being charged with this' and then we're gonna go through the rights thing again, [and] it's at that time, you know, you can say 'hey let me talk to my PD and then I'll talk to you again,' but you know, but that's entirely up to you. We're here only to do shit on the up and up. If we don't do it on the up and up then we might as well throw it away right now, you know what I mean?

(People's Pretrial Exhs. 4 and 4A [pp. 1-4].)

The foregoing portion of the conversation in the car makes it clear that there was no communication on appellant's side that could be considered reinitiation at all. To the contrary, it was Dudek who initiated the conversation by asking appellant if he had any questions. Appellant then said, "I'm in limbo," and Dudek asked appellant whether that was a good thing or a bad thing. When appellant said "I don't know," Dudek asked appellant if he wanted to know what was going on. Understandably, appellant said yes. None of this is indicative of any reinitiation by appellant, but instead indicates prohibited interrogation by Dudek.

The foregoing portion of the conversation also makes it abundantly clear that Dudek never heard any statement by appellant at San Quentin that he interpreted as a reinitiation. First of all, in summarizing past events to describe "where we're at," Dudek never mentioned appellant's supposed reinitiation at San Quentin. Instead, he spoke about appellant's March 21 invocation and then repeated what the officers had said to appellant then, i.e., that it was now up to appellant whether he wanted to speak to the detectives again. If appellant had actually said only minutes earlier at San Quentin that he wanted to talk to the detectives, it is hard to believe that Dudek would not have mentioned the fact in his summary of "where we're at."

Moreover, Dudek's statements to appellant are flatly inconsistent with any prior reinitiation by appellant at the Reception Center. Dudek stated that he and Chicoine were "not in a position" to inquire further about appellant's explanation and that appellant was "in control" with respect to whether he wanted Dudek to tell him about the case. Moments later, when appellant said "you can tell me," Dudek immediately asked "does that mean you want to talk to us again?" Plainly, if appellant had actually told the detectives that he wanted to talk to them only minutes earlier in the Reception Center, as Chicoine claimed, Dudek would not have told appellant the officers were not in a position to ask questions, nor would he have asked appellant if his request for an explanation of the charges against him meant he had changed his mind and now wanted to speak with them.

Dudek's later statements also show he did not believe that appellant had reinitiated with them at San Quentin. At the beginning of his interrogation of appellant at the Eden Township substation, Dudek stated, "on the trip over here, you said 'now I want to talk to you for a little

while.'" Thus, at the time of the conversation in the car and the time of the interrogation at Eden Township, neither officer thought that appellant had initiated contact with them at the prison.

Also undermining Chicoine's testimony is the fact that the supposed reinitiation exchange at San Quentin was not recorded. Dudek and Chicoine were scrupulous in their efforts to capture any of appellant's communications which might be important to his prosecution. Not only did they record all three interrogations that took place in interview rooms, they also surreptitiously recorded the conversation in the car.

Furthermore, these officers had an established practice of repeating what they believed were significant off-record exchanges as soon as they got on the record. For example, during the March 21 questioning at San Quentin, Chicoine opened the interview by repeating for the record what had just taken place off the record, "Carl, like I've explained to you before, we want to talk to you about some of your past crimes and some of the sex registration laws and things like that. Before we do that, I had mentioned to you before that we're going to read you your rights . . . ." (People's Pretrial Exhs.3 and 3A [p.1].) Similarly, at the beginning of the interview at Eden Township, Dudek was careful to memorialize what he viewed as each significant point of advisement, invocation, and initiation, identifying the car ride as the point of reinitiation, stating, "[o]n the trip over here, you said 'now I want to talk to you for a little while, . . ." (People's Pretrial Exhs.5 and 5A [p.2].) While appellant disagrees with the self-serving content of Dudek's summary, and particularly his omission of appellant's second invocation in the car, it is significant that the officers both tried to memorialize previous off-tape discussions once the tape was turned on.

However, on the tape of the car ride, Dudek made no mention of any

reinitiation at the prison. In fact, appellant's supposed reinitiation at the prison was not mentioned or memorialized in any way whatsoever until Detective Chicoine's testimony during the suppression hearing. Given the fact that these officers had an established custom and practice of restating significant matters first said off-tape, it is simply not credible that had appellant actually indicated a willingness to speak at San Quentin they would have neglected to memorialize it immediately when the tape was rolling in the car or at the station, and then again in their written report.

In short, there is simply no credible evidence to support Chicoine's self-serving testimony of a reinitiation by appellant in the Reception Center. Moreover, the evidence of the tape recordings in the car and in the interrogation room at the station and Chicoine's own report contradicts Chicoine's testimony. There was simply no credible evidence to overcome respondent's "heavy burden" of the *Edwards* presumption of involuntariness. Given the additional fact that Chicoine admitted on the stand that he lied to obtain appellant's waiver of his *Miranda* rights on March 21, this court on *de novo* review must find that the trial court abused its discretion in ruling that appellant reinitiated contact at the prison.[22]

---

[22]/ Other aspects of Chicoine's testimony are also unworthy of belief. For example, Chicoine also testified that appellant reinitiated communication about the case with him in the parking lot of Eden Township Substation after the tape recorder had been turned off and they had gotten out of the car. (3RT 357.) It is simply not credible that on a day when nearly every minute of the conversations between appellant and law enforcement officials were tape recorded, and no reinitiation occurred during any of this time, Detective Chicoine heard appellant make not one but *two* reinitiation statements during the only two brief moments that day when no recording was being made. It is all the more implausible given that the supposed off-record waivers attested to by this admitted liar are inconsistent with the tape recordings and other evidence.

With regard to the purported reinitiation statement in the parking lot of the Eden Township Substation, Chicoine's subsequent written report *does* at least support his later testimony. The report states that in the parking lot appellant

However, even if Chicoine's testimony regarding appellant's statement to the officers at San Quentin on March 31 had been believable, it was still clearly the officers who reinitiated the contact on March 31 following appellant's March 21st invocation of the right to counsel, thereby rendering any subsequent waiver involuntary.

As previously noted, the United States Supreme Court held in *Edwards v. Arizona, supra*, that when a suspect invokes the right to counsel all questioning must cease until an attorney is present or "the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* 451 U.S., at p. 485.) In discussing how a suspect might initiate such communication, the court made it clear that the critical fact is whether it was the suspect or law enforcement officers who initiated the subsequent meeting after the right has been invoked.

> In concluding that the fruits of the interrogation initiated by the police on January 20 could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. . . .

"adamantly told me that he wanted to tell what had happened without an attorney stopping him, and then have whatever happens to him happen quickly." (Defense Pretrial Exh. C.) However, Sergeant Dudek's first line of questioning in the substation interrogation room indicates that he was unaware of that purported parking lot statement and believed that appellant had reinitiated only in the car. Thus, while Chicoine wrote in his report that appellant had made a statement that he was willing to talk, he somehow forgot to tell his partner about this rather significant event.

These two officers were never able to get their stories straight because there was no truth in any of them. The record does not support the conclusion that appellant ever reinitiated contact with the officers.

> But this is not what the facts of this case show. Here, the officers conducting the interrogation on the evening of January 19 ceased interrogation when Edwards requested counsel as he had been advised he had the right to do. The Arizona Supreme Court was of the opinion that this was a sufficient invocation of his *Miranda* rights, and we are in accord. It is also clear that without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request. Indeed, Edwards informed the detention officer that he did not want to talk to anyone. At the meeting, the detectives told Edwards that they wanted to talk to him and again advised him of his *Miranda* rights. Edwards stated that he would talk, but what prompted this action does not appear. He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement, which was used against him at his trial. We think it is clear that Edwards was subjected to custodial interrogation on January 20 within the meaning of *Rhode Island v. Innis, supra*, and that this occurred at the instance of the authorities. His statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.

(*Id.* at pp. 485-487.)

This court has also indicated that a waiver of the previously invoked right to counsel cannot be found unless the suspect initiates the contact with law enforcement In *People v. Boyer* (1989) 48 Cal.3d 247, a suspect was subjected to custodial interrogation for more than an hour before he asserted his right to silence and right to counsel. (*Id.* at p. 273.) Police continued interrogation over the accused's objections for some time, and then ceased interrogation. (*Ibid.*)

After fingerprinting the suspect and allowing him a phone call, one of the officers brought the accused back into the interrogation room to "tell him a couple of things." (*Ibid.*) After carefully admonishing the suspect

that he could not be questioned further in light of his invocation of *Miranda* rights, the officer nevertheless launched into a monologue on the status of the investigation. He told the accused he was still under suspicion and that investigation of his involvement would continue. As he turned away, the accused gave up and blurted out, "I did it." This court held that the statement was improperly admitted into evidence.

> [U]nder *Edwards* and *Innis*, [] defendant's statement was the result of the authorities' improper resumption of contact and questioning. The *Edwards* rule renders a statement invalid if the authorities initiate any 'communication, exchanges, or conversations' relating to the case, other than those routinely necessary for custodial purposes. (*Edwards, supra*, 451 U.S. at pp. 484-485 [68 L.Ed.2d at p. 386]; see *Bradshaw, supra*, 462 U.S. at p. 1045 [77 L.Ed.2d at p. 412] [plur. opn.].) The record discloses no custodial reason why, once defendant had invoked his Miranda right to counsel, it was necessary to approach him again to 'tell him a couple of things' about the investigation. On this basis alone, we must find that defendant's statement contravened the requirements of Miranda.

(*Ibid.*)

Similarly, the officers' interaction with appellant on March 31 was not at his request. That fact is uncontroverted in the record. Dudek and Chicoine approached appellant at the prison that day in order to arrest him. (3RT 341.) There is no credible evidence that appellant asked to talk to the officers once they arrived; to the contrary it was the officers who presented themselves to appellant. However, the fact that appellant did not reinitiate contact with the officers is a further, independent basis for concluding that appellant did not as a matter of law reinitiate communication on March 31.

c. Appellant once again invoked his right to counsel during the car ride from San Quentin to San Leandro

Even if this court were to somehow find Chicoine's testimony about the alleged Reception Center statement to be credible, or were to find in spite of *Shatzer* that there was a break in custody or a voluntary contact of the officers by appellant sufficient to end the *Edwards* presumption, appellant once again invoked his right to counsel for a second time during the car ride from San Quentin, thereby rendering any subsequent waiver involuntary.

As noted above, the recording of the car ride includes the following exchange:

> APPELLANT: Can I ask you a question?
>
> DUDEK: Sure.
>
> APPELLANT: They'll assign me a PD, right?
>
> DUDEK: Right.
>
> APPELLANT: I can sit down and talk with my PD and they'll talk (unintelligible)?
>
> DUDEK: Yeah.
>
> APPELLANT: Can I do that?
>
> DUDEK: Yeah, that's one of your options and that's why we're here, you know.
>
> APPELLANT: *I would, I would feel more comfortable.*
>
> DUDEK: Ok. If you're gonna go through that, formally when we get to the tape, we're gonna say 'Carl Molano, you understand you're being charged with this' and then we're gonna go through the rights thing again, [and] it's at that time,

> you know, you can say 'hey let me talk to my PD and then I'll talk to you again,' but you know, but that's entirely up to you.

(People's Pretrial Exhs. 4 and 4A [pp. 3-4], emphasis added.)

Although appellant submits that his previous unambiguous, uncontroverted invocation of the right to counsel on March 21 still controlled, and that the officers themselves initiated contact with him after that invocation, appellant further submits that the foregoing constituted yet another unambiguous invocation of appellant's right to counsel. Appellant asked whether he would be assigned a public defender and whether he could sit down and talk to the public defender first before he spoke with the officers. Having been assured he could, he replied "I would feel more comfortable." Thus, even if his prior invocation of the right to counsel had not been in continuous force, this was yet another invocation of the right to counsel which required termination of all further questioning.

Petitioner submits that the invocation was unequivocal. Petitioner did not say he "might" want to talk to a lawyer (*United States v. Fouche* (9th Cir. 1987) 833 F.2d 1284), or "maybe I should call my lawyer" (*Robtoy v. Kincheloe* (9th Cir. 1989) 871 F.2d 1478, 1482), or "I don't know" when asked if he wanted a lawyer (*Grooms v. Keeney* (9th Cir. 1987) 826 F.2d 883, 886-887). Instead, he asked if he could speak to a public defender before speaking to the officers, and when he was told he could do so, replied "I would feel more comfortable." In context, that invocation of the right to counsel is every bit as unambiguous as the equally polite invocation the officers understood appellant to be making when he invoked on March 21: "I understand where this is leading to, this conversation and I would rather not say anything else until I have a public defender . . ." (People's Pretrial Exhs. 3 and 3A [p. 44]; 3RT 332.) Appellant's statement in the car

was a second clear and unambiguous invocation of the right to counsel.[23]

It is also clear that Dudek understood appellant's statement to be an invocation of the right to counsel. His response was, in effect, that it was too soon to invoke the right to counsel. Instead, he told appellant "[i]f you're gonna go through that, formally when we get to the tape [at the station], we're . . . gonna go through the rights thing again, [and] it's at that time, you know, you can say 'hey let me talk to my PD and then I'll talk to you again,' . . ." (People's Pretrial Exhs. 4 and.4A [p. 4].)

However, instead of honoring this second tape-recorded invocation of the right to counsel, Dudek continued with a "softening up" interrogation process remarkably similar to the ones condemned by the United States Supreme Court in *Brewer v. Williams* (1977) 430 U.S. 387, and by this court in *People v. Honeycutt* (1977) 20 Cal.3d 150. That "softening up" process is the subject of the next section.

However, before addressing that error, it should be emphasized that without regard to anything else that had happened previously, once appellant made a second invocation of the right to counsel in the car, all questioning by Dudek or anyone other law enforcement personnel should have ceased. Instead, appellant continued to be badgered by Dudek and

---

[23]/ The tape recording itself was played for the court. There is background noise on the tape recording of the conversation in the car as the apparent result of Chicoine's turning on the air conditioner at the beginning of the trip. However, the statement is at least as clear, and even more so, as many of the other statements that are transcribed. In spite of that fact, the district attorney's transcript did not contain this statement but instead reported it as "unintelligible."

It is not clear from the record whether the court at the hearing was listening to the tape with or without the transcript. However, had an accurate transcript been prepared, it would have assisted the court to know there was a second invocation in the car and might well have spared all parties the time and expense of this appeal.

Chicoine and was then subjected to interrogation by employees of the district attorney's office. Like all statements taken after appellant's March 21 invocation, all statements following this second invocation on March 31 were taken in violation of the *Edwards* bright-line rule and should have been suppressed.

d. Any waiver made after Appellant's second invocation of his right to counsel was involuntary under the totality of the circumstances.

As discussed above, the record in this case shows that the investigating officers lied to appellant in order to obtain the initial waiver of his rights, and then repeatedly ignored appellant's dual invocations of his right to counsel. Chicoine's testimony regarding appellant's supposed "reinitiation" is contradicted by his own report and by the tape recordings themselves and therefore not credible, but even if appellant had made the statements Chicoine claimed he made, appellant did not as a matter of law reinitiate contact with the officers because he was in continuous custody throughout the period in which the questioning occurred. Considering those facts, and without any more evidence, the prosecution could not overcome the presumption of involuntariness that applied to appellant's statements.

However, after appellant *again* invoked his right to counsel during the car ride back to Eden Township, Dudek and Chicoine proceeded to engage in an impermissible "softening up" process which by law constituted improper interrogation and rendered any subsequent waiver or statements involuntary.

In *Brewer v. Williams* (1977) 430 U.S. 387, defendant Williams was arrested and Mirandized in Davenport, Iowa, for a killing which had occurred 200 miles away in Des Moines. His attorney in Des Moines spoke

to police officers and it was agreed that Williams would not be questioned about the crime during the car ride back from Davenport. The attorney also spoke on the phone with Williams and advised him not to speak to police officers about the killing until after Williams and the attorney had met in person on Williams' return to Des Moines. (*Id.*, 430 U.S. at pp. 390-392.)

On the ride back to Des Moines, the detective who was transporting Williams did not directly question Williams about the killing, but instead gave what has come to be called "the Christian burial speech," as follows:

> I want to give you something to think about while we're traveling down the road.... Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

(*Id.*, 430 U.S. at pp. 392-393.)

Shortly thereafter, Williams asked the detective whether the victim's shoes had been found. When the detective said he was not sure, Williams directed the officer to a service station where he said he had left the shoes. Not long thereafter, he directed the detective to the body. (*Id.*, 430 U.S. at p. 393.) Williams was convicted of murder. The state courts held that he

had waived his right to counsel, applying a "totality of the circumstances" test.

However, the federal district court granted habeas corpus relief on the grounds that the "Christian burial speech" constituted an interrogation and rendered the self-incriminatory statements in the car involuntary. Both the federal Court of Appeals for the Eighth Circuit and the United States Supreme Court affirmed. While the detective's speech may not have focused on questions explicitly directed to obtaining a confession to the crime itself, they constituted an attempt to "elicit incriminating statements from Williams," and thus constituted an interrogation at a time when Williams was represented by counsel. (*Id.*, 430 U.S. at p. 406.)

Although the relief in *Williams* was based primarily on a Sixth Amendment *Massiah* violation, since Williams already had counsel in that case and had not waived that right at the time the incriminating statements were made, this court applied the same principles to a *Miranda* violation later that same year.

In *People v. Honeycutt* (1977) 20 Cal.3d 150, a police detective brought a suspect in a homicide case into an interrogation room and, instead of reading him the Miranda warnings, engaged him in general conversation for half an hour. The detective later testified that he stayed away from a discussion of the offense and did not expect the suspect to make a statement, but said he viewed it as "my duty to continue the efforts to try to get him to talk." During the conversation, the detective mentioned that the victim had been a suspect in another homicide case and was thought to have homosexual tendencies. As the conversation went on, the detective "could see that [defendant] was softening up." By the end of the half-hour defendant indicated that he would talk about the homicide. He was then

read his Miranda rights, waived them, and confessed to the killing. (*Id.*, at pp. 158-159.)

On appeal, this court held the defendant's statement should have been suppressed. This court noted that no incriminating statements were made by the defendant until after the Miranda admonitions were given and the defendant waived his rights. However, "prior to explaining the Miranda rights," the detective had "already succeeded in persuading defendant to waive such rights." (*Id.*, at p. 159.) "Thus," said this court, "the critical question is what effect failure to give a timely Miranda warning has on the voluntariness of a decision to waive which is induced prior to the Miranda admonitions." (*Ibid.*)

This court pointed to the previously cited language in the *Miranda* opinion itself stating that a waiver of rights is involuntary as a matter of law if the defendant was "threatened, tricked, or cajoled" into the waiver. (*Id.*, at p. 160; *Miranda v. Arizona*, *supra*, 384 U.S., at p. 476.) "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." (*People v.* Honeycutt, *supra, 20 Cal. 3d at 160.*) This court held as follows:

> The self-incrimination sought by the police is more likely to occur if they first exact from an accused a decision to waive and then offer the accused an opportunity to rescind that decision after a Miranda warning, than if they afford an opportunity to make the decision in the first instance with full knowledge of the Miranda rights. (Citation omitted.) The police by applying practices condemned in *Miranda* cannot be heard to contend that they should benefit because they have violated only the spirit of *Miranda*. It must be remembered that the purpose of *Miranda* is to preclude police interrogation unless and until a suspect has voluntarily waived his rights or has his attorney present. *When the waiver results from a*

> *clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a Miranda warning must be deemed to be involuntary* for the same reason that an incriminating statement made under police interrogation without a Miranda warning is deemed to be involuntary.

(*Ibid.*, emphasis added.)

This court has also held that once a defendant has invoked his right to counsel, police may not attempt to badger him into changing his mind. In *People v. Enriquez* (1977) 19 Cal.3d 221, *overruled on an unrelated point* in *People v. Cromer* (2001) 24 Cal.4th 889, 901, n. 3,[24] the defendant was arrested four hours after he was seen inflicting fatal stab wounds to the victim, and was subsequently interrogated in custody. The police gave him the Miranda warnings and asked if he wished to talk about the case. He replied in the affirmative, but immediately thereafter told each of his two interrogators that he wanted a lawyer present before discussing the matter further. Rather than honoring the request, the police pressed him not to assert this right. They gave him the Miranda warnings again, and this time he waived his right to counsel. The interrogation proceeded, and the defendant made inculpatory statements.

This court reversed the judgment, emphasizing the rule that once a suspect indicates he wants an attorney, all interrogation must cease until an attorney is present. (*Id.*, 19 Cal.3d, at p. 237.) This court specifically rejected the People's argument that even though the defendant had

---

[24]/ *Enriquez* was overruled on the question of whether appellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's right of confrontation at trial. *Enriquez* and other cases had held the trial court was entitled to deference on this question, and *Cromer* reversed them, imposing a rule of independent review on appeal.

explicitly asked for a lawyer, his subsequent statements were voluntary. Instead, this court held that the statements were the product of continued police pressure to waive the right to counsel, and concluded that all statements following the invocation of the right to counsel were inadmissible. (*Id.*, at p. 238.) This court explained that "just as Miranda prohibits continued police interrogation into the substantive crime after a clear indication that a suspect wants an attorney present, it also prohibits continued police efforts to extract from a suspect a waiver of his rights to have an attorney present after a clear indication that the suspect desires such an attorney." (*Ibid.*)

In this case, it is abundantly clear that these two officers chose to ignore appellant's multiple invocations and instead tried to soften him up in an effort to persuade him to reverse his prior invocation and agree to talk to them. As in *Williams, Honeycutt,* and *Enriquez*, this softening up process as a matter of law constituted prohibited interrogation and rendered any subsequent waiver invalid and the statements inadmissible.

At the time the conversations in the car began, appellant had validly invoked his right to counsel and had not revoked that invocation. During the ride, when Dudek repeatedly attempted to engage him in conversation, even asking him direct questions to lure appellant into asking questions about the status of the investigation, appellant once again invoked his right to counsel. However, the officers persisted in badgering him to revoke that invocation through two separate psychological techniques.

First, during the car ride Dudek and Chicoine both repeatedly disparaged the victim, Suzanne McKenna, in order to minimize the crime and ingratiate themselves with appellant. This technique was also used by the detective in *Honeycutt, supra*, in which the officer mentioned that the

victim "had been a suspect in a homicide case and was thought to have homosexual tendencies." (*Id.*, 20 Cal.3d at p. 158.) In this case, the officers began disparaging McKenna during the March 21 interview, telling appellant that they knew McKenna to be a drug user and referring to group sex, asking appellant if McKenna was "into two dudes and her or anything like that." (People's Pretrial Exhs. 3 and 3A [p. 41.]) During the car ride to San Leandro, Dudek reminded appellant, "I was up front with you when I said the other day . . . I know [McKenna]'s not an angel or wasn't an angel, you know what I mean?" (People's Pretrial Exhs. 4 and 4A [p. 3].)

It is important to understand that the kind of disparagement of the victim that occurred in this case and in *Honeycutt* are not accidental or isolated occurrences. To the contrary, disparagement of the victim is a specific interrogation technique in which law enforcement officers are trained.

The law enforcement interrogation "bible" is Inbau, Reid, and Buckley's *Criminal Interrogations and Confessions,* a work now in its 5th edition. At the time of the interrogation in question here, the then-current version of this book was the third edition, published in 1986. Chapter 6 of that edition describes the tactics and techniques to be used in questioning both emotional and unemotional subjects, including a number of interrogation "themes." The fourth of these "themes" is "Sympathize With Suspect By Condemning Others," and the first subheading of this "theme" is "Condemning the Victim." (*Id.* (3d ed. 1986) at pp. 106-11.) The subheading goes on to recommend, *inter alia*, attacking the character of rape victims for promiscuity or prostitution, and attacking the character of others as "no good." (*Id.*, at p. 109.)

Moreover, the officers' conduct in trying to ingratiate themselves to appellant went much further than the conduct in *Honeycutt*. In *Honeycutt*, the record showed that the investigating officer engaged the defendant in discussion about "unrelated past events and former acquaintances." (*Id.*, 20 Cal.3d at p. 158.) In this case, however, as with the detective's "Christian burial speech" in *Williams*, Dudek and Chicoine attempted to provoke feelings of guilt in appellant by engaging appellant in a discussion about his children.

During the March 21 interview, when appellant still believed the officers were sex crime investigators conducting a routine pre-release evaluation, appellant provided the officers with information about his children, including the fact that appellant wanted to mend his relationship with them. (People's Pretrial Exh. 3.) During the car ride, after appellant refused to engage with Dudek about McKenna's death and then again invoked his right to counsel, Dudek deliberately used this information as a lever to persuade appellant to revoke his invocation, turning the conversation to appellant's children in an attempt to exploit appellant's desire to mend his relationship with them.

Noting that the officers had been out to visit appellant's daughter, a "4.0 [GPA] whiz kid," Dudek told appellant, "it sounds like you're starting to, you know, at least head in the right direction there with a relationship with her." (People's Pretrial Exhs. 4 and 4A [p. 4].) Dudek continued, telling appellant, "I think it's only fair that you know that [your son] Robert . . . played a fairly key role [in your arrest], and I just don't want it to be a mind-blower for you when [that] comes out." Dudek then told appellant, "[w]hat I'm asking you, probably from my standpoint as a dad and stuff, you got to rebuild [with your kids]." (*Id.*) Dudek told appellant,

"[u]nfortunately Robert's had a lot of problems over the years because of this . . . and you probably will never have a relationship with Robert but in the scheme of things hopefully you'll view it as Robert becoming a man." (*Id.* at p.4)

Once again, under a pretense of concern for appellant's relationship with his family, Dudek sought to ingratiate himself with appellant, telling him that "[news of your arrest] is gonna be a fairly big deal in the newspapers and probably even in the media and stuff. . . . if there's somebody you may want to prepare for it, you may want to let us know that, so we can tell them before they hear it on the 7 o'clock news tonight. Your daughter or whoever else, I mean." (*Id.* at p.5) Dudek went on to inquire about appellant's son and told appellant "your daughter obviously is pissed off at you for not having a relationship but at least she's kinda proud of herself or proud of making amends. . . .The healing process has to start with you first, you know." (*Id.* at p.9.) Here, Dudek's attempts to play on appellant's feelings of guilt about his relationship with his children clearly went far beyond the kind of ingratiating softening up in *Honeycutt* and is closely analogous to the Christian burial speech in *Brewer v. Williams.*

Appellant's March 31 statements to both investigating officers and representatives of the district attorney were made involuntarily as a result of an illegal softening up process that ignored appellant's dual invocations of his right to counsel and exploited his feelings of guilt about his children. Use of his statements at trial violated his Fifth and Fourteenth Amendment rights.[25]

---

[25]/ Appellant also notes that the statements made at Eden Township Station were obtained without an express waiver of appellant's Miranda rights. Sergeant Dudek read appellant the advisements but never asked appellant whether he was willing to waive those rights and speak to the officers, and never obtained a signed waiver form from him. (People's Pretrial Exh. 5A, p. 3.)

D. BECAUSE ADMISSION OF APPELLANT'S STATEMENTS WAS EXTRAORDINARILY PREJUDICIAL, REVERSAL IS REQUIRED

On direct appeal, prejudice from federal constitutional errors is determined according to the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, which requires the prosecution to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Id.,* at 24.) To meet this standard, the prosecution must show the error to have been "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) Due to the prejudicial impact of the statements in the context of this case, the state cannot carry this burden.

Appellant's statements admitted the killing of Suzanne McKenna. Although appellant maintained that the killing was accidental, his statements admit the act of killing and thus are closely analogous to a confession. Indeed, without appellant's statements it is highly questionable whether a jury could have convicted appellant of first degree murder, or if

---

Under United States Supreme Court authority, an implied waiver of *Miranda* rights occurs even if the defendant is silent as to waiver if it is clear from the circumstances that he understands his rights and engages in a course of conduct indicating waiver. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373; *Berghuis v. Thompkins* (2010) 130 S.Ct. 2250, 2261-2262.) Here appellant stated that he understood his rights and responded to questions. He had also been Mirandized once before and waived his rights at that time, though he later invoked his right to counsel not once but twice.

Appellant concedes that while his actions at Eden Township Station were sufficient to constitute an implicit waiver under *Butler* and *Berghuis*, that waiver was nevertheless involuntary due to the violation of his rights under *Edwards*, the officers' disregard for his dual invocations, and the subsequent softening up process in the car. Having twice invoked his right to counsel, appellant should never have been Mirandized or questioned again without counsel. However, the officers' failure to obtain a verbal or written waiver is yet another indication of their persistent disregard for appellant's Fifth and Sixth Amendment rights.

they had, whether they could have returned a true verdict to the rape special circumstance allegation. With respect to confessions, this court has stated that "the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial." (*People v. Cahill* (1993) 5 Cal.4th 478, 503.)

As the Ninth Circuit has stated, "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" (*Collazzo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 424, quoting *Bruton v. United States* (1968) 391 U.S. 123, 139-40.)

In the instant case, appellant's statements on March 21 and March 31 provided the basis for establishing appellant's identity as McKenna's killer. Appellant's March 21 statement connected appellant to McKenna; appellant stated that he knew the victim, got high with her, and, most damning, had sex with her very shortly before her death. (People's Exh. 38A at p. 30.) The prosecutor stated that on March 31, appellant admitted to drinking and getting high with McKenna, ripping her clothes off, and "possibly bit[ing] one of Sue McKenna's breasts." (*Ibid.*) Appellant admitted to engaging in rough sex play with McKenna and choking her at her request. (People's Exhs.39 and 39A [p. 14]; People's Exhs. 40 and 40A [p. 4].) As the prosecutor stated, appellant "started to choke Sue and then the next thing he knew she was dead." (11RT 1605.) Appellant's March 31 statements also

admitted actions following McKenna's murder that implied guilt: he returned to the scene and tried to remove any evidence that he had been there. (People's 38A; People's 40A.) Without the statements, the prosecution would have been left with circumstantial evidence that by itself would not have been sufficient for a conviction beyond a reasonable doubt.

Apart from their impact on the evidence of murder, the recorded statements provided the prosecution's only substantial evidence of rape– a fact critical both to proof of first degree murder under a rape/felony murder theory, and the rape special circumstance allegation.

Indeed, as Sheriff's Deputy Casey Nice testified (16RT 2334) and as defense counsel pointed out in her closing argument (22RT 3142), there was no mention of rape in the 1995 police reports of the investigation into the McKenna killing. The first mention of rape as a possible charge did not occur until after appellant made his statements to law enforcement seven years later. It was those statements, not the circumstantial or forensic evidence from the crime scene, that supplied the basis for the rape felony murder theory and the rape special circumstance.

In the instant case, there was no physical evidence consistent with sexual assault observed anywhere on the victim's body, including the internal and external genitalia and anus. (13RT 1906-1907, 1910.) Abrasions were found on the victim's buttocks and thighs and breast (13RT 1904-1905, 1908-1909), but these injuries provided no evidence of sexual assault. (See, e.g., *People v. Craig* (1957) 49 Cal.2d 313 [evidence of struggle and torn clothing insufficient to support conviction for rape]). Dr. Tschetter testified that the injuries to the buttocks and thigh were caused when the victim's body was dragged across the floor after her death. (13RT 1909.) He further testified that the contusion on the victim's breast could

have been caused by a blow or a bite. (13RT 1907.) Despite the facts that the contusion was photographed by both the crime scene analyst and the forensic pathologist and that imprints of the defendant's teeth were taken for comparison to the possible bite mark (14RT 2001), no evidence confirming that the contusion was in fact a bite mark or that appellant was responsible for the contusion was presented at trial.

Likewise, the nudity of the victim's body provided no evidence of intent to rape. The victim's body was essentially naked (12RT 1783-1784), but as the cases discussed above show, this Court has consistently held that the fact that the victim's body is naked is by itself insufficient to establish an attempted rape. (*People v. Johnson* (1993) 6 Cal.4th 1, 39; see *People v. Anderson, supra,* 70 Cal.2d at p. 34-36; *People v. Craig, supra,* 49 Cal.2d 313, 318-319; *People v. Granados, supra,* 49 Cal.2d 490, 497.)

On the issue of lack of consent, an element essential to proving rape or attempted rape, there was no evidence whatsoever that the victim objected to sexual contact or communicated her lack of consent. The state offered only the weak evidence that the victim's closest friend, Judy Luque, and two of the victim's former neighbors had no knowledge of whether the victim had a prior sexual or romantic relationship with appellant. (22RT 3097-3099; 12RT 1706; 15RT 2137, 2160-2165.) However, testimony of appellant's son and the victim's neighbors shows that the appellant and the victim had a social relationship (16RT 2277-2279), and no evidence was presented that tended to suggest that in the course of that relationship appellant had shown any aggressive or unwelcome sexual interest in the victim. There was no evidence of a struggle, the victim's arms and legs were never bound, and there were no defensive wounds on the victim's body.

Also of significance on the issue of consent is the evidence concerning the empty condom wrapper, which suggests that a condom may have been used during any sexual act that occurred in the apartment. As the jury instruction indicated, use of a condom is not conclusive on the question of consent. (7CT 1645; 22RT 3172.) However, the use of a condom does tend to suggest consent, and the inference of consent from this evidence accordingly cannot be ignored.

In the absence of any persuasive forensic evidence, the most compelling evidence of rape that was offered by the prosecution was wholly circumstantial evidence of appellant's two prior rape convictions.[26] While there was testimony that appellant attacked the victims in those two cases with sufficient force to cause ripped clothing and genital trauma (19RT 2873, 2896; 18RT 2578), neither of these facts were present in this case. In addition, even if these prior incidents had closely mirrored the facts in this case, this Court has found that evidence that a defendant committed another sexual assault much closer in time and place nevertheless provides insufficient support for the inference that the same crime was committed by the defendant against the victim in question.

In *People v. Raley* (1992) 2 Cal.4th 870, the defendant was charged with attempted felony oral copulation of the deceased victim and capital murder and attempted murder. The case involved two victims, only one of whom survived. The survivor testified that the defendant announced his intention to sexually assault both of the victims, and then attempted forcible oral copulation on her just minutes after removing the deceased victim to another room for an apparently similar purpose. Reversing the conviction

---

[26]/ See Argument II, which argues that admitting evidence under Evidence Code section 1108 to show appellant's propensity to rape was improper.

for an attempted forcible oral copulation against the deceased victim, this Court stated:

> There is clear and substantial evidence of a forcible sexual attack of some kind on [the deceased] and of a forcible oral copulation on [the surviving victim]. However, there is no evidence of the particular nature of the sexual assault on [the deceased], apart from an inference that because defendant committed a forcible oral copulation against [one], he may have attempted to do the same thing against her companion.

(*People v. Raley, supra*, 2 Cal.4th at p. 890.)

Similarly, without some evidence that Suzanne McKenna was actually raped, the fact that appellant was found to have committed rape in the past, some nine and thirteen years before, is insufficient to prove that appellant raped Suzanne McKenna.

In short, appellant's illegally obtained statements provided the prosecution with all the evidence it had that could lawfully support a true finding against appellant on the rape special circumstance allegation. Without appellant's admissions that he had sex with Ms. McKenna, evidence of sexual intercourse was inconclusive and amounted at most to a suspicion. With his statements removed from the case, the prosecution could not prove beyond a reasonable doubt that the killing occurred during the commission of rape or attempted rape.

There is also no way to know for certain whether the jury found appellant guilty of murder under a premeditation theory or a rape felony murder theory. However, the fact that the jury found the special circumstance to be true strongly suggests that they found appellant guilty of first degree murder on a rape felony murder theory. Thus, the judgment of first degree murder must be struck. However, appellant submits that at a minimum, even if the murder conviction were to be allowed to stand, this

court must reverse the special circumstance finding.

Under these circumstances, the prosecution cannot demonstrate that the error in the admission of appellant's statements of March 21 and March 31 was harmless beyond a reasonable doubt, and reversal is required. The error also violated appellant's right to a reliable verdict and judgment under the Eighth Amendment, and reversal is required for this separate reason.

II. ADMISSION OF EVIDENCE OF THE RAPES OF ANN HOON AND MABEL LOVEJOY AND THE CORPORAL INJURY OF BRENDA MOLANO AND THE INSTRUCTIONS GOVERNING THE JURY'S USE OF THAT EVIDENCE, VIOLATED APPELLANT'S RIGHT TO DUE PROCESS

A. FACTUAL BACKGROUND

Prior to appellant's trial, the prosecutor filed a formal written motion seeking to introduce evidence of appellant's prior convictions for the 1982 rape of Ann Hoon[27] and the 1987 rape of Mabel Lovejoy pursuant to Evidence Code section 1108[28] (hereinafter, "section 1108"). (6CT 1469-1483.) By a separate motion, the prosecutor also sought to introduce evidence of the Hoon and Lovejoy rapes and the 1996 corporal injury upon Brenda Molano pursuant to Evidence Code section 1101(b)[29] (hereinafter,

---

[27]/ At the time of trial, Ms. Hoon was known as Ann Hoon Wheeler. Accordingly, she is sometimes referred to in the record as "Wheeler" and the 1982 incident is sometimes described as "the Wheeler incident." (See, e.g., 2RT 115.)

[28]/ California Evidence Code section 1108, subdivision (a) provides:

> In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

[29]/ California Evidence Code section 1101, subdivisions (a) and (b) provides:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in

"section 1101(b)") (6CT 1435-1455).

The defense filed oppositions to both motions.[30] (6CT 1309-1315, 1374-1381.) With respect to section 1108, the defense argued that admission of the prior sex offenses would violate Evidence Code section 352 (hereinafter, "section 352") because the prior sexual offenses were remote in time; factually dissimilar to the charged offense; likely to confuse, mislead, or distract the jurors; and far more prejudicial than probative.[31] (6CT 1374-1381.) With respect to section 1101(b), the defense argued that the prior act evidence was irrelevant to any disputed issue because the acts were not sufficiently similar to provide a rational inference of identity, common design or plan, or intent. (6CT 1312.) The defense also argued that the prejudicial effect of the prior act evidence outweighed its probative value. (6CT 1314.)

On June 18, 2007, the defense filed an additional opposition addressing both section 1108 and section 1101(b), arguing in the alternative that if the court were to admit evidence of the Hoon or Lovejoy rapes or the assault on Brenda Molano, the evidence should be limited to the facts of the

---

good faith believe that the victim consented) other than his or her disposition to commit such an act.

30/ The defense's opposition to the prosecution motion under section 1108 wasactually filed before the prosecution's motion because the prosecutor had notified the defense that he intended to introduce the prior conviction evidence and the defense prepared and submitted a large number of in limine motions simultaneously. (2RT 162.)

31/ California Evidence Code section 352 provides:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

sexual assaults pertinent solely to the issue of appellant's propensity to commit rape, and that all other related evidence was both irrelevant and inadmissible under Evidence Code section 350 and unduly prejudicial and inadmissible pursuant to section 352. (7CT 1518-1523.)

On June 14 and June 18, 2007, the court heard argument on the admissibility of evidence of the three prior convictions.[32] (2RT 102-128, 162-193.) The defense argued that evidence of statements made by appellant during the incidents that led to the three prior convictions should not be admissible under section 1108 because under that section it is the commission of the offense, not the defendant's statements, which show propensity. (2RT 110.) With respect to section 1101(b), the parties and the court agreed that identity was not an issue, and that the evidence therefore was not admissible to prove that fact. (2RT 112.) The prosecutor argued that the evidence of the Hoon incident was admissible to prove intent and absence of mistake and to rebut appellant's statements that Suzanne McKenna's death had occurred during consensual, rough sex. In particular, the prosecutor argued that appellant's statements during interrogation following the Hoon incident, in which appellant had initially contended the sex was consensual, provided the jury with evidence necessary to evaluate his similar statements in this case. (2RT 113.) With respect to the Lovejoy incident, he argued that a statement appellant made to the effect that Ms. Lovejoy had also consented to sex should be admitted for the same reason.

---

[32]/ During the discussion of the prior convictions, the court grappled with the difficult problem presented when same evidence is presented under both 1108 and 1101(b). Under 1101(b), the jury is instructed not to consider prior conviction evidence for propensity but only for the limited purpose of determining such matters as modus operandi, common plan or design, or intent. However, under section 1108, the same evidence may be considered for propensity, thus negating the limitation of section 1101(b) and creating confusion for the jury. (See 2RT 108-110.)

(2RT 121-122.) He also argued that the evidence of the choking of Brenda Molano was relevant on the question of modus operandi in the choking of Suzanne McKenna and to rebut appellant's contention that the choking death was the result of an accident or mistake. (2RT 113-114.) The defense disagreed that the choking of Brenda Molano was admissible under section 1101(b), arguing that the incident did not involve any sexual component and was too dissimilar to the McKenna case to be relevant or have any probative value. (2RT 186-187.)

The court ultimately ruled that the Hoon and Lovejoy incidents were admissible under section Evidence Code 1108 rather than section 1101(b) and the 1997 incident involving Brenda Molano was admissible under section 1101(b). (7CT 1525; 2RT 192-193). During argument, the defense argued that *People v. Falsetta* (1999) 21 Cal.4th 903, requires exclusion of irrelevant and inflammatory details of the rapes. (2RT 164.) After considering the probative value of the Hoon and Lovejoy incidents, the court found that these incidents were of "extremely strong" probative value and admissible pursuant to sections 352 and 1108. (2RT 191-192.) Though the defense argued that the 1996 assault was not relevant to any factors allowed under section 1101(b), court found that the Brenda Molano incident was admissible because it provided evidence that "strangulation is a method employed by the defendant when facing psychological dissonance" and rebutted appellant's statement that McKenna's death by strangulation was accidental. (2RT 193.)

The court also ruled that appellant's statements made during interrogation in the prior cases were admissible as part of the prosecutor's burden of proving the offenses by a preponderance of the evidence. (2RT 197.) The defense argued that the statements were not needed to prove

propensity to commit rape, and that appellant's statements regarding consent in those cases would only have been admissible had he actually testified at trial, but the court stated that it would not change its ruling on the issue. (2RT 196-198.)

Thus, at the guilt phase of appellant's trial, the prosecution offered evidence of these three incidents.

1. The 1982 Rape of Ann Hoon

On April 13, 1982, appellant pleaded guilty to the forcible rape of Ann Hoon and was sentenced to state prison. (People's Exh. 65.) At appellant's trial, rape victim Ann Wheeler, formerly Ann Hoon, and former Long Beach Police Department investigator George Fox testified. Wheeler testified that in March, 1982, when she was 19 years old and living with her husband on a navy base in Long Beach, California, she was raped by appellant at her home on the base. (19RT 2860.) Appellant was a shipmate of her husband's. (19RT 2863.) Hoon, her husband, who in March of 1982 was away on his first deployment, and appellant had been casual acquaintances prior to the incident. (19RT 2863-2867.) On March 29, 1982, Hoon was home alone when appellant knocked on her door and she invited him in. (19RT 2867.) For the next 15 minutes, appellant and Hoon talked, and at one point the conversation turned to the fact that Hoon wanted a cat. (*Id.*) Appellant then left Hoon's home, but later that evening, at approximately 9:00 p.m., appellant returned to Hoon's house, bringing with him a small striped kitten. (19RT 2868-269.) Hoon again invited him in, and appellant and Hoon returned to the living room, where Hoon showed appellant a photo album. (19RT 2870-2871.)

When she sat by him on the couch, appellant put his arm around Hoon, and she became uncomfortable and asked him to leave. (19RT

2871.) Hoon went to find the kitten, who had wandered off, and when she entered the bedroom, appellant grabbed her neck from behind. (19RT 2872.) While choking her, appellant threatened to kill her if she screamed. (19RT 2873.) Appellant ripped her shirt off. (*Id.*) Appellant then told Hoon, who testified that she was scared and felt threatened, to take off her pants, which she did. (19RT 2874-2875.) Holding her by her hair, appellant forced Hoon onto the bed and forced anal, vaginal and oral sex on her for 20-30 minutes. (19RT 2875-2882.) Hoon testified that she was terrified and that appellant slapped her several times. (19RT 2888.) Appellant ejaculated in Hoon's rectum. (19RT 2886.) After the attack, appellant told Hoon that he would kill her and her husband if she told anyone what happened and then left Hoon's house. (19RT 2887.) Hoon then called for help, and when officers arrived, Hoon reported that she had been raped by appellant. (19RT 2888-2889.)

The following day, on March 30, appellant was arrested by Long Beach police officers and incarcerated and interrogated in the city jail. (19RT 2899-2900.) In a hearing outside the presence of the jury, the trial court found that appellant then voluntarily waived his Miranda rights in regards to that interrogation (2RT 118; 19RT 2818-2853), and the court admitted the testimony of investigator George Fox about the content of his March 30, 1982, interrogation of appellant. During the March 30, 1982, interrogation, appellant, who was "polite" and "very cooperative," told Fox that he knew Hoon and her husband through their mutual connection to the Navy and that he had visited the Hoons' home on March 29, 1982. (19RT 2902, 19RT 2920.) Appellant stated that Hoon had flirted with him in the past, and he believed her to be teasing and flirting with him in an effort to "entice" him that night. (19RT 2904-2905.) Appellant stated that he had

brought Hoon a cat, which he told her she could keep if she kissed him. (19RT 2904.) Appellant first stated that Hoon followed the cat into the bedroom, and he followed behind her, and they removed their clothes and had consensual sex. (19RT 2904-2907, 2910.) Upon further questioning, appellant admitted that he had too much to drink on the night in question and that he could not remember what happened after he and Hoon entered the bedroom. (19RT 2910.) Appellant told Fox that he did not recall using force, but "if she said I forced her, I probably did." (19RT 2912.)

2. The 1987 Rape of Mabel Lovejoy

On November 23, 1987, appellant pleaded guilty to the November 5, 1987, rape of 60-year-old Mabel Lovejoy and was sentenced to a term in state prison. (People's Exh. 65.) At trial for McKenna's murder, six witnesses, including Lovejoy, testified about that incident, and over appellant's objection, the 911 call Lovejoy made that night was played for the jury and admitted as evidence.

Lovejoy testified that she had known appellant since he was a child. (18RT 2542.) On November 23, 1987, appellant came to her home in the early morning hours and asked to use her bathroom. (18RT 2542-2544.) She let him in, and she watched as appellant walked through the kitchen toward the bathroom. (18RT 2544.) Lovejoy testified that when he came out of the bathroom, appellant knocked her down onto the floor and vaginally raped her. (18RT 1546-2547.) After completion of the rape, Lovejoy saw that appellant had a knife, and she began to plead for her life. (18RT 2548.) Appellant stabbed Lovejoy in the back, and when she fell to the floor, he climbed atop her and began to choke her with his hands. (18RT 2549-2550.) Lovejoy then grabbed appellant's testicles and squeezed until he released her. (18RT 2553-2555.) Lovejoy ran to a

bedroom, got a gun, and called 911. (18RT 2554-2556.) Appellant fled. (18RT 2554-2555.)

Over defense objection (18RT 2513-2515), Lovejoy's 911 call was played for the jury. (18RT 2555.) In the recording, Lovejoy is heard telling the operator that she had been "raped and cut" and identified her attacker as, "Carl . . . a neighbor's boy." (People's Exh. 53A at pp.1-2.) Oakland Police Department ("OPD") officers responded to the call, and Lovejoy was taken by ambulance to the hospital, where she was examined and then released. (18RT 2561-2562.)

OPD officer Don Williams testified that he was the first officer on the scene. (17RT 2485.) Williams found the front door unlocked, and inside he saw bloodstains on the living room floor. (17RT 2488-2489.) Hearing noise from inside a locked bedroom, Williams forced the door open and found a bloody knife on a dresser. (17RT 2492-2493.) Looking out the bedroom window, Williams saw Lovejoy with OPD officer Charles Gibson, who had just arrived on the scene outside the house. (17RT 2594-2596.) Williams searched the house, but found no one in inside. (17RT 2496.)

Officer Charles Gibson testified that when he arrived at Lovejoy's address at 3:40 a.m. on November 5, 1987, he saw Lovejoy standing inside at a window, injured and bleeding, and apparently on the phone with the dispatcher. (17RT 2518, 2520, 2522.) Gibson helped Lovejoy climb through the window and escorted her to the waiting ambulance. (17RT 2523-2524.) Gibson then stayed at the scene while OPD officer Vince Chan collected crime scene evidence. (17RT 2525-2526.)

OPD officer and crime scene technician Vincent Chan testified that when he arrived at the scene to collect evidence, he observed two pools of blood and a pair of panties in the living room of Lovejoy's house. (17RT

2534-2535.) He found a knife on a bedroom dresser. (17RT 2536.) After collecting the panties and the knife, Chan went to Highland Hospital and photographed Lovejoy. (17RT 2536-2537.)

At Highland Hospital, Lovejoy was examined by Dr. Paul Freitas. (18RT 2566, 2568.) Freitas testified that he observed that Lovejoy had a stab wound on her left flank and superficial lacerations on her stomach and abrasions and lacerations on her neck. (18RT 2570.) The abrasions on Lovejoy's neck were consistent with choking. (18RT 2571.) The examination also revealed genital trauma consistent with force. (18RT 2574.) Freitas collected and examined a vaginal slide, but found no evidence of spermatozoa. (18RT 2571-2572.)

On November 5, 1987, OPD investigator Sergeant Mark Emerson met with Lovejoy at her home to take her statement, and Lovejoy identified appellant as her attacker. (20RT 3027-3028.) A warrant for appellant's arrest was issued later that day, and on November 9, Emerson arrested appellant at his home in Oakland. (20RT 3029-3031.) After the trial court held a hearing and determined that it was made voluntarily (20RT 3024), Emerson testified to the content of the appellant's statement to Emerson that appellant stated that he had stabbed somebody and had consensual sex with someone. (20RT 3032-3033; People's Exh. 67.)

3. The 1996 Corporal Injury on Brenda Molano

On March 26, 1997, appellant pleaded guilty to the June 7, 1996, corporal injury upon his then wife, Brenda Molano, and was sentenced to a term in state prison. (People's Exh. 65.) Brenda Molano and Christopher and Robert Molano, her sons with appellant, testified about that incident. Probation officer Frank Tapia testified to the content of appellant's statement about the incident.

Brenda testified that during the afternoon of June 7, 1996, she was at home, resting in her bedroom with appellant when appellant told her that, despite his parole status, he was using drugs again. (16RT 2217.) Upset, Brenda attempted to get off the bed, but appellant grabbed her and, putting her into a headlock position, choked her until she lost consciousness. (16RT 2217-2218.) Brenda regained consciousness and found that her hands and feet had been tied with scarves and that she was gagged with a pillow. (16RT 2218-2219, 2238.) When she struggled, appellant again choked her into unconsciousness. (16RT 2219.) When Brenda regained consciousness the second time, she found that she had been unbound and appellant was gone. (16RT 2219, 2238-2239.) Bleeding and sore, Brenda crawled to the living room, where her sons were and told her older son, Christopher, to call 911. (16RT 2221.) Paramedics and sheriff's deputies responded to the call, and Brenda was transported to the emergency room, where she was treated. (16RT 2221.)

Robert Molano testified that he was in the living room playing video games with his brother, Christopher, when his mother crawled out of the bedroom, gasping and barely able to talk, and told the boys to call 911. (16RT 2273.) Christopher Molano testified that the boys were in the living room when appellant rushed out of the bedroom and left the apartment. (16RT 2295-2296). A few minutes later, Brenda Molano, wearing only her underwear, crawled from the bedroom into the living room and told the boys that she had been choked, and Christopher called 911. (16RT 2297-2298.)

Brenda and Christopher provided statements regarding this incident to sheriff's deputies (16RT 2221, 2301), and appellant was later arrested (16RT 2221). On April 2, 1997, appellant, who was incarcerated in

Alameda County Jail in Santa Rita, was interviewed by probation officer Frank Tapia, who was preparing a sentencing report. Tapia testified that appellant told him, "I choked my wife. I was under the influence of crack and I got paranoid. I thought she was going to call the police." (17RT 2411.) Tapia further testified that appellant told him that he had a history of drug and alcohol abuse, and that appellant had smoked crack cocaine three times a day for the last six months and supported his habit by dealing drugs. (17RT 2413.)

At the conclusion of the guilt phase, the jury was given two instructions regarding the relevance of this evidence. The jury was first instructed with CALCRIM No. 375, as follows:

> The People presented evidence that the defendant, in 1996, committed the offense of infliction of corporal injury with great bodily injury on his spo offense was not charged in this case.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> If the People have not met this burden, you must disregard this evidence entirely.
>
> If you decide that the defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding in the charged offense whether or not:
>
> > The defendant intended to kill; or
> >
> > The defendant acted with the knowledge that his acts were reckless and that they created a high risk of death or great bodily injury; or

The defendant's alleged actions were the result of mistake or accident; or

The defendant reasonably and in good faith believed that Suzanne McKenna consented.

Do not consider this evidence for any other purpose except for the limited purposes identified above.

If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty the charged offense and special circumstance allegation. The People must still prove each element of the charge beyond a reasonable doubt.

(7CT 1651; 22RT 3174-3175.)

The jury was also instructed with CALCRIM No. 1191, as follows:

The People presented evidence that the defendant committed the crime of forcible rape in 1982 against Ann Hoon and forcible rape in 1987 against Mabel Lovejoy. These offenses were not charged in this case. The crime of forcible rape is defined for you in these instructions in Instruction number 1000.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a

preponderance of
the evidence if you
conclude that it is
more likely than not
that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit rape, as alleged in the special circumstance charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of rape, as alleged in the special circumstance. The People must still prove each element of the charge contained in the special circumstance beyond a reasonable doubt.

You may also consider this evidence for the limited purposes identified in Instruction number 375, but for no other purpose or purposes.

(7CT 1651; 22RT 3175-3176.)

B. ADMISSION OF THE TWO PRIOR RAPE OFFENSES TO SHOW A PROPENSITY TO COMMIT RAPE VIOLATED APPELLANT'S RIGHT TO DUE PROCESS; TO THE EXTENT IT PERMITS SUCH PROOF, EVIDENCE CODE SECTION 1108 IS UNCONSTITUTIONAL

Petitioner respectfully submits that Evidence Code section 1108 is unconstitutional because it permits evidence of prior crimes to be presented in order to show a propensity to commit such crimes. The principle that evidence may not be presented for that purpose is "so firmly rooted in the

traditions and conscience of our people as to be ranked as fundamental." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43.)

Petitioner recognizes that this court has previously upheld section 1108 against just such a due process challenge (see *People v. Falsetta* (1999) 21 Cal.4th 903, 911), but respectfully submits that this court should revisit the issue for the reasons set forth herein. In addition, because the United States Supreme Court has never squarely addressed the issue (see *Estelle v. McGuire* (1991) 502 U.S. 62, 75, n. 5), and because the point cannot be raised through habeas corpus (*Teague v. Lane* (1989) 489 U.S. 288; 28 U.S.C. §2254(d)(1)), appellant must raise the issue on direct appeal in order to preserve it for federal review. A more detailed discussion follows.

1. Admission of Prior Crimes Evidence to Show Propensity Offends Principles of Justice Firmly Rooted in Anglo-American Legal Tradition and Violates Due Process Principles

The Fifth and Fourteenth Amendments of the United States Constitution guarantee that criminal defendants will have due process of law, that is, the "observ[ation of] that fundamental fairness essential to the very concept of justice." (*Lisenba v. California* (1941) 314 U.S. 219 at p. 236.) Thus, state law violates due process where "it offends some principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Montana v. Egelhoff* (1996) 518 U.S. 37 at p. 43; *Cooper v. Oklahoma* (1996) 517 U.S. 348 at p. 356; *Medina v. California* (1992) 505 U.S. 437 at pp. 445-446.)

One of the functions of due process is to "draw[] a boundary beyond which state rules of evidence cannot stray; . . ." (*Perry v. Rushen* (9th Cir. 1983) 713 F.2d 1447 at p. 1453.) For example, due process requires proof

of a criminal charge beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358) and prohibits conviction unsupported by evidence or based on unreliable evidence (*California v. Green* (1970) 399 U.S. 149, 186, fn. 20) or based on evidence that is unnecessarily suggestive or conducive to irreparable mistake. (*Stoval v. Denno* (1967) 390 U.S. 293, 301-302.)

In *People v. Falsetta, supra*, this court upheld California Evidence Code section 1108 against a due process challenge. Evidence Code section 1108 contains an exception to the Code's broad proscription on the admission of evidence of an accused's other crimes to prove his general criminal disposition to commit a charged crime and allows the prosecution in any sexual offense case to introduce "evidence of the defendant's commission of another sexual offense or offenses" and this evidence is admissible to prove the defendant's general criminal disposition, or propensity, to commit the charged crime. (Cal. Evid. Code section 1108(a); *People v. Falsetta* (1999) 21 Cal.4th 903 at p. 911.)

While acknowledging that "[t]he rule excluding evidence of criminal propensity is nearly three centuries old in the common law", this court concluded that it was "unclear whether the rule against 'propensity' evidence in sex offenses should be deemed a fundamental historical principle of justice" because courts "permit admission of . . . sexual misconduct [for the purpose of showing] motive, identity, and common plan . . ." (*Ibid.*) This court declined to settle that question and held that the limitations imposed on the admission of section 1108 evidence, largely those imposed by the trial court's discretion to exclude propensity evidence under section 352, were sufficient to avoid offending whatever historical practice existed. (*Id.*, at pp. 915-918.)

For the reasons discussed below, appellant respectfully requests that

this court reconsider its decision in *Falsetta*.

2. Application of the United States Supreme Court Due Process Analysis Demonstrates That Admission of Evidence of Appellant's Propensity to Rape Violated Due Process

Appellant acknowledges that the United States Supreme Court has stopped short of announcing a bright-line rule prohibiting propensity evidence because the Court has never needed to answer this precise question in order to resolve a case before it. (See *Estelle v. McGuire* (1991) 502 U.S. 62, at p. 75, fn.5.) However, the Supreme Court has clearly explained the analysis that applies to due process claims. For over 150 years, the Court has applied a historical test for ascertaining what rules are protected by due process. In *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856) 59 U.S. 272, the Court held that when the process at issue is not in conflict with any express constitutional provisions, the court must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. (*Id.,* at 277.)

This historical test was further elaborated in *Hurtado v. California* (1884) 110 U.S. 516, at p. 528 [rule deemed to be embodied in due process if supported by the sanction of settled usage both in England and in this country]. Over a century later, the Supreme Court affirmed this definition in *Dowling v. United States* (1990) 493 U.S. 342, defining due process as "those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." (*Id.* at p. 352 (internal quotation omitted).)

The historical pedigree of the prohibition on propensity evidence is unimpeachable. The rule is rooted in English law and was adopted by the colonial courts, enforced as a common-law rule throughout the history of our nation's judiciary, and codified in state and federal rules of evidence.[33] Commentators agree that the propensity ban has received judicial sanction for three centuries.[34] This historical legacy amply demonstrates that propensity evidence "offends [a] principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Patterson v. New York* (1977) 432 U.S. 197 at pp.201-202.)

The Supreme Court has acknowledged the constitutional dimensions of the trial rights protected by the propensity ban. (See *Boyd v. United States,* 142 U.S. 450 (1892) [prior crimes evidence impermissibly impressed upon jury the notion that defendants were "wretches" undeserving of prescribed trial protections]; see also *Estelle*, *supra*, 502 U.S. at 78 (O'Connor, J., concurring) [suggesting that prohibition on propensity evidence protects proof beyond reasonable doubt standard].)[35] Thus, federal law compels the conclusion that the propensity ban is a requirement

---

[33]/ See, Louis M. Natali, Jr. & R. Stephen Stigall, "Are You Going To Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause, 28 LOYOLA U. CHI. LJ. 1, 13-15 & fn. 85-101 (1996) (summarizing historical record and collecting cases).

[34]/ See, e.g., 1A Wigmore on Evidence, § 58.2, p. 1213 (rev. 1983)

[35]/ Justice O'Connor commented that the Due Process Clause requires proof beyond a reasonable doubt, and prohibits presumptions which have the effect of relieving the prosecution of its burden of proof. Her analysis suggests that propensity evidence creates an improper presumption that the accused has committed the crime charged because he was involved in prior similar offenses. Accordingly, her opinion suggests that the use of prior bad acts as propensity evidence offends due process, not only because of its inconsistency with longstanding principles of fundamental fairness, but also because it undermines the standard of proof required by due process in criminal cases.

of due process. Moreover, at least two federal courts of appeal have explicitly held that admission of character evidence to prove the disposition of the defendant to commit the current offense violates federal due process. (*Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

Even in the absence of a bright-line rule that pure propensity evidence violates due process, the use of propensity evidence rendered appellant's trial fundamentally unfair. In this case, during jury instructions prior to deliberations, the jury was instructed with CALCRIM No. 1191. This instruction told the jury that it could conclude "that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit rape, as alleged in the special circumstances charged here." (7CT 1651.) Admission of this evidence accompanied by an instruction expressly authorizing a propensity-based inference of guilt violated "the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not who he is." (*United States v. Hodges* (9th Cir. 1985) 770 F.2d 1475 at p. 1479.) As the *Hodges* court continued:

> Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing.

(*Id.*, at p. 1479.)

The evidence involving the prior offenses and CALCRIM No. 1191 invited the jury to convict appellant on the general basis that appellant was a sex offender, rather than on the exclusive basis of evidence regarding the

death and possible rape of McKenna. Thus, admission of evidence of the rapes of Ann Hoon and Mabel Lovejoy rendered the trial fundamentally unfair. Further, in light of the long recognized dangers of permitting jurors to rely upon propensity evidence as a basis for conviction,[36] the evidence and instruction also undermined the reliability required by the Eighth and Fourteenth Amendments for a constitutionally valid capital conviction and sentencing determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38 [heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense]; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination].)

3. Section 352 Does Not Provide the Safeguard Anticipated by *Falsetta*

In *Falsetta*, *supra*, this court relied heavily on *People v. Fitch* (1997) 55 Cal.App.4th 172, in holding that section 1108 did not violate due process because:

> [W]e think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from

---

[36]/ See, e.g., *Michelson v. United States* (1948) 335 U.S. 469 at pp. 475-476:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt . . . . The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

> defendant's due process challenge. As stated in *Fitch,* '[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. (. . . §1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (. . . § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. *With this check upon the admission of uncharged sex crimes in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.*" [emphasis in original.] [Citation.]

(*Falsetta, supra*, 21 Cal.4th at p. 917-918.)

As anticipated by *Falsetta*,

> [r]ather than admit[ting] or exclud[ing] every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]

(*Falsetta, supra,* at p. 917.)

However, section 352 does not provide the "safeguard" this court anticipated. Section 1108 alters the traditional balancing process of section 352 by establishing a presumption in favor of admissibility of prior sex

offenses to prove disposition, and because section 1108 makes prior sex offenses presumptively admissible, such priors may now be excluded under section 352 only if they are unduly prejudicial for some reason other than their tendency to prove disposition.

As this court has noted, propensity evidence has historically been "deemed objectionable, not because it has no appreciable probative value, but because it has too much." (*Falsetta, supra*, 21 Cal.4th at p. 915.) Thus, based on its "appreciable probative value," in addition to its presumption of admissibility, it is clear that prior sex offenses will only be excluded under section 352 in extremely rare circumstances. This cannot be considered an adequate safeguard against the admission of evidence that has traditionally been considered inherently prejudicial. (See *United States v. Burkhart* (10th Cir. 1972) 458 F.2d 201 at p. 204 ["[O]nce prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."].)

Indeed, experience has shown that section 352 provides no safeguard at all. The *Falsetta* opinion relied on the earlier court of appeal decision in *People v. Harris* (1998) 60 Cal. App.4th 727, to demonstrate that the section 352 exclusion remedy is both vital and legally viable:

> [I]n *Harris* [citation], the appellate court reversed a conviction under that section, concluding the trial court abused its discretion under section 352 in admitting an altered version of the defendant's past violent sex offense. In its discussion, the *Harris* court carefully examined, and applied to the facts before it, the factors included in the trial court's discretionary decision to admit propensity evidence under sections 352 and 1108.

(*Falsetta, supra,* 21 Cal.4th at pp. 918.)

Harris was decided in January, 1998 – more than 15 years ago, and it

is the only pre-*Falsetta* case holding that a trial court erred in admitting evidence under section 1108. Although this Court found that there was "no reason to assume, as defendant suggests, that 'the prejudicial effect of a sex prior will rarely if ever outweigh its probative value to show disposition'" (*Falsetta, supra,* 21 Cal.4th at p. 919), no reported appellate decision since *Falsetta* has found reversible error in the admission of other crimes evidence proffered by the prosecution under section 1108. A practice which admits other crimes evidence when offered to prove a defendant's disposition to commit the charged offense -- even when subject to the empty safeguard of section 352 -- violates Due Process. Indeed, as a matter of logic, section 352 analysis conducted in light of Evidence Code section 1108 and an instruction like CALCRIM No.1191 cannot remedy the due process problem since that analysis will now assume, contrary to our longstanding traditions, that propensity evidence is a proper basis for conviction, and hence accord probative value to a theory of proof that should not be permitted at all.

In short, if proving propensity is deemed legitimate, it is difficult to imagine a case in which Evidence Code section 352 analysis would ever exclude prior sex crimes evidence.[37] A 352 analysis thus does not save

---

[37]/ A brief examination of the facts in *Harris* shows why exclusion of prior sex offenses under section 352 will be extraordinarily rare. In that case, the defendant, a male mental health nurse, was charged with fondling the breasts and clitoris of one female patient and having an inappropriate but consensual sexual relationship with another female patient, both of whom were or had been under his care and had a strong defense with respect to each count. (*People v. Harris, supra*, 60 Cal.App.4th at pp. 691-692. The prior offense which the prosecution sought to present under section 1108 involved not merely inappropriate sexual conduct but an incident in which the defendant broke into the home of a strange women in the nighttime, beat her unconscious, used a sharp instrument to rip through the muscles from her vagina to her rectum, then stabbed her in the chest with an ice pick, leaving a portion of the pick inside her. The police found both the victim and the defendant covered in blood. (*Id.*, at p. 692.) In that case, the

section 1108 from unconstitutionality as a federal due process violation, appellant's conviction must be reversed under *Chapman*.

C. EVIDENCE OF THE 1996 CORPORAL INJURY INCIDENT WAS IRRELEVANT TO ANY PURPOSE PERMITTED BY SECTION 1101(B) AND THEREFORE INADMISSIBLE

As discussed above, the trial court not only admitted evidence of appellant's prior rape convictions pursuant to section 1108 and statements made by appellant during the investigations into those prior offenses, but also admitted evidence of appellant's 1996 conviction for corporal injury on his wife, Brenda Molano, pursuant to section 1101(b). The facts relating to the offense underlying that conviction showed that appellant had choked his wife during the incident. The court's rationale for admitting the evidence was that the incident showed "strangulation is a method employed by the defendant when facing psychological dissonance" and also rebutted appellant's statement that McKenna's strangulation death was accidental. (2RT 193.)

Appellant submits that the court's ruling was error and that the evidence was inadmissible under the Fifth, Sixth, Eighth, and Fourteenth Amendments as a violation of due process. A more detailed discussion follows.

1. Under the Applicable *Ewoldt* Analysis, the 1996 Incident Lacks Sufficient Similarity to the Charged Offense to Be Relevant or Admissible.

While the fact that a defendant has committed prior crimes may

---

appellate court properly found the prior conviction inadmissible because it was shocking, inflammatory, and profoundly out of proportion to the charged offense. The fact that there has not been a single section 352 exclusion of a prior sex offense in an 1108 case in the last 15 years shows just how rare such circumstances are likely to be.

show bad character, or a propensity or disposition to commit the crime charged, evidence of prior crimes is generally inadmissible for this purpose. (Evidence Code sections 1101, 1102; *People v. Thompson* (1980) 27 Cal.3d 303, 316; *People v. Sam* (1969) 71 Cal.2d 194, 203.) The reason such evidence is excluded, and has consistently been excluded throughout the history of American law, is summarized in the often-quoted language of Dean Wigmore:

> It may almost be said that it is because of this indubitable relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal– whether judge or jury– is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charge, any or all of which may be mere fabrications."

(*People v. Baskett* (1967) 237 Cal.App.2d 715, 716, citing 1 Wigmore, *Evidence* (3d ed. 1940).)

As an exception to the general rule of exclusion for prior crimes evidence, evidence of uncharged offenses is made admissible if the evidence is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan or knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act did not reasonably and in good faith believe that the victim consented)" other than criminal disposition. (Evid. Code § 1101, subd. (b).) For analytical purposes, this court has often grouped these facts into three

categories: identity, common design or plan, and intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403; *People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)[38] The degree of similarity required to establish relevance of the prior uncharged offense evidence depends upon which of the foregoing matters is sought to be proved. The highest degree of similarity applies to identity. "To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses." (*Id.*, at p. 403.) A great degree of similarity is required to establish common design or plan. The prior misconduct evidence must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Id.*, at p. 402.) The least degree of similarity is required to prove intent; the similarity must merely be sufficient to support the inference that the defendant probably harbored the same intent in each instance. (*Ibid.*)

It is important to note that *Ewoldt's* similarity analysis is only the first step. Once a court has determined that prior uncharged misconduct bears sufficient similarity to the charged misconduct, the proffered evidence

---

[38]/ *People v. Ewoldt* has been superseded by Evidence Code section 1108 in casesin which the prior uncharged offense is a sex offense falling within the purview of that section. (*See, e.g., People v. Robertson* (2012) 208 Cal.App.4th 965, 991; *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) However, appellant's 1996 conviction for corporal injury was not a sex offense subject to section 1108, and the *Ewoldt* analysis therefore continues to apply to it.

is deemed *relevant* to prove a fact other than the defendant's criminal disposition. However, that is not the end of the inquiry. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Because of the strictures of Evidence Code section 352, a second-stage analysis must also be done to determine whether the probative value of the evidence is outweighed by its prejudicial effect.

> Evidence of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis. [Citations.]" (*People v. Smallwood* (1986) 42 Cal.3d 415, 428; see also *People v. Thompson* (1988) 45 Cal.3d 86, 109.) "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson* (1980) 27 Cal.3d 303, 318, italics in original, fn. omitted.)

(*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.)

In conducting this analysis in *Ewoldt*, a case which involved the assessment of evidence proferred to prove common design or plan, this court stated that "[t]he principal factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of a common design or plan." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) If the uncharged conduct and the charged offense are committed in a manner that it "nearly identical," as were the offenses in question in *Ewoldt*, the "tendency is strong." (*Ibid.*) The probative value of uncharged misconduct evidence is also affected by "the extent to which its source is independent of the evidence of the charged offense" and if "independent evidence of additional instances of similar misconduct, committed pursuant to the same design or plan, [is] produced." (*Ewoldt, supra*, at pp. 404-405.) Probative value is *decreased*, however, to the extent that the prior uncharged misconduct occurred more than a few

years prior to the charged misconduct. (*Ibid.*)

On the other side of the scale, the court must analyze the prejudicial effect of the evidence. As noted above, this court found in *Ewoldt* that prior uncharged offense evidence *always* involves a substantial prejudicial effect. However, that prejudicial effect is heightened if the defendant's uncharged acts did not result in criminal convictions, or if the testimony regarding the uncharged offense is stronger or more inflammatory than the testimony concerning the charged offenses. (*Ewoldt, supra*, 7 Cal.4th at p. 405.)

Application of the foregoing analysis to the instant case demonstrates that the evidence of the 1996 conviction for corporal injury on a spouse was inadmissible in this matter. The first step in the analysis is to determine what the evidence was proffered to prove. In the instant case, the parties and the court all agreed that identity was not in issue (2RT 112), and the evidence was therefore not admissible for that purpose. Instead, the prosecutor appeared to argue initially that the evidence was relevant to intent and absence of mistake or accident, but subsequently agreed with the court that the evidence of choking in the 1996 offense arguably showed a similar "modus operandi" the charged offense– in short, evidence of a common design or plan– and then finally stated that he sought to prove "*all* the 1101(b) events, in a way . . ." (2RT 113, emphasis added.)

While the prosecutor may have thought his scattershot, cover-all-the-bases approach to the proffer maximized his chances of prevailing on the issue, it was not particularly helpful for the purposes of focusing appellate analysis under *Ewoldt*. However, the court's more focused ruling helps to clarify the issue. As noted above, the court ruled that the evidence pertaining to the 1996 assault was admissible because it showed that "strangulation is a method employed by the defendant when facing

psychological dissonance" and that the evidence also rebutted appellant's statement that McKenna's strangulation death was accidental. (2RT 193.)

Appellant submits that the first rationale advanced by the court, i.e., that the evidence of the prior offense tended to show strangulation was a method employed by the defendant under certain conditions, is essentially a "common plan or design" rationale. This conclusion is also supported by the court's previous statements indicating its understanding that the choking behavior involved in the Brenda Molano and McKenna incidents arguably showed a common "modus operandi." (2RT 115.) Accordingly, appellant will first analyze the relevance of the evidence under the *Ewoldt* rubric for common plan or design.

To establish sufficient relevance to show common plan or design, the proffering party must show a great degree of similarity between the charged and uncharged offenses, though not as great as the degree of similarity required to show identity. To show common plan or design, the prior misconduct evidence must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Id.*, at p. 402.)

Plainly, under the foregoing analysis, the 1996 corporal assault offense was not sufficiently similar to the McKenna killing to establish common plan or design. In the prosecutor's argument, he stated that the 1996 assault resulted from appellant returning home under the influence of drugs and alcohol, contrary to his earlier promise to his wife. The prosecutor argued that appellant feared his wife would contact his parole officer and report him, and that he choked her into unconsciousness and tied her up so he could steal her ATM card and car and make a getaway. (2RT

188-190.) By contrast, in the McKenna killing appellant went to the victim's house, apparently had alcohol and cocaine with Ms. McKenna, had sex with the victim, and at some point choked her to death. Appellant never tied up McKenna, and obviously never killed or intended to kill Brenda Molano. Apart from the choking, there are no common features in the two situations, and even the results of the choking were different.

The court's ruling on this point appears to have been based on the fact that a choking occurred in each incident and the court seemed to feel that this single similarity was sufficient. However, as *Ewoldt* makes clear, the question is not whether there is one similar *feature* shared by the two incidents, but rather whether the there was "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Id.*, at p. 402.) In short, *all* of the features of both offenses must be compared to determine whether they arguably resulted from the same "general plan."

The mere concurrence of one similar feature is not enough, and the two incidents share no other concurrent features. First of all, the motivations were dramatically different. Even under the prosecutor's theory, the corporal injury incident was not motivated by a sexual or homicidal intent, but instead by an intent to temporarily immobilize Brenda Molano and keep her quiet so appellant could get away before she reported him to his parole officer. The McKenna incident, at least under the prosecutor's theory, was propelled by either a sexual motive, a homicidal motive, or some combination of the two. This distinction is critical, as it is difficult to see how two crimes share a common plan or design if they do not at least share similar motivations. Other differences between the two

incidents are numerous. No rape or sex of any kind occurred in the corporal injury incident, whereas sex was central to the prosecution's theory of the McKenna homicide. In the corporal injury incident, the victim was appellant's spouse, who was sober and disapproved of his drug and alcohol use, whereas in the McKenna case, the victim was a single woman and a co-participant in appellant's drug and alcohol use. In the corporal injury incident the victim was tied up, whereas in the McKenna case the victim was not. The corporal injury incident occurred in appellant's home, whereas the McKenna incident occurred in the victim's home. Indeed, apart from mere fact of the choking itself, there do not appear to be any other shared features between the two incidents, and even the circumstances of the choking were different: in the Brenda Molano incident, appellant appears to have used his bare hands, whereas McKenna was choked with a garment.

Furthermore, *Ewoldt* states that to show common design or plan one must show "not *merely* a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Id.*, at p. 402.) This language strongly suggests that while similarity in results is not *sufficient* by itself to establish relevance of prior misconduct, it is at least one of the *requirements* to show common plan or design. Clearly, the results in these two incidents were different, and the analysis therefore fails for this separate reason. The corporal injury prior was irrelevant and inadmissible to show common design or plan.

A more interesting question arises with respect to the question of the standard required to show absence of mistake or accident. Appellant has found no precedent from this court's cases which clearly indicates what

Ewoldt analysis is required to determine the relevance of prior misconduct proffered for this purpose. There are Court of Appeal cases which appear to conclude, without any detailed analysis or citation to any decision of this Court, that because evidence of mistake or accident tends to negate intent, the *Ewoldt* "intent" analysis should be applied to evidence offered to show absence of these factors. (See, e.g., *People v. New* (2008) 163 Cal.App.4th 442, 469; *People v. Burnett* (2003) 110 Cal.App.4th 868, 881; *People v. Singh* (1995) 37 Cal.App.4th 1343, 1381.) However, a closer examination of the rationale behind this court's decision in *Ewoldt* raises considerable doubt whether these appellate cases were correct in this conclusion or, even if they were correct as a general matter, whether the *Ewoldt* "intent" analysis is appropriate here.

In *Ewoldt*, this court decided that the lowest degree of similarity between the uncharged act and the charged offense was required to prove intent. In so deciding, this court relied upon language from the 1979 edition of *Wigmore on Evidence*, which stated that "the recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act, . . ." (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 302, p. 241.)

However, while this rationale may be logical when the prior crimes are the same as the crime charge, the logic breaks down when the prior crimes are *different* than the charged offense. In this instance the prior offense was corporal injury upon a spouse, but appellant was not charged with that offense in the instant case. Thus, the inference of a common intent from "the recurrence of a similar result" cannot be made because

there was no "similar result" in the instant offense. McKenna was killed, whereas Ms. Molano was not.

Moreover, the corporal injury offense was a *general* intent crimes, whereas the instant offense required proof of a *specific* intent. It must be recalled that appellant was not charged with rape, a general intent crime, but rather with murder under alternative theories of premeditated and deliberate murder, on one hand, and rape felony murder, on the other. The question was not whether appellant had the general intent required for rape but rather whether he had the specific intent to commit murder or the specific intent to commit rape, during the commission of which a killing occurred. Under the Wigmore logic, this general intent prior has no relevance to the question of appellant's specific intent in this case.

However, even if it is assumed *arguendo* that the Court of Appeal cases cited above are correct, and even if it assumed *arguendo* that the *Ewoldt* intent analysis is to be applied to evidence offered to negate accident or mistake when the intent involved is *specific* intent, the result is still that the 1996 incident was not relevant to the instant offense. In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403, citing *People v. Robbins* (1988) 45 Cal.3d 867, 879.) As explained above, appellant's intent in the 1996 case was not to kill or rape, but to render Brenda Molano unconscious and tie her up so he could make a getaway. The evidence was thus irrelevant to show an intent to kill or rape or to negate an inference of accident or mistake.

Because the evidence of the 1996 corporal injury incident was not relevant to show either intent or common design or plan under the *Ewoldt*

analysis, it should have been excluded without resort to the second stage of the analysis, namely the evaluation of probative value and prejudicial effect. However, for purposes of assessing the reversible effect of the error, it is necessary to examine prejudice. That is the subject of the next section.

2. The Improper Admission of the 1996 Conviction Was Prejudicial and Reversal Is Compelled.

As explained above, the 1996 crime did not support any inferences about intent to kill and/or rape, and yet the jury was instructed with CALCRIM Nos. 375 and 1191 that such inferences were permissible. The instructions authorized the jury to draw unwarranted incriminating inferences in violation of appellant's Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and to fair and reliable guilt and sentencing determinations. (*County Court of Ulster County, N.Y. v. Allen* (1979) 442 U.S. 140, 157 [an authorized inference undermines the application of the "beyond a reasonable doubt" standard and violates due process when, under the facts of the case, there is no rational way to make the connection permitted by the authorized inference]; *In re Winship* (1970) 397 U.S. 358 [due process requires proof beyond a reasonable doubt as a prerequisite to conviction of a criminal offense]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-38 [heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense]; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (same); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85 (same). Not only was the 1996 offense inadmissible, but the jury was authorized to use it in an impermissible fashion.

In addition, the combination of 1108/1101 instructions was inherently confusing, and the jury was likely to have improperly relied upon the 1996 offense as propensity evidence, in violation of due process and the Eighth Amendment for the reasons set forth in section B of this argument.

Federal constitutional error requires reversal unless the beneficiary of the error can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*In re Terry* (1971) 4 Cal.3d 911, 916; *Chapman v. California* (1967) 486 U.S. 18, 24.) "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Chapman v. California, supra*, 486 U.S., at p. 23, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.)

Respondent simply cannot show the evidence of the prior corporal injury conviction was harmless beyond a reasonable doubt. The evidence clearly had no probative value and, as with *all* prior misconduct evidence, its prejudicial effect was substantial. (*Ewoldt, supra*, 7 Cal.4th at p. 404.) The evidence simply depicted appellant as a bad and violent character who choked his own wife into unconsciousness, then stole her ATM card and car to get away before she could notify his parole officer. Indeed, the jury was likely to accept the evidence for the same improper purpose that the court ruled it admissible– to show a common plan or design or to negate a defense of accident or mistake. However, the evidence was inadmissible for these purposes, and because the required intent elements and results in the two cases were different there was no proper use to which the evidence could be put.

The erroneous admission of evidence of a prior conviction is inherently prejudicial in all cases, but it is particularly prejudicial in a case in which the prosecutor specifically relies upon it in closing argument.

(*People v. Thompson* (1980) 27 Cal.3d 303, 332-333; *People v. Woodard* (1979) 23 Cal.3d 329, 341.) In this case, the prosecutor specifically relied upon the evidence in his closing argument, citing the evidence as refuting appellant's statements to law enforcement officers that McKenna's death by strangulation was an accident:

> The choking of Brenda is a piece of circumstantial evidence that can be used to draw an inference that strangling McKenna was not an accident. He choked Brenda because he thought she would turn him in for being under the influence of drugs. He was ready to silence her. Use that to evaluate his various statements. The evidence shows that he had a long-standing pattern of denying or minimizing his conduct. His strategy is admit what you must, and nothing more.

(RT 3111-3112.)

Nor did the instruction regarding this evidence effectively limit its use or alleviate the prejudice inherent in the introduction of the evidence. The jury was expressly instructed that they could consider the evidence of the 1996 corporal assault in determining whether appellant intended to kill McKenna, whether he acted with knowledge that his acts were reckless and created a high risk of death or great bodily injury, whether McKenna's death was the result of mistake or accident, or whether he reasonably and in good faith believed McKenna consented. (8CT 1650; 22RT 3175 CALCRIM No. 375.) While couched as a "limiting" instruction, the instruction actually placed few actual limits on the jury's use of the evidence. For example, in considering whether appellant "intended to kill," it is entirely possible, even probable, that the jury improperly considered the evidence as showing that appellant had a propensity to commit violent crimes and therefore was more likely to have intended to kill McKenna than someone without a criminal record.

Furthermore, the case was far from being open and shut. Appellant admitted that he had killed McKenna; the questions were whether the killing was accidental, or reckless, or intentional, and whether it occurred during the commission of a rape. The evidence on all these questions was wholly circumstantial, and the forensic and other evidence were consistent with a conclusion that the sexual conduct between appellant and McKenna consensual. Appellant's credibility was crucial in deliberations on that question. The evidence of appellant's priors, and the instructions authorizing the jury to draw inferences about his propensities, character, and mens rea, very likely tipped the balance in determining whether to believe his statements that McKenna's death was accidental. (*See People v. Allen* (1978) 77 Cal.App.3d 924, 935 [error in a close case turning on appellant's credibility is more likely to be harmful]; *People v. Rolon* (1967) 66 Cal.2d 690, 693 [improper admission of prior conviction more likely to be reversible in a close case].)

As noted above in connection with the error of admitting appellant's statements to Emerson and Fox, the circumstances pertaining to the jury's deliberations are also informative on the issue of prejudice from the wrongful admission of the 1996 prior conviction. As noted above, the jury deliberated for two days and also requested that the court provide them with the autopsy report, Sergeant Power's report, Deputy Dutra's report, and the audio and videotapes of appellant's interviews with Detectives Dudek and Chicoine on March 21 and 31, 2003. (7CT 1626.) On Monday, August 20, 2007, they sent a question to the judge asking what the result would be if they were unable to reach a unanimous verdict with respect to the special circumstance allegation, and more specifically whether in that event the allegation would be deemed not true, or whether the jury would be

considered simply not to have reached a decision on the question. (7CT 1676, 1679.) At 10:05 a.m., after conferring with counsel, the court responded in writing to the jury that there must be a unanimous verdict of either 'True' or 'Not True.' If the jury cannot unanimously so agree the result would be a mistrial as to that allegation."[39] (7CT 1677.) At 11:35 a.m., the jury returned its verdict finding appellant guilty of murder and finding the special circumstance of murder in the commission of rape to be true. (7CT 1679.)

As noted above, the foregoing facts are indicative of a close case. Two days of deliberations was more than the six hour periods that have been held by this court to indicate that a case is not "open and shut" and to "strongly indicate that errors in the admission of evidence are prejudicial." (*People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Woodard* (1979) 23 Cal.3d 329, 341.) In addition, the fact that the jury sent the judge a note indicating that they were having difficulty arriving at a unanimous decision on the rape special circumstance indicates that they viewed the evidence on this point as close and problematic. This suggests that any error in the case that might have contributed to the jury's determination of the special circumstance issue cannot have been harmless beyond a reasonable doubt. (See, e.g., *People v. Markus* (1978) 82 Cal.App.3d 477, 480 [jury request for additional instruction on issue indicative of prejudicial effect of error relating to that issue].) Finally, a jury request to review evidence or have testimony re-read during deliberations is also an indicator of a close case in

---

[39]/ The court's response did not explain what the term "mistrial" meant. The jury might well have assumed that appellant would go unpunished and could not be tried again if they were unable to reach a decision on the special circumstance. Even if they understood the meaning of a "mistrial," the response placed pressure on the jury to make a decision or force the county to expend the time and resources necessary to retry appellant.

which prejudice from an error is likely to be greater. (See, e.g., *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40.)

Because respondent cannot show the error to have been harmless beyond a reasonable doubt, reversal is required.

D. CONCLUSION

There is a reasonable probability that the guilt phase result would have been different had the section 1108 and section 1101(b) evidence not been admitted and the jury authorized to draw propensity and mens rea inferences from them. Introduction of evidence of the rapes of Ann Hoon and Mabel Lovejoy and the corporal injury upon Brenda Molano violated appellant's Fifth and Fourteenth Amendment rights to due process and fundamental fairness. Under these circumstances, respondent cannot show that the erroneous admission of the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 a p. 24.) The improper and unconstitutional admission of this evidence and the improper instructions which accompanied it requires that appellant's guilt phase conviction be reversed.

III. THE TRIAL COURT ERRED IN GIVING THE JURY AN INSTRUCTION ON INFERRING CONSENT FROM EVIDENCE OF PRIOR SEXUAL INTERCOURSE WITHOUT MODIFYING THE INSTRUCTION TO PERMIT THE JURY TO CONSIDER THIS EVIDENCE FOR THE PURPOSE OF DETERMINING WHETHER APPELLANT HAD AN HONEST BUT UNREASONABLE BELIEF THAT THE VICTIM CONSENTED TO THE CHARGED ACT.

At the guilt phase of appellant's trial, evidence was presented that appellant and the victim, Suzanne McKenna, had consensual sexual intercourse on an occasion prior to the incident that resulted in her death. (People's Exhibit 38A, at p. 30.) Accordingly, at the conclusion of the guilt phase, the court read an instruction permitting the jury to consider this evidence for the purpose of determining whether Ms. McKenna consented to the sexual intercourse that occurred during the incident leading to her death and whether appellant had a reasonable, good faith belief that she had consented.

The court administered the standard version of CALCRIM No. 1194, which read as follows:

> You have heard evidence that Suzanne McKenna had consensual sexual intercourse with the defendant before the act that is charged in this case. You may consider that evidence only to help you decide whether the alleged victim consented to the charged act and whether the defendant reasonably and in good faith believed that Suzanne McKenna consented to the charged act. Do not consider this evidence for any other purpose.

(CALCRIM No. 1194; RT 3174; CT 1648.)

The foregoing instruction is entirely correct when the only charged crime is rape. However, it is incorrect when the prosecution pursues a theory of rape felony murder and/or charges a rape special circumstance.

By its terms, the instruction *prevented* the jury from considering whether evidence of prior consensual sexual intercourse caused appellant to have a good faith, but unreasonable, belief that Ms. McKenna consented to the sexual act that immediately preceded her death. Because such a good faith belief, even if unreasonable, is a defense to rape felony murder and a rape special circumstance, and because no other instruction permitted the jury to consider the evidence for that purpose, the instruction deprived appellant of his right to present a complete defense. The error deprived appellant of his federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Because respondent cannot show the error to have been harmless beyond a reasonable doubt, reversal is required.

A more detailed discussion follows.

A. AN UNREASONABLE BELIEF IN CONSENT IS A DEFENSE TO RAPE FELONY MURDER AND RAPE SPECIAL CIRCUMSTANCE.

Penal Code section 1127d, subdivision (a), provides as follows:

> In any criminal prosecution for the crime of rape, or for violation of Section 261.5, or for an attempt to commit, or assault with intent to commit, any such crime, the jury shall not be instructed that it may be inferred that a person who has previously consented to sexual intercourse with persons other than the defendant or with the defendant would be therefore more likely to consent to sexual intercourse again. However, if evidence was received that the victim consented to and did engage in sexual intercourse with the defendant on one or more occasions prior to that charged against the defendant in this case, the jury shall be instructed that this evidence may be considered only as it relates to the question of whether the victim consented to the act of intercourse charged against the defendant in the case, or whether the defendant had a good faith reasonable belief that the victim consented to the act of sexual intercourse. The jury shall be instructed that it shall not consider this evidence for any other purpose.

(Pen. Code §1127d, subd. (a).)

The crime of rape requires a union of act and wrongful intent. (*People v. Mayberry* (1975) 15 Cal.3d 143, 155.) In the context of this case, the crime consists of an act of sexual intercourse accomplished with a person not the spouse of the perpetrator against that person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another. (Pen. Code §261(a)(2).)

Rape itself is a general intent crime and, as such, is subject to the defenses applicable to crimes requiring general criminal intent, including the defense of mistake of fact. "Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent" are exempt from criminal liability. (Pen. Code §26; see generally, Witkin, *California Criminal Law* (4th ed 2012), vol. 1, "Defenses," §47, pp. 478-480, and cases there cited.) A mistake of fact, and thus a complete defense to a charge of rape, is established if the perpetrator reasonably believes that the victim has consented to the sexual act. "If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented . . . to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite [to commit] rape by means of force or threat (§ 261, subds. 2 & 3)." (*People v. Mayberry*, *supra,* 15 Cal.3d at p. 155.) Thus, CALCRIM 1194 correctly states the law with respect to a perpetrator's reasonable belief in consent as it applies to the crime of rape.

However, while rape itself is a general intent crime, appellant was not charged with the crime of rape; rather, he was charged with the crime of murder, on both premeditated murder and rape felony murder theories (CT 1643, 1647), together with a felony-murder special circumstance allegation

that the murder was committed while appellant was engaged in the commission of the crime of rape. (Penal Code §190.2, subd. (a)(17)(C); 4CT 932; RT 1582.) Rape felony murder and the rape felony murder special circumstance both require the additional element of specific intent to commit rape. (*People v. Haley* (2004) 34 Cal.4th 283, 314; *People v. Jones* (2003) 29 Cal.4th 1229, 1256-1257; see also *People v. Cavitt* (2004) 33 Cal.4th 187, 197.) The jury was therefore instructed, at the prosecutor's request, with a modified version of CALCRIM No. 540A which stated that to find defendant guilty of first degree murder under a felony murder theory the jury had to find that appellant specifically intended to commit the underlying offense of rape. (21RT 3056 [prosecutor's request], 3095 [prosecutor's argument]; CT 1637; 22RT 3166 [instruction].) The court also instructed that a specific intent to commit rape was required for proof of the rape felony murder special circumstance, CALCRIM No. 251, CALCRIM No. 705, and CALCRIM 730. (CT 1639, 1642, 1644.)

Unlike general criminal intent, the element of specific intent is negated by even an *unreasonable* mistake of fact. (See, e.g., *People v. Mares* (2007) 155 Cal.App.4th 1007, 1010 [unreasonable belief in amount of bank account sufficient to negate specific intent element of crime of passing bad check]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1426 [defendant in a case of receiving stolen property is entitled to an instruction that an unreasonable belief that property was not stolen negates specific intent element]; *People v. Navarro* (1979) 99 Cal. App. 3d Supp. 1, 10-11, 160 Cal. Rptr. 692 [concluding that a mistake of fact in regard to theft need not be reasonable because theft is a specific intent crime]; CALJIC No. 4.35 [reasonableness requirement should be deleted from instruction on mistake of fact when specific intent crime involved];

CALCRIM No. 3406 [if specific intent or knowledge is element at issue, belief required for mistake of fact need not be reasonable].) Accordingly, CALCRIM No. 1194 incorrectly stated the law the jury was to apply to this case and the court erred in giving that instruction.

Contrary to CALCRIM No. 1194, evidence that Suzanne McKenna previously had consensual sexual intercourse with appellant was relevant to show not only a reasonable belief that she had consented to the charged sexual act (a defense to the charge of rape), but also to show a bona fide belief, reasonable or otherwise, that she had consented, thereby negating the mens rea required for rape felony murder and the rape special circumstance, i.e., a specific intent to rape.

Furthermore, the wording of CALCRIM No. 1194 was reasonably likely to have misled one or more jurors as to the meaning of the required specific intent to rape. The instruction limited the relevance of the defendant's belief in consent to a reasonable belief. A juror was likely to understand that an unreasonable, albeit sincere, belief in consent was simply irrelevant and not inconsistent with an intent to rape and that the defendant would be guilty of both rape and rape felony murder if he acted under circumstances that would have alerted a reasonable person to the victim's lack of consent. Indeed, why else bar consideration of seemingly relevant evidence to anything broader than a reasonable belief?

Thus, CALCRIM No. 1194 both deprived appellant of the benefit of significant trial evidence supporting doubt as to whether he had the required intent for felony murder (and the rape special circumstance), and skewed the jury's understanding of that mens rea requirement in a way that lessened the prosecution's burden of proof regarding the murder charge and special circumstance allegation. As a result of the instructional error, appellant may

have been convicted of capital murder without a jury finding of the required mens rea.

The Due Process Clause of the Fourteenth Amendment entitled appellant to have the jury determine every material issue presented by the evidence. (*In re Winship* (1970) 397 U.S. 358, 364; *People v. Sedeno* (1974) 10 Cal.3d 703, 720 [overruled on other grounds in 19 Cal.4th 142, 165.) Further, "[w]hen the jury is not given an opportunity to decide a relevant factual question," the defendant is denied his Sixth Amendment right to jury trial. (*United States v. McClain* (5th Cir. 1977) 545 F.2d 988, 1003 -1004.) Accordingly, it is the judge's responsibility to give the jury "correct and pertinent" instructions on the general principles of law relevant to the issues raised by the evidence. (Pen. Code §§1127, 1093, subd. (f); see also *People v. Hood* (1969) 1 Cal.3d 444; *People v. Lamb* (1988) 206 Cal.App.3d 397, 400 .) The general principles of law governing the case are those commonly or closely and openly connected with the facts of the case before the court that are necessary for the jury's understanding of the case. (*People v. Wilson* (1967) 66 Cal.2d 749.)

An instruction that tends to shift to the defense, lighten, or relieve the state of its burden of proof or its burden of persuasion violates due process. (*Sandstrom v. Montana* (1973) U.S. 510, 520-524; *Yates v. Evatt* (1991) 500 U.S. 391, 402; *Carella v. California* (1989) 491 U.S. 263, 266; *Francis v. Franklin* (1985) 471 U.S. 307, 322-325.) Similarly, instructions which shift the burden of proof or persuasion to the defendant to negate an element of the offense violate due process. (*Patterson v. New York* (1977) 432 U.S. 197, 215.) An instruction which reduces the prosecution's burden of proof as to specific intent violates due process. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740.)

A criminal defendant is entitled to correct instructions on his theory of the case. (*Conde v. Henry, supra,* 198 F.3d at p. 739.) Failure to instruct on a defendant's theory of the case, when supported by the evidence, violates the defendant's right to present a defense under the Sixth and Fourteenth Amendments as well as the Sixth Amendment right to a jury trial. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *United States v. Unruh* (9th Cir. 1988) 855 F.2d 1363, 1372; accord *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.) "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."' [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-25.) "[T]he right to present a defense would be empty if it did not entail the further right to . . . instruction[s] that allowed the jury to consider the defense." (*Bradley v. Duncan* (9th Cir.2002) 315 F.3d 1091, 1098.) Failing to give the jury correct instructions regarding an affirmative defense such as entrapment or unreasonable self-defense violates due process. (*Bradley v. Duncan* (9th Cir 2002) 315 F.3d 1091, 1099 [erroneous entrapment instruction]; *McNeil v. Middleton* (9th Cir. 2003) 344 F.3d 988, 997, *reversed on other grounds*, 541 U.S. 433 (2004) [erroneous imperfect self-defense instruction].) The instruction here, erroneously barring the jury from fully considering relevant and, indeed, centrally important evidence on the question whether appellant acted with a specific intent to rape deprived appellant of his rights to due process, to jury trial, and to a meaningful opportunity to present a complete defense, in violation of the Sixth and Fourteenth Amendments.

B. THE ERROR COMPELS REVERSAL OF THE JUDGMENT.

A jury instruction which violates federal constitutional principles compels reversal of the judgment unless it appears "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 18; *see also*, *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal required unless clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"]; *Yates v. Evatt*, *supra*, 500 U.S. at p. 403.) To satisfy this standard, it is incumbent upon respondent to show that the guilty verdict "was surely unattributable to this error." (*Conde v. Henry, supra*, 198 F.3d at p. 741, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Given the evidence at trial and the nature of the defense, respondent can make no such showing.

The defense did not dispute that appellant had sexual intercourse with Ms. McKenna or that he caused her death during that sex act. The only issues for the jury to resolve related to whether Ms. McKenna consented to the rough sex that took place and appellant's own mental state at the time of the incident. Defense counsel, early in her closing argument, told the jury that they would be instructed that "the prosecution has the burden to show that Carl Molano specifically intended to rape Suzanne McKenna" (23RT 3128), and then proceeded to discuss at length the bases for uncertainty as to whether Ms. McKenna had consented. (23RT 3128-3145.) There was no discussion as to issues of identity or cause of death.

The case against appellant was based upon circumstantial evidence, particularly from inferences drawn from the circumstances of the crime scene, and appellant's own statements regarding the events leading up to

Ms. McKenna's death. Appellant's defense, based upon appellant's interrogation statements to the police, was that McKenna had consented to having sex with him, that she had asked him to choke her for sexual arousal, and that he had accidentally killed her during the process.[40] (23RT 3139-3141.) While appellant admitted having killed McKenna, he repeatedly denied having raped her. (RT 1991-1996, 2033-2034, 2075-2077; People's Exhibit 40.)

This defense was consistent with the circumstances of the crime scene. It was clear from the position of the body and other circumstances that McKenna had died of asphyxiation inflicted upon her by someone else. Her semi-nude body was found with a bra, a pair of panties, and a length of leather material, apparently a shoelace, wrapped around her neck. (RT 1901-1902.) The bra was loose against McKenna's neck, and the panties were not knotted, but appeared to have been cinched to apply pressure. (RT 1901-1902.)

The circumstances also suggested she had been engaged in some sort of sexual activity at some point prior to her death. However, forensic evidence of rape was inconclusive. Dr. Clifford Tschetter, the forensic pathologist, testified that when performing the autopsy he found contusions up to 24 hours old on her back, breast, and head but no evidence of trauma to the vaginal or anal areas. (RT 1910-1917.) He also took swabs from

---

[40]/ The practice of intentionally restricting the flow of oxygen to the brain for purposes of sexual arousal or orgasm is called asphyxiophilia or hypoxyphilia. It is sometimes self-induced through self-strangulation with a ligature, in which case it is known as autoerotic asphyxia. The erotic interest in asphyxiation is classified as a paraphilia in the Diagnostic and Statistical Manual of the American Psychiatric Association. In 2009, the actor David Carradine died of what is believed to have been accidental erotic asphyxiation during sex. (*Bangkok Post*, "Carradine Death 'Erotic Asphyxiation' (June 6, 2009); *People Magazine*, July 2, 2009.)

McKenna's vagina, anus and mouth for later testing. (RT 1911.) That testing found sperm present in both the vaginal swab and slide, though only a very small amount was present. (RT 2462-2463.) No semen was found on the oral or rectal swabs or slides. (RT 2465, 2478-2479.) McKenna's underpants were not torn and tested negative for semen and inconclusively for blood. (RT 2452.) Two containers of personal lubricant, a tin containing condoms, and an empty condom wrapper– all items suggestive of consensual sex– were recovered from the living area. (RT 1805-1806, 1842-1850.) There was no sign of forced entry on any of the windows or doors. (RT 1833-1837.) Judy Luque testified that McKenna was very security conscious and had to unlock both the door and the screen door in order to let anyone into her cottage. (23RT 3134.) Thus, whoever killed McKenna was likely admitted to her cottage voluntarily by her.

In her closing argument, appellant's counsel noted that based upon these circumstances the 1995 sheriff's investigation into the crime did not focus on rape or rape-homicide. In fact, the police reports from the 1995 investigation into the crime did not even mention the word "rape." (23RT 3140.) Only years later, after appellant had been identified as a suspect and his prior rape convictions became known, did Detectives Chicoine and Dudek begin to think about a rape-murder theory. (23RT 3140-3141.)

Even apart from appellant's own statements, the evidence strongly suggested that appellant and McKenna had a prior sexual relationship. It is clear that he and McKenna were acquainted. Paulette Johnson established that McKenna knew appellant, and although she testified that McKenna had said she did not like appellant sometime prior to April, 1995 (15RT 2165), Johnson moved out that month and had no knowledge what McKenna's and appellant's relationship was during the two succeeding months. (15RT

2137-2139, 2169-2170; 23RT 3132.) Other neighbors, including Carla Fleming, also saw appellant in the area of McKenna's house many times. (16RT 2133, 2134-2136; 23RT 3133.)

Both appellant's estranged wife, Brenda Molano, and his son, Robert Molano, testified that appellant frequented the cottages in which McKenna lived. Brenda Molano testified that she had seen appellant in that area where "females" lived, and Robert Molano testified that his father socialized with women there. (16RT 2199-2203, 2232-2233; 16RT 2278-2280; 23RTY 3132-3133.) Robert Molano testified that he had seen appellant in front of McKenna's cottage many times. (16RT 2278-2280; 23RT 3133; People's Exhibit 7-C.) Robert Molano also testified that he often saw his father socializing with the lady who lived there and that he saw them together "maybe every other day" during the period prior to the McKenna killing. (16RT 2278-2280; 23RT 3133.) He saw them together at McKenna's house either the day or two days before the killing. (16RT 2278-2280; 23RT 3133.) He often saw McKenna holding a bottle of alcohol. (16RT 2278-2280; 23RT 3133.) Given the fact that Brenda Molano and Robert Molano went to the sheriff's department to report that they thought appellant might have killed Suzanne McKenna and testified as prosecution witnesses, their testimony on these points was extremely credible.

Defense counsel also focused on the facts that Suzanne McKenna used drugs and alcohol, including wine, peppermint schnapps, and methamphetamine, which she snorted off a mirror and, sometimes, combined with alcohol. (RT 1677-1678, 1713; 16RT 2128-2130, 2145-2146, 2170; 23RT 3129.) These facts were confirmed by McKenna's friends Judy Luque, Carla Fleming, and Paulette Johnson. Judy Luque

testified that she saw McKenna drinking wine and snorting methamphetamine only two days before her death. (RT 1729, 1731-1735; 23RT 3129.) A wine bottle and a beer bottle were found on the wall heater in McKenna's cottage after her death (RT 1851-1852), and an Early Times bourbon bottle was found outside the cottage with some of Ms. McKenna's other possessions. (RT 1892, 2049; 23RT 3135.) Dr. Clifford Tschetter, the forensic pathologist, found both alcohol and methamphetamine in McKenna's bloodstream at the time of her death. Her blood alcohol level was .15, nearly twice the legal limit in California for operating a motor vehicle. In addition, she had 40 micrograms of methamphetamine per liter in her system at the time of her death, which means that she must have consumed between 500 and 1,000 milligrams of methamphetamine shortly before her death. (RT 1919-1920; 23RT 3131.) This evidence tended to support appellant's statements to law enforcement that he and McKenna had used alcohol and drugs together prior to having sex. (People's Exhibit 38A at pp. 26, 28-30; People's Exhibit 39A at pp. 10-11, 13; People's Exhibit 40A at p. 5.)

There was substantial evidence from which the jury could have concluded that appellant had a sincere but unreasonable belief that McKenna had consented to have sex with him. As noted above, appellant told law enforcement officers that he and McKenna had previously had consensual sex. (People's Exhibit 38A, at p. 30.) In addition, circumstantial evidence found at McKenna's apartment was consistent with a conclusion that McKenna could have consented to have sex, or could have initially consented and then revoked that consent, and the jury watched the videotape of appellant's statement to law enforcement officers at the Eden Township Station on March 31, 2003, in which appellant stated that on the

day of her killing McKenna consented to have sex with him and asked him to choke her. (People's Pretrial Exh. 5A, pp. 13-16, 25.) Indeed, in the statement accompanying his denial of the automatic motion for modification of the verdict, Judge Hymer appeared to acknowledge the possibility that McKenna may have initially consented to have sex with appellant when the judge stated, in his written conclusions, that he believed McKenna "would have communicated to the defendant, by her desperate efforts to stay alive, that she was *no longer* consenting to the sexual intercourse, if, indeed, she ever did." (CT 2079.)

George Fox, the investigator in the Anne Hoon case, testified that appellant had told him that Ms. Hoon flirted with, teased, and enticed him into having sex with her. (19RT 2903-2905.) Appellant recalled that she had led him into her bedroom and told him to remove his clothes, then had consensual sex with him. (19RT 2904.) Appellant said afterwards he had put on his clothes and left and "next thing I know I'm being arrested for rape." (19RT 2907.) Later, when confronted with photographs and other evidence of violence, appellant stated that he did not remember using force, but that "if she said I forced her I probably did." (19RT 2912.) Appellant said he had been drinking at the time, and that "when I drink I don't remember certain things." (19RT 2912.) Mark Emerson, the investigator in the Mabel Lovejoy case, also reported that appellant told him the sex he had with Ms. Lovejoy was consensual. (20RT 3033.)

The foregoing evidence all suggested that appellant has a history of unreasonably believing that women with whom he has had sex have consented to do so when in fact they have not done so, particularly when appellant is under the influence of drugs and alcohol or other altered psychological states. Indeed, that appears to have been the judge's

understanding of the evidence. In his ruling admitting evidence relating to appellant's 1996 corporal injury conviction, the judge reasoned that the prior conviction evidence was relevant because it showed that "strangulation is a method employed by the defendant when facing *psychological dissonance*." (2RT 193, emphasis added.) Evidence that appellant had engaged in prior consensual sex with Ms. McKenna, particularly when coupled with evidence showing that he was again under the influence of drugs and alcohol and in a state of "psychological dissonance," would have made the conclusion that appellant unreasonably believed McKenna had consented on this occasion all the more compelling.

A properly instructed jury, free to consider all relevant evidence, therefore could have concluded that there was no way to find beyond a reasonable doubt that appellant did not have a good faith, albeit unreasonable, belief that Ms. McKenna consented to have sex with him even if she had not actually done so. Had the jury reached that conclusion, under correct jury instructions, they could not have found that appellant had the specific intent to rape required for either the felony murder theory or the felony murder special circumstance.

This case is strikingly similar to *McNeil v. Middleton*, *supra*, 344 F.3d 988 (9th Cir. 2003), *reversed on other grounds*, 541 U.S. 433 (2004). In *McNeil*, the defendant admitted killing her husband but claimed that she acted in self-defense because she suffered from Battered Woman's Syndrome and feared that her life was in imminent peril. The California Superior Court incorrectly instructed the jury on "imperfect" self-defense by defining "imminent" peril as a peril that was apparent to a "reasonable" person, when in fact an honest but unreasonable belief that peril is imminent is sufficient for imperfect self-defense. The jury convicted

McNeil of second-degree murder. The California Court of Appeal agreed that the instruction was erroneous but found the error harmless, and this court denied review. (*Id.*, 344 F.3d at pp. 990-991.)

In an appeal following federal habeas corpus proceedings, the Ninth Circuit held that the erroneous imperfect self-defense instruction violated due process because it "wholly deprived McNeil of that defense by requiring that her fear be reasonable." (*McNeil v. Middleton*, *supra*, 344 F.3d at p. 991.) The court reasoned that a properly instructed jury could have found that McNeil sincerely but unreasonably feared imminent peril at her husband's hands and, if they had so found, could have convicted McNeil of no crime greater than voluntary manslaughter. Accordingly, the instruction resulted in constitutional error.

> Under McNeil's version, even if the jury concluded that her perception of imminent peril was unreasonable, McNeil nonetheless had a genuine perception of imminent harm on the night that she shot Ray and was therefore, at most, guilty of voluntary manslaughter. See *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967) (describing the rights guaranteed under the due process clause, including, inter alia, the right to present a defense and the right "to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"). . . . [¶] The erroneous inclusion of a reasonable person standard in the definition of imminent peril eliminated one of McNeil's two possible defenses. Under the facts of this case, preventing the jury from considering McNeil's imperfect self-defense claim constituted a denial of her right to present a complete defense and her right to a fair trial. McNeil provided more than enough BWS evidence for a reasonable jury to conclude that she had a genuine perception of imminent harm, even if it concluded that that perception was unreasonable. . . . [¶] The trial court's failure to instruct the jury on the defendant's theory of defense violates the Due Process clause.

(*McNeil v. Middleton*, *supra*, 344 F.3d at p. 997.)

Although the California Court of Appeal had also held the instruction to be erroneous, it found the error harmless. The state appellate court noted that three other instructions had correctly stated that the defendant's fear could be unreasonable. In addition, the prosecutor had argued that if McNeil had actually believed in the necessity for self defense, she would be guilty only of manslaughter and not murder. The state appellate court found this argument eliminated the prejudice from the incorrect jury instruction. The Ninth Circuit disagreed with this harmless error analysis, holding that the single erroneous instruction was at least confusing and that the arguments of counsel carry less weight with a jury than the instructions of the court and that it must be assumed that a jury will follow the trial court's instructions. (*McNeil v. Middleton*, *supra*, 344 F.3d at pp. 999-1000.) Accordingly, the Ninth Circuit granted the writ.

The United States Supreme Court subsequently granted certiorari and reversed the Ninth Circuit's decision in *Middleton v. McNeil* (2004) 541 U.S. 433, on other grounds. The high court did not question the conclusion of either the California Court of Appeal or the Ninth Circuit that the instruction was given in error. Instead, the Supreme Court noted that the case arose from a federal habeas corpus petition filed by McNeil and held that McNeil had failed to show that the state appellate court's harmless error analysis was "objectively unreasonable" under United States Supreme Court precedent, as the petitioner must do under 28 U.S.C. section 2254, subdivision (d).

The high court's reversal of the Ninth Circuit's decision regarding the harmless error analysis does not affect the application of *McNeil* to this

case. Here, as in McNeil, there can be no question but that the instruction was in error; appellant's belief in consent, even if unreasonable, was sufficient to negate the specific intent required for the rape felony murder theory and the rape felony murder special circumstance, and the evidence of prior consensual sex was clearly both relevant and likely to be important to raising a doubt on the specific intent issue. However, unlike the situation in *McNeil*, in this case there were no other instructions which expressly informed the jury that a defense to felony murder (and the rape special circumstance) would be established even by an unreasonable belief in consent, and there was no argument from either counsel that explained this to the jury.

Appellant recognizes that the instruction, CALCRIM No. 1194 was included on the list of instructions requested by the defense. (CT 1596.) However, this does not alter the analysis regarding either error or prejudice. "The invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction." (*People v. Moon* (2005) 37 Cal.4th 1, 28, 32 Cal.Rptr.3d 894, 117 P.3d 591; *see also, People v. Moore* (2011) 51 Cal.4th 386, 409-410 [fact that erroneous instruction was included on defense counsel's list of requested instruction does not compel application of invited error doctrine without showing of tactical reason for request].) Here, no such tactical reason appears in the record. The record discloses no discussion of the pros and cons of the instruction at all, and since the instruction actually deprived appellant of an available defense, there could have been no such tactical reason for requesting the erroneous instruction.

Moreover, it is the trial judge's duty to see to it that the jury is properly instructed with correct legal principles and to tailor form

instructions accordingly. (See, e.g., *People v. Woods* (1991) 226 Cal.App.3d 1037, 1054-55 [court has duty to "tailor instructions to fit the facts"].) "[A] court may give only such instruction as are correct statements of the law. [Citation]." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) This duty requires the trial court to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the defense was incorrect. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law rather than deny outright]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924 ["trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"]; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Whitehorn* (1963) 60 Cal.2d 256, 265; *People v. Coates* (1984) 152 Cal.App.3d 665, 670-71; *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1597; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446 and cases cited therein; Witkin & Epstein, *Cal. Crim. Law* (2d Ed. 1988) § 2954, p. 3628.) For example, even though the trial court has no sua sponte duty to instruct upon the elements of other crimes introduced at the penalty phase as aggravating factors, if instructions are given, the court has a duty to instruct correctly. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1337; see also *People v. Castillo* (1997) 16 Cal.4th 1009 [even when a trial court instructs on a matter on which it has no sua sponte duty to instruct, it must do so correctly]; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Montiel* (93) 5 Cal.4th 877, 942.)

Because the court's erroneous instruction deprived appellant of a correct instruction on his theory of the case, lessened the prosecution's burden of proof and persuasion, and deprived him of a meaningful

opportunity to present a complete defense, appellant was deprived of his rights to due process, to trial by jury, and to present a defense under the Fifth, Sixth, and Fourteenth Amendments. In addition, because due process and reliability requirements are heightened in capital cases such as this one (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305), the error also deprived appellant of his Eighth Amendment right to be spared cruel and unusual punishments. Because respondent cannot show that the error was harmless beyond a reasonable doubt, reversal is required.

IV. APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE PROSECUTOR VIOLATED A COURT ORDER BY PRESENTING IMPROPER VICTIM IMPACT EVIDENCE SUGGESTING APPELLANT WAS RESPONSIBLE FOR THE ALLEGED "SUICIDE" OF THE VICTIM'S SISTER, AND THE COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL

A. INTRODUCTION

Suzanne McKenna's sister, Patti Dutoit, died seven months after McKenna's murder. Though an investigation into the manner of death was inconclusive, Dutoit's family, especially her brother, Ron McKenna, believed that her death was a suicide committed as a direct result of McKenna's murder. Before and during appellant's trial, the defense vigorously opposed admission of evidence of Dutoit's death and any testimony speculating that Dutoit killed herself as a result of McKenna's murder. While the court denied the motion to exclude reference to Dutoit's death, the judge excluded evidence that the death was a suicide and also excluded testimony regarding the cause of Dutoit's death.

Ron McKenna was the prosecution's first penalty phase witness. During his testimony, and in clear contravention of the court's ruling, he stated both that Dutoit committed suicide and that appellant was responsible for her suicide. Both McKenna and his mother also testified that Dutoit died seven months after Suzanne McKenna's murder.

Because of the prejudicial nature of the testimony, appellant twice moved for a mistrial. The motions were denied, but the trial court gave a cautionary instruction and allowed testimony that Dutoit had significant mental health problems before McKenna's murder. However, the cautionary instruction did not alleviate the great prejudice inherent in Ron

McKenna's testimony that appellant was responsible for Dutoit's death–prejudice the defense had taken pains to prevent in advance precisely because this particular "bell" could not be unrung. As a result, appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts were violated.

A more detailed discussion follows.

B. FACTUAL BACKGROUND

On January 27, 1996, seven months after Suzanne McKenna's death, McKenna's sister, Patti Dutoit, died. (6CT 1297.) According to her death certificate, Dutoit died of respiratory failure and acute salicylate intoxication caused by "ingest[ing] an excessive amount of salicylate".[41] (6CT 1298.) Though the manner of death was not determined (*id.*), the McKenna family apparently believed that Dutoit committed suicide (2RT 134), and that Dutoit's suicide was a result of Suzanne McKenna's homicide. (2RT 134; see also Court's Exhibit 10 at pp.8-9; Court's Exhibit 11 at pp. 12-14; Court's Exhibit 12 at 8-9.)

Seven years later, during appellant's March 31, 2003, interrogation at Eden Township Substation, Detective Chicoine told appellant that Dutoit "ended up taking her own life after [McKenna's murder]." (People's Pretrial Exhibit 5A at pp. 42-43.) Chicoine also told appellant that "there would be nothing worse" for appellant than if "[McKenna's] brother looks at you and says, 'you know what, you bastard, you took my sister's life, and you took my other sister's life [seven months] later.'" (*Id.* at p. 43.)[42]

---

[41]/ A salicylate is a drug, such as aspirin, that is derived from salicylic acid and acts as an analgesic, antipyretic, and anti-inflammatory.

[42]/ The statements Chicoine made to appellant regarding Dutoit's death were redacted from the tape played for the jury at trial. They are included here simply to show how the defense was initially informed of Ron McKenna's potential

On March 1, 2007, pursuant to Penal Code, section 190.3, the state gave notice of its intent to present aggravating evidence, including the testimony of Suzanne McKenna's mother and siblings about the impact of McKenna's death. (6CT 1253-1254.)

Defense counsel vigorously opposed admission of any evidence that Patti Dutoit's death had been a suicide. On May 18, 2007, the defense filed a motion to exclude and limit admission of victim impact evidence, and moved specifically for exclusion of any reference to Dutoit's death as both irrelevant and inflammatory. (6CT 1291-1296.) The defense also requested an in limine hearing on the issue before the commencement of jury selection. (*Id.*) On June 6, 2007, without moving specifically for admission of evidence about the effect of Suzanne McKenna's death on her sister Patti, the state filed a written motion to admit a wide variety of victim impact evidence relevant to the circumstances of McKenna's death. (6CT 1459-1468). The state also opposed appellant's motion for an in limine hearing on victim impact evidence, arguing that only notice, not production, of victim impact evidence is required by Penal Code section 190.3.[43] (6CT 1467).

On June 8, 2007, the defense replied, arguing that while Penal Code

---

victim impact testimony.

[43]/ Penal Code section 190.3 provides in relevant part:

> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

190.3 requires only notice, the state was required by Penal Code section 1054 et seq. to provide discovery of their victim impact evidence including any statements of the prosecution's witnesses. (7CT 1506-1508.) The court ruled that while the prosecution was not required to take statements from victim impact witnesses, any statements were discoverable under section 1054. (2RT 133.)

During a pretrial hearing on June 13, 2007, the defense argued that the court should rule prior to jury selection on the exclusion of evidence that Dutoit had committed suicide as a result of McKenna's death in order to allow for relevant voir dire during jury selection.[44] (1RT 58-65, 2RT 134-136.) The court deferred ruling until conclusion of the guilt phase. (2RT 136.)

During the guilt phase of appellant's trial, the jury heard evidence that Suzanne McKenna had an older sister named Patti who, on the day after McKenna's death, received a call from Victor Perry, the man who found McKenna's wallet and who first contacted the Luques and investigating officers on the day McKenna's body was discovered. (11RT 1587, 1627-1632, 12RT 1681-1683, 1738, 1741, 17RT 2424-2425.)

On September 24, 2007, before the commencement of the penalty phase, the court held a hearing on admissibility of victim impact evidence. The court reviewed and found admissible five photographs of the grave site shared by Suzanne McKenna and Patti Dutoit. (People's Exhibit's 9A-9E; 24RT 3249-3250.) The court reviewed transcripts from victim impact interviews conducted by the prosecution on September 13 with McKenna's mother, sister, and brother. The court also heard argument about the

---

[44]/ On June 25, 2007, the court did order redaction of the mention of Dutoit's suicide by investigating officers during appellant's interrogation because it was inadmissible during the guilt phase. (4RT 654-655).

admissibility of the testimony of McKenna's family members about the effect McKenna's death had on Dutoit. (24RT 3251-3252.)[45] The state argued that testimony that Dutoit had "deteriorated as a direct result of Sue McKenna's death," and that evidence of the circumstance's of Dutoit's death was relevant to the impact McKenna's death had on Dutoit and "to the overall impact that losing two daughters had on the victim's mother, sisters, and brother," and was therefore admissible. (24RT 3253-3254.)

The defense argued that such evidence was inflammatory and irrelevant. (24RT 3252, 3254.) In response the state argued that evidence that Dutoit had long struggled with suicidal thoughts even before McKenna's death rendered evidence of her suicide less inflammatory. (24RT 3254.) The prosecutor argued that "the People aren't standing up here and saying this suicide was solely the responsibility of the defendant, but in the overall scheme of things, this is a life line that was lost, this is a murder that caused an enormous impact on the entire family . . . ." (24RT 3255.) In response, the defense argued that according to the victim impact interview transcript provided by the state, Suzanne McKenna's brother did believe that Suzanne's death was the sole cause of Dutoit's suicide.[46] *(Id.)*

---

[45]/ In her interview with the District Attorney's investigator about the impact of McKenna's murder on her family, McKenna's mother, Yvonne Searle, stated that Suzanne's murder was the "breaking point" in Dutoit's decision to commit suicide. (Court's Exhibit 11 at p. 14.) Lori McKenna stated that "when [Dutoit] found out that Sue was murdered, she didn't want to go on anymore at all." (Court's Exhibit 10 at p. 8.) Ron McKenna stated that his sister's murder was the sole factor in Dutoit's decision to take her own life. (Court's Exhibit 12 at p. 8.)

[46]/ During its September 14, 2007, interview with Ron McKenna, the prosecution was put on notice that Ron McKenna attributed Dutoit's death solely to Suzanne McKenna's murder:

The court denied the motion to exclude testimony about Dutoit's death, but found that the family's opinion that Dutoit's death was suicide was irrelevant. Accordingly, the court excluded evidence that Dutoit's death may have been a suicide and limited the State to evidence of the fact

---

> MEEHAN: I want to talk to you about one of your other sisters in some detail, and that's your sister Patty.
>
> RON MCKENNA: Right.
>
> MEEHAN: It's my understanding that Patty took her own life roughly 7 months or so. . .
>
> RON MCKENNA: Right.
>
> MEEHAN: . . . after Sue's murder. Now, in your opinion to what extent was Sue's death a factor in Patty's decision to take her own life?
>
> RON MCKENNA: I would say all of it. Patty had some problems with alcohol and they were very close. I don't know if she knew any of Sue's friends that she had lived next door to but it devastated her very much and I, I could tell that she wasn't going to get over it. She wouldn't even attend the funeral.
>
> MEEHAN: Uhm-hmm.
>
> RON MCKENNA: She was that upset.
>
> MEEHAN: Did you spend any time with Patty between the time that Sue was killed and before Patty's suicide?
>
> RON MCKENNA: The only time that I recall would be at our mom's house when we were trying to make arrangements and she would kind of just play the outcast. She didn't want to be around us any more. She didn't want to hear what was going on. She didn't want to deal with any of it. And that's why I think that she did the suicide thing just to escape from it. She couldn't handle the pain because they were very close, very close.

(Court's Exh. 12 at . 8-9.)

that another sister died in 1996 shortly after McKenna's death but that the cause of her death should not be brought to the attention of the jury. (24RT 3255-3256.) In response to the court's ruling, the prosecutor asked if he would be allowed to elicit testimony about Dutoit's response to her sister's murder, and the court agreed that he would, but that the state "should caution witnesses not to use that as an excuse to say that she reacted by committing suicide . . . ." (24RT 3255-3257.)

On September 25, 2007, the day following this ruling, the prosecutor began his penalty phase presentation. The prosecution's penalty phase consisted entirely of the testimony of victim impact witnesses. The first witness was Ron McKenna. (25RT 3300.) On direct examination, the prosecutor asked Mr. McKenna, "How did Patti take the news of Sue's death?"[47] Mr. McKenna answered, "Very bad. She committed suicide. So I lost two sisters because of this clown." (25RT 3311.)

The defense immediately objected and moved to strike or clarify the testimony. (25RT 3311.) A sidebar conference followed, and after the sidebar the court instructed the jury, "you are not to consider the suicide mentioned as in any way relating to the defendant Molano."[48] (*Id.*; 25RT 3334.) The prosecutor then resumed direct examination:

> MEEHAN: Let me just ask you in terms of Patti's death, she died in 1996?
>
> RON MCKENNA: Yes.

---

[47]/ Prior to the penalty phase, the prosecutor had agreed not to pose questions that would invite responses about Dutoit's death. (23RT 3215-3216.)

[48]/ While this instruction attempted to sever the connection between appellant and Dutoit's "suicide," it left undisturbed Ron McKenna's testimony that Patti died as the result of committing suicide, and thus assumed that a suicide had actually occurred.

MEEHAN: In fact one of the photographs here on the board, photograph 68-I, that actually shows the memorial plaque for Pattie next to the memorial plaque for Sue?

RON MCKENNA: Exactly.

MEEHAN: In fairness, it's true, is it not, that Patti had significant psychological problems before Sue was murdered, is that correct?

RON MCKENNA: That's correct.

MEEHAN: In fairness? Did you consider Sue to be in a sense a lifeline for Patti?

RON MCKENNA: Yes.

(25RT 3311-3312.)

The defense then cross-examined Mr. McKenna about Patti:

SCHNELLER: You mentioned that Patti had some psychological problems?

RON MCKENNA: Yes.

SCHNELLER: Did she also have some problems with alcohol?

RON MCKENNA: Yes, she did.

SCHNELLER: Did Sue and Patti ever drink together?

RON MCKENNA: I don't know. I've never seen them.

SCHNELLER: Was Patti, as a result of her problems, kind of reclusive?

RON MCKENNA: Yes.

SCHNELLER: This was even before Sue's death?

RON MCKENNA: Sure.

(25RT 3315.)

Immediately after Ron McKenna's testimony, Suzanne McKenna's mother, Yvonne Searle, testified. Ms. Searle testified that Dutoit had been born in 1960 and died in 1996. (25RT 3317.)[49] She testified that Dutoit was a chronic alcoholic and recluse who lived with Searle and did her cooking and cleaning for her. (25RT 3320, 3325.) Searle testified that Suzanne was a "lifeline" for Dutoit. (25RT 3325.)

Searle also testified that Suzanne had done a tarot card reading for her mother and foresaw two deaths, presumably those of Suzanne McKenna and Dutoit:

MEEHAN: Did she ever read your cards?

SEARLE: Yes. In fact she foresaw two deaths and first she said, "I see a death in your life, mother," and I got all upset, I thought she meant me, and she said "well, it doesn't necessarily mean your life, just somebody in your life; in fact I see two deaths." I thought about it later. It kind of tore me up.

(25RT 3322.)

Referring to McKenna and Dutoit, Searle also testified that "[b]oth girls were cremated. I couldn't afford a full [burial] since I paid for both." (25RT 3324.)

After Searle's testimony, outside the presence of the jury, the

---

[49]/ Patricia Dutoit's death certificate actually lists her date of birth as May 15, 1958.(6CT 1297.)

prosecutor stated that earlier that day he had informed both Ron McKenna and Yvonne Searle that they were to make no mention of Dutoit's suicide. (25RT 3334.)

The next day, on September 26, 2007, another sister of Suzanne McKenna and Judy Dutoit testified. (26RT 3336.) Lori McKenna testified that Dutoit "couldn't" attend a memorial service for Suzanne McKenna and that Dutoit was "devastated" and "broken" by her sister's murder. (26RT 3345-3346.)

Immediately following Lori McKenna's testimony, the defense moved for a mistral on the ground that Ron McKenna's testimony blaming appellant for Dutoit's death had prejudiced appellant and that the admonishment that followed did not cure the prejudice. The court denied the motion, explaining that the instruction given after Ron McKenna's testimony and the subsequent examination by both sides as to Dutoit's preexisting psychological problems had cured any prejudice. (26RT 3359.) The court also stated that it had drafted a possible follow-up instruction, a modification of CALCRIM Number 303, in which the jury would have been instructed that Ron McKenna's opinion that Suzanne McKenna's death motivated Dutoit's suicide had "no basis in evidence." (*Ibid.*) The defense proposed its own follow up instruction, which it requested be given immediately. The proposed instruction would have informed the jury that "there was no connection between Patti's death and Carl Molano." The court declined to give either instruction that day and deferred further consideration of both CALCRIM Number 303 and the proposed defense instruction until final jury instructions were considered. (26 RT 3350-3351.)

On September 27, 2007, the defense renewed its motion for a

mistrial and objected to the court's proposed modification of CALCRIM 303 because that instruction assumed that Patti Dutoit's death was a suicide. The court proposed instead a modification of CALCRIM Number 222 which would have instructed the jury to disregard Ron McKenna's opinion that Dutoit had committed suicide in reaction to Suzanne McKenna's death and that appellant was responsible for Dutoit's death because that testimony had "no basis in fact." The court then denied the renewed motion for mistrial. (27RT 3488-3495.) Arguing that the court's proposed instruction was inadequate, the defense proposed adding "[n]or is there any basis in fact that Patti's death was a suicide other than Ron McKenna's testimony to that effect." (27RT 3498.) The court refused that addition, reasoning that such a restriction on Ron McKenna's testimony would be "ineffective" in view of the testimony regarding Dutoit's longstanding psychological problems that was elicited by both sides without objection. (27RT 3497-3498.)

On October 4, 2007, the court instructed the jury with a modified version of CALCRIM 222, which read in pertinent part:

> If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose. In this regard, the opinion testimony of the witness Ron McKenna that his sister Patricia Dutoit had committed suicide in reaction to Sue McKenna's death and that Carl Molano was responsible for Patricia Dutiot's death has no basis in fact and that testimony was ordered stricken from the record. You must not consider it for any purpose."

(8CT 1887; 26RT 2259.)

C. THE ADMISSION OF IMPROPER VICTIM IMPACT EVIDENCE, AND THE PROSECUTOR'S VIOLATION OF THE COURT'S ORDER EXCLUDING THE EVIDENCE, WAS INCURABLE ERROR, AND THE TRIAL COURT THEREFORE ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL

As noted above, the defense filed a motion in limine to exclude all evidence concerning the death of Patty Dutoit as inadmissible victim impact evidence. (RT 1291-1298.) The portion of the court's order excluding references to Ms. Dutoit's death as a suicide or as having been caused by appellant's killing of Ms. Dutoit's sister was manifestly correct, and the violation of the order not only constituted the presentation of inadmissible, wholly speculative, and prejudicial victim impact evidence but also reversible prosecutorial misconduct. The resulting evidence that appellant was responsible for a second death was so prejudicial that no cautionary instruction could possible have cured the harm done. Because this particular bell could not be unrung, the court erred in denying the defense motions for a penalty phase mistrial.

The Eighth Amendment to the United States Constitution does not bar the states from admitting victim impact evidence in general. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) The constitution is not violated when the prosecution merely offers a "quick glimpse of the life" of the victim, or demonstrates the impact of the loss to the victim's family. However, the Fourteenth Amendment Due Process Clause places limits on the admission of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (*Payne, supra*, 501 U.S. at p. 825.)

In *People v. Edwards, supra*, this court also held that victim impact

evidence showing "the impact on the family of the victim" was admissible as part of the circumstances of the crime under sentencing factor (a). (Penal Code section 190.3.) However, this court cautioned that "[t]his holding only encompasses evidence that logically shows the harm caused by the defendant. . . . we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*." This court further explained the limitations on such evidence as follows:

> Our holding does not mean there are no limits on emotional evidence and argument. In *People v. Haskett* (1982) 30 Cal.3d at p. 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citation.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'

(*Id.*, 54 Cal.3d at p. 836.)

Plainly, the portion of the trial court's ruling excluding evidence regarding the manner of Dutoit's death or its supposed connection to the McKenna case was proper. The evidence was inadmissible victim impact evidence because it did not "logically show the harm caused by the defendant," as *Edwards* requires. Indeed, the evidence was completely bereft of factual support. Ms. Dutoit's death was not ruled a suicide. Her death certificate, attached to the defense in limine motion (6CT 1297), listed the cause of death as respiratory failure and an overdose of salicylate, a drug found in aspirin and other analgesics, and a box on the certificate for

"suicide" was unchecked. To the extent the death resulted from salicylates, the death may have been entirely accidental– a conclusion that also finds support in the fact that Ms. Dutoit was a chronic alcoholic. (25RT 3320, 3325.) Ron McKenna's testimony characterizing Dutoit's death as a suicide was thus entirely speculative lay opinion testimony that was unsupported by any evidence.

Moreover, even if the death had been *proved* to be suicide, the connection of that death to the McKenna killing was not merely speculative but also flew in the face of the facts. Suzanne McKenna was killed either in the late hours of June 15, 1995 or the early morning hours of June 16, 1995. Ms. Dutoit's death did not occur until January 27, 1996– *seven months* after the McKenna homicide. (6CT 1297.) She was a chronic alcoholic and recluse who, at the age of 37, still lived with her elderly mother. (25RT 3320, 3325; Court's Exh. 12 at pp. 8-9.) She also had other "significant psychological problems." (25RT 3311-3312.) To permit evidence to be introduced in the penalty phase attributing her death to appellant would have been factually baseless, highly improper, and grossly inflammatory.

Accordingly, the evidence was properly barred from the penalty phase. The court's ruling excluded evidence that Dutoit's death may have been a suicide and limited the State to evidence of the fact that she had died shortly after McKenna's death. (24RT 3255-3256.) In response to the court's ruling, the prosecutor asked if he would be allowed to elicit testimony about Dutoit's response to her sister's murder, and the court agreed that he would, but also ordered that the state "should caution witnesses not to use that as an excuse to say that she reacted by committing suicide . . . ." (24RT 3255-3257.)

However, during direct examination only one day later, the

prosecutor asked Ron McKenna "How did Patti take the news of Sue's death?" Mr. McKenna answered, "Very bad. She committed suicide. So I lost two sisters because of this clown." (25RT 3311.) This was highly improper victim impact evidence, and because it could not be ignored by the jury and was then made more prejudicial by the prosecutor's argument and the other factors discussed below, required a mistrial.

Moreover, in view of the court's clear instructions to the prosecutor to admonish the witnesses not to refer to the death as a suicide, the presentation of this highly prejudicial, speculative, inadmissible evidence constituted not merely improper victim impact evidence but also prosecutorial misconduct. The prosecutor's questions were designed to elicit testimony regarding a matter that had been ruled inadmissible only the previous day. The prosecutor was instructed to and stated that he would admonish his witnesses not to refer to Dutoit's death as a suicide or as having been caused by appellant. The fact that his witnesses nevertheless referred to evidence that had been ruled inadmissible indicates that he either failed to admonish them at all or failed to admonish them in a manner sufficient to achieve the goal. Indeed, if the prosecutor had correctly admonished his victim impact witnesses that any reference Dutoit's supposed "suicide" would result in a mistrial of McKenna's killer, it is highly improbable that any such witness would have made such a reference. The prosecutor's failure to adequately admonish and control his witnesses, particularly after lengthy litigation on this specific issue, was misconduct on his part.

It is also clear that the prosecutor had a calculated strategy of attempting to blame appellant for Dutoit's death. That strategy was clear not only from his open ended question ("How did Patti take the news of Sue's

death?") to a witness (Ron McKenna) who prior to taking the stand made clear that he believed Patti had committed suicide because of McKenna's murder, but also from the prosecutor's questions to both Ron McKenna and Yvonne Searle regarding whether Sue McKenna had been "a lifeline" for Patti. (25RT 3311-3312, 3324-3325.) During the admissibility colloquy, Sue McKenna's having been a "lifeline" for Patti was the theory the prosecutor advanced for why it was appropriate to assign blame, at least in part, to appellant for Patti's alleged suicide. (24 RT 3255.) The prosecutor was unwilling or unable to abandon this theory in spite of the trial court's ruling that there was no evidence to support the assertion that appellant had caused Patti to commit suicide and that witnesses must be admonished not to make such statements.

A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. (*People v. Kelley* (1977) 75 Cal. App. 3d 672, 690; *People v. Hill* (1998) 17 Cal.4th 800, 820.) As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

As the United States Supreme Court has framed the controlling federal constitutional standard in criminal trials, the relevant question is whether the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1985) 477 U.S. 168, 181, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642.)

That standard also applies to misconduct of victim impact witnesses and prosecutors in the penalty phase of capital prosecutions. "[I]f, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 831.)

Even if such misconduct does not rise to the level of a federal due process violation, it is still reversible under state law if the misconduct involved "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) The error here was federal constitutional error and is also reversible under state law.

A prosecutor may not ask a question designed to elicit testimony that the court has previously ruled inadmissible. (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1175-1176, *overruled on other grounds, Payton v. Woodford*, 299 F.3d815 (9th Cir. 2002) [prosecutor found to have committed intentional misconduct in asking whether defendant used a gun during a prior robbery when court had previously ruled gun use evidence inadmissible]; *United States v. Beeks* (8th Cir. 2000) 224 F.3d 741, 746 [prosecutor improperly asked how defendant had answered question on job application regarding past criminal history in spite of prior ruling this was inadmissible; error particularly "egregious because the prosecutor had been told to avoid any such references"]; *Hill v. Turpin* (8th Cir. 1998) 135 F.3d 1411, 1414-1417 [prosecutor's misconduct in referring to defendant's prior request for counsel and silence during interrogation after court ordered no such references compelled mistrial].)) A prosecutor must also avoid using questions to "waft an unwarranted innuendo into the jury box." (*United*

States v. Davenport (9th Cir. 1985) 753 F.2d 1460, 1462.) California law also holds that it is misconduct to deliberately ask questions calling for inadmissible and prejudicial answers. (*People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Pitts* (1991) 233 Cal.App.3d 606, 734.)

It is also important to note that no showing of intentionality or bad faith on the prosecutor's part is required to establish prosecutorial misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822.) "[A] prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury.... But the defendant need not show that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct, nor is a claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith." (*People v. Price* (1991) 1 Cal.4th 324, 447; *People v. Hill, supra,* 17 Cal.4th, at p. 822, 823.) Indeed, in *Hill, supra*, this court observed that "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill, supra*, 17 Cal.4th at p. 823, n. 1.)

While the prosecutor's specific question theoretically could have been answered in a way that complied with the court's ruling, the fact that Ron McKenna gave an answer that flatly violated the ruling indicates that the prosecutor failed to admonish McKenna to avoid references to his sister's supposed suicide or the speculation that she had killed herself because of Suzanne McKenna's homicide. However, as noted above, appellant need not show that the prosecutor's misconduct was intentional or in bad faith. It was his responsibility to ensure that improper references to Dutoit's supposed suicide were avoided by his witnesses. He was the party

who prepared and presented the witnesses; it is irrelevant whether he intentionally or negligently failed to adequately admonish them.

It is also clear that the testimony was incurably prejudicial and that the defense motion for a mistrial should have been granted. Appellant recognizes that a trial court's denial of a motion for mistrial is reviewed for an abuse of discretion, a standard that is relatively deferential. (*People v. McCain* (1988) 46 Cal.3d 97, 113.) However, appellate deference is not abdication; and a mistrial motion should be granted when "'a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayaia* (2000) 23 Cal.4th 225, 282.) Although most mistrial motions are based upon prosecutorial or juror misconduct, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice. (See *People* v. *Rhinehart* (1973) 9 Cal.3d 139, 152.)

In this case, the factually baseless, irrelevant, but highly inflammatory testimony suggesting that appellant was responsible for not one but *two* deaths did irreparable damage to appellant's case. This testimony, by itself, would compel reversal. However, the prosecutor actually exacerbated the damage from the error by repeatedly referring to or encouraging witnesses to say that Suzanne McKenna was Patti Dutoit's "lifeline" who was "lost" as a result of McKenna's murder. (26RT 3312, 3325.) It took little imagination for the jurors to jump to the improper conclusion the prosecutor wanted them to reach: if in killing McKenna appellant removed Patti Dutoit's "lifeline," and if Dutoit committed suicide shortly thereafter, then appellant was responsible for Dutoit's death as well as McKenna's death. Worse still, the prosecutor again drove home this point by showing the jury photographs of the adjacent grave markers of Patti Dutoit and Suzanne McKenna, a blatant use of utterly irrelevant

evidence that served no purpose other than to further link the two deaths in their minds. (People's Exhibit 68-I.)

Although the foregoing demonstrates a pattern of misconduct by the prosecutor, it is important to note that even a single instance of prosecutorial misconduct can be reversible federal due process error. (*United States v. Beeks, supra*, 224 F.3d at p. 746 ["We recognize that this is not a case with repeated instances of impropriety. 'However, a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated.' *United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) (internal quotations omitted)]."") The misconduct in this instance is also particularly prejudicial because it occurred in the penalty phase, where a prosecutor has an even higher duty to avoid misconduct.

> The sentencing phase of a death penalty trial is one of the most critical proceedings in our criminal justice system . . . . Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices.

(*Lesko v. Lehman,* 925 F.2d 1527, 1541 (3d Cir. 1991).)

The trial court erred and abused its discretion in denying a mistrial and in concluding that the error could be solved with a curative instruction. Where the prejudice is particularly egregious, as it is in this case, respondent cannot "insulate reversal by pointing to a limiting [or cautionary] instruction. . . ." (*Francis v. Franklin* (1985) 471 U.S. 307, 324, n.9 ["Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights."]; *Krulewitch v. United States* (1949) 336 U.S. 440, 453 ["The naive

assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction."]) And, as stated in *People v. Gibson* (1976) 56 Cal.App.3d 119:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(*Id.*, at p. 130.)

This court has often reversed judgments in cases involving prejudicial testimony elicited as a result of prosecutorial misconduct, even when a curative instruction is given to the jury to disregard the line of questioning. (*See, e.g., People v. Wagner* (1975) 13 Cal.3d 612, 619 [error reversible where prosecutor's questions implied defendant had been involved in drug sales in another state]; *People v. Evans* (1952) 39 Cal.2d 242, 248-249 [curative instruction not sufficient to eliminate harm from implication of prosecutor's improper questions that defendant molested a child when no evidence was offered to prove this].)

No instruction could effectively remedy the prejudice from Ron McKenna's testimony. The testimony that appellant was responsible for a second killing amounted to an inadmissible and highly inflammatory factor in aggravation, one that would have been reinforced by the multiple photo exhibits of the sisters' shared grave site. (People's Exhibits 68-H, 68-I, and 68-J; 24 RT 3249-3250.) .

The inadmissible evidence that appellant had caused Dutoit to commit suicide was too emotionally charged for the jury to disregard,

regardless of any instruction the trial court could have given. The error violated appellant's right to due process of law as guaranteed by the 14th Amendment, and also rendered the penalty verdict arbitrary and unreliable in violation of the 8th Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) Because respondent cannot show that the improper admission of testimony that appellant was responsible for the death and supposed "suicide" of Patti Dutoit was harmless beyond a reasonable doubt, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18.)

V. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6[50]; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass

---

[50]/ In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood

on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained thirty-three special circumstances[51] purporting to narrow the category of first degree murders to those murders

---

[51]/ This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797.

most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this court's construction of the lying-in-wait special circumstance, which the court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[52]

---

[52]/ In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital

B. APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE PENAL CODE § 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[53] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three

---

sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[53]/ *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, par. 3, par. 3; CALCRIM 763, par.3

weeks after the crime,[54] or having had a "hatred of religion,"[55] or threatened witnesses after his arrest,[56] or disposed of the victim's body in a manner that precluded its recovery.[57] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra,* 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.)

---

[54]/ *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[55]/ *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[56]/ *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[57]/ *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; THEREFORE IT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a

crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 *[Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found

or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra,* 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Blakely, supra,* at p. 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra,* at p. 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the

facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham*, the high court rejected this court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra,* 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (549 U.S. at 282.)

a. In the wake of *Apprendi, Ring, Blakely,* and Cunningham, any jury finding necessary to the imposition of death must be found true beyond a reasonable doubt.

California law as interpreted by this court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra;* see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially

outweigh any and all mitigating factors.[58] As set forth in CALCRIM No. 763, which was read to appellant's jury, "an aggravating circumstance or factor is any fact, condition or event relating to the commission of a crime above and beyond the elements of the crime itself that increases the wrongfulness of the defendant's conduct, the enormity of the offense or the harmful impact of the crime." (30RT 3808.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[59] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[60]

---

[58]/ This court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[59]/ In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[60]/ This court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

This court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this court held that notwithstanding *Apprendi*, *Blakely*, and *Booker,* a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[61] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (549 U.S. at pp. 276-

---

[61]/ *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* 549 U.S. at p. 289.)

279.) That was the end of the matter: Black's interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra,* 549 U.S. at pp. 290-291.)

Cunningham then examined this court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 293.)

> The Black court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see Black, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* 549 U.S. at pp. 291.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not

apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[62] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra,* 549 U.S. at p. 279.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

---

[62]/ Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [*Ring*] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra,* 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALCRIM 766.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's

applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether aggravating factors outweigh mitigating factors is a factual question that must be resolved beyond a reasonable doubt

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra,* 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring*, 65 P.3d 915 (Az. 2003); *Woldt v. People*, 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[63])

---

[63]/ See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[64] As the high court stated in *Ring, supra,* 536 U.S. at p. 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

---

[64]/ In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981), and *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).)

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra,* 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Ca1.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra,* the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra,* 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship, supra,* 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge,* the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981), and *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional

guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking

to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[65] The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section 4, post), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias, supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne, supra,* 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant

---

[65]/ A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra,* 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a

capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this court and applied in fact, has become just such a sentencing scheme. The high court in *Harris,* in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris,* 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can not be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See Section 1 of this Argument, ante.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section 3, ante), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section 2, ante). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra,* 548 U.S. at pp. 177-178), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro, supra,* 1 Cal.4th at p. 253.)

The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

6. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and

Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, *"no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors."* (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected

to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[66] The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than

---

[66]/ See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State-as represented by the trial court [through the giving of CALJIC No. 8.85]-had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALCRIM No. 763 pattern instruction. (See 30RT 3803-3810.) Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings, supra,* 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the above, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, supra, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at

stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[67] as in Snow,[68] this court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra,* 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person

---

[67]/ "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (Prieto, supra, 30 Cal.4th at p. 275; emphasis added.)

[68]/ "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (Snow, supra, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) At the time of appellant's trial, Rule 4.42(e), for example, also required the court to give "a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Further, this court has conceded that at the time of appellant's 2007 trial, pursuant to *Cunningham*, the Sixth Amendment required that in non-capital cases findings of aggravating circumstances supporting imposition of the upper term be made beyond a reasonable doubt by a unanimous jury. (See *In re Gomez* (2009) 45 Cal.4th 650.)

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[69] *(Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

---

[69]/ Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa – with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at www.amnesty.org).

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, supra, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is

unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[70] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

---

[70]/ See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

VI. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS WHICH OCCURRED DURING THE GUILT PHASE COMPELS REVERSAL EVEN IF NO SINGLE ERROR, STANDING ALONE, WOULD DO SO

In this brief, appellant has set forth separate arguments identifying and explicating guilt and penalty phase errors, and he submits that each one of these errors independently compels reversal of the judgment. However, even in cases in which no single error compels reversal, the defendant may nevertheless be deprived of due process if the cumulative effect of all the errors in the case denied him fundamental fairness. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459; see also, *People v. Ramos* (1982) 30 Cal.3d 553, 581, rev's'd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 388; *People v. Buffum* (1953) 40 Cal.2d 719, 726; and *see Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791.)

In addition, the Eighth and Fourteenth Amendment guarantee of heightened reliability in death judgments (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638) also compels reversal when the cumulative effect of errors undermines confidence in the reliability of the judgment. Appellant submits that the errors in this case require reversal both individually and because of their cumulative impact.

As explained in detail in the separate arguments on these issues, the errors in this case individually, and all the more clearly when viewed collectively, violated federal constitutional protections under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Accordingly, the errors and

their cumulative effect must be evaluated under the *Chapman* standard of review, and reversal is required unless respondent can prove them harmless beyond a reasonable doubt. (*Chapman v. California* (1968) 386 U.S. 18, 24.) Respondent cannot make this showing.

Appellant's statements of March 21 and March 31, 2003, were obtained in violation of *Miranda v. Arizona* and *Edwards v. Arizona* and were played for the jury. These statements provided evidence connecting appellant to the killing of Suzanne McKenna and provided nearly all the evidence the prosecution was able to present regarding rape felony murder and the rape special circumstance. Without these statements there was no properly admitted evidence sufficient to show rape, and the jury relied primarily on improperly admitted evidence of appellant's prior rape convictions to show a propensity to commit sex offenses in returning its guilty verdict. The jury was also improperly instructed with CALCRIM No. 1194 regarding the use of such evidence. This combination of errors directly resulted in the erroneous guilt verdict.

Exacerbating these errors was the improper evidence regarding the irrelevant death of Suzanne McKenna's sister, Patti Dutoit, seven months after McKenna's death. In spite of a clear ruling by the court that prosecution witnesses be admonished not to refer to the death as suicide, the prosecutor's first victim impact evidence stated on the day following the ruling that Dutoit had committed suicide because of McKenna's death, and that appellant was therefore responsible for not one but two deaths. The prejudice from this error could not be undone with any cautionary instruction, and the court erred in denying the defense mistrial motion.

The cumulative effect of all these errors deprived appellant of due process and the other constitutional rights identified herein and further

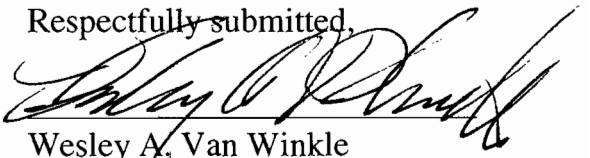
rendered the verdict and judgment completely unreliable. Respondent cannot show the foregoing errors to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Both individually and when viewed together, these errors undoubtedly produced a fundamentally unfair trial setting and a new trial is required. (*See Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Derden v. McNeel* (5th Cir. 1992) 978 F.2d 1453; *cf. Taylor v. Kennedy* (1978) 436 U.S. 478 [several flaws in state court proceedings combine to create reversible federal constitutional error].)

CONCLUSION

For the reasons set forth herein, Appellant respectfully submits that the judgment and death sentence should be reversed.

August 2, 2013

Respectfully submitted,



Wesley A. Van Winkle

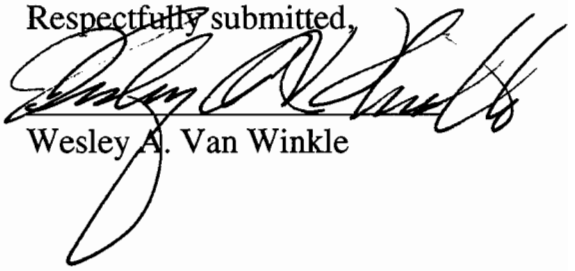
For Wesley A. Van Winkle and
Laura M. Rogers
Attorneys for Appellant
CARL EDWARD MOLANO

CERTIFICATE OF WORD COUNT

I declare that I am the attorney appointed by this court to represent appellant CARL EDWARD MOLANO in this capital appeal, and that I also prepared appellant's opening brief. On the date set forth below, I calculated the number of words in this brief by using the word count calculator included in WordPerfect X6, the word processing system used to produce this brief. According to that calculator, this brief contains 72,852 words.

Executed this 2nd day of August, 2013, at Berkeley, California.

Respectfully submitted,



Wesley A. Van Winkle

CERTIFICATE OF SERVICE BY MAIL

I declare that I am over the age of eighteen years and am employed in a law office in the City of Berkeley, County of Alameda, State of California. On this date, I served the within **APPELLANT'S OPENING BRIEF** on the parties in said cause by placing true and correct copies thereof in envelopes with postage thereon fully prepaid in the United Sates mail at Berkeley, California, addressed as follows:

James Meehan, Esq.
Deputy District Attorney
1225 Fallon St., 9th Floor
Oakland, CA 94612

David Schneller
PO Box 1057
Alameda, CA 94501

Tammy Yuen
Deputy Public Defender
1401 Lakeside Drive, Suite 400
Oakland, CA 94612

Office of the Attorney General
455 Golden Gate Avenue
San Francisco, CA 94102

Steven Parnes, Esq.
California Appellate Project
101 Second Street
San Francisco, CA 94105

Mr. Carl Edward Molano
P.O. Box G-07179
San Quentin State Prison
San Quentin, CA 94974

Hon. Allan Hymer
Alameda County Superior Court
1225 Fallon St. Dept 6
Oakland CA 94612-4218

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Berkeley, CA on August 2, 2013.

Carol Friedman