S161399

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. H038118

DEATH PENALTY APPEAL

APPELLANT'S REPLY 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

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by appointment of the
California Supreme Court.

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INTRODUCTION

In his opening brief, appellant raised six separate assignments of error, many of which contained subissues. Respondent disputes each of these assignments of error, and appellant will now reply with respect to each of these issues. Appellant notes, however, that many of respondent's contentions have been adequately addressed in the opening brief, and therefore not all of respondent's specific contentions merit a reply. Accordingly, while appellant has submitted replies with respect to each of the six general issues in the appeal, appellant's decision not to reply to a specific contention included in respondent's brief should not be regarded as a concession of any point.

Before turning to the legal issues in the case, appellant briefly notes a number of inaccuracies in respondent's introductory factual statement. First, on the day before Suzanne McKenna's body was found, her former neighbor Paulette Johnson went to McKenna's home to pick up houseplants

she'd left with McKenna. Respondent contends that this visit happened in the afternoon, and that Johnson went into McKenna's home. (RB 4). However, Johnson's testimony was that she went to McKenna's home in the morning and spoke with McKenna for 20-30 minutes on her porch, but never went inside. (15RT 2165-2166.)

Respondent states that when appellant was being interrogated at Eden Township Substation (ETS) on March 31, 2003, "appellant requested to speak to the district attorney's office." (RB 18.) She cites the testimony of investigating officer Edward Chicoine. (*Id.;* 14RT 2011-2013.) In appellant's view, appellant was actually asking whether he could speak to the district attorney with a public defender also present. At the station, in response to the officer's questioning, appellant said "what I would like, you know, I can talk to you guys. *I can even talk to the DA, . . . you know with my Public Defender there or whatever right, . . .*" (People's Pretrial Exh. 5A at 8, emphasis added.) After a brief exchange, appellant then reiterated, "Can I sit down with the DA?" (*Id.,* at 9.) Based upon the context of the exchange, at this point in the interrogation appellant was asking to speak with the district attorney with a public defender representing him.

Respondent's statement of the facts presented during penalty phase is also inaccurate in several respects. (RB 28-34.) For example, appellant grew up with his half-brother Ernest, not Ernesto. (26RT 3373.) Ernest and appellant changed their last names to Molano at the behest of their sister, Dolores, not their sister Cynthia. (26RT 3376-3377.) Lula Ellis was appellant's step-grandmother, not his biological grandmother. (26RT 3387.) Bonnie Alexis, not Dottie Harris, testified at appellant's trial (24RT 3439-3453), and Alexis testified about appellant's relationship with his niece, not his daughter. Respondent contends that appellant was "very upset" and "angry" with his mother because she did not tell him the identity

of his biological father. (RB 32.) The evidence shows only that "it was unclear [to appellant] who his father was, and upsetting to him." (26RT 4420.) Respondent also states that "appellant spent a lot of time with his older brother Ernesto using alcohol and drugs." (RB 33.) The evidence regarding Ernest and appellant using drugs and alcohol together came in the form of the testimony of appellant's social historian, who testified only that the brothers "used alcohol together, [and] they also used drugs together as they got older in the their teens." (26RT 3417.) There was no evidence regarding the amount of time spent or frequency with which their drug and alcohol use occurred.

I. THE TRIAL COURT'S RULING ON THE *MIRANDA* ISSUE IN THIS CASE WAS ERRONEOUS BECAUSE THE FACTS SHOW A CLEAR PATTERN OF DISREGARD FOR APPELLANT'S RIGHTS AND APPELLANT'S STATEMENTS WERE THEREFORE INVOLUNTARY AS A MATTER OF LAW.

In his opening brief, appellant contended that his Fifth and Fourteenth Amendment rights were violated when law enforcement officers made intentional misrepresentations in order to trick him into waiving his right to counsel and then disregarded his unequivocal invocations of that right, all in clear violation of the rules of *Miranda v. Arizona* (1966) 384 U.S. 436 and *Edwards v. Arizona* (1981) 451 U.S. 477. (AOB 74, 90.) Specifically, appellant first showed that the officers' lies about both their identity as homicide investigators and the nature of their investigation rendered appellant's waiver involuntary. Appellant also showed that the officers subsequently disregarded or ignored two separate and unequivocal invocations of appellant's right to counsel. Consequently, appellant contended, the statements made by appellant on March 21 and March 31, 2003, should have been suppressed and reversal of appellant's conviction is

now required.

Respondent argues that appellant's *Miranda* waiver made on March 21, 2003, was voluntary and that appellant's subsequent statements did not violate the *Edwards* rule. (RB 51, 55.) Respondent is wrong on both counts.

A. Investigating Officers' Lies About Their Identity and the Nature of Their Investigation Were Calculated to Mislead Appellant About the Nature of the Rights Being Waived and the Consequences of the Waiver.

Determining whether appellant voluntarily waived his *Miranda* rights on March 21, 2003, requires this court to address and resolve the question the United States Supreme Court expressly left open in *Colorado v. Spring* (1987) 479 U.S. 564, i.e., whether, and under what circumstances, an "affirmative misrepresentation" by law enforcement officers regarding the scope of interrogation constitutes the kind of trickery or deception which *Miranda* teaches will render a waiver involuntary. Appellant submits that, at a minimum, intentional deception by law enforcement which misrepresents the officers' identities and fails to at least inform the suspect that he is under investigation for a crime vitiates the waiver, particularly where, as here, the record clearly shows the defendant would never have waived his rights had he been informed of the true identity and nature of the investigation. Indeed, any holding to the contrary would effectively nullify *Miranda's* prohibition against police use of trickery and deceit to obtain waivers.

Respondent asserts that "[a]ppellant does not claim that any police action caused him to misunderstand the nature of his rights or the consequences of his decision to waive them." (RB 51.) To the contrary, in his opening brief, appellant specifically argued that the detectives'

"misrepresentations vitiated the waiver because appellant was entirely misled about the scope of the investigation, the nature of the offense itself, the identities of the officers to whom he was speaking, and the potential consequences of speaking to them." (AOB 80-81.) It is undisputed that the officers' actual purpose on March 21, 2003 was to interrogate appellant– by then their prime suspect– regarding the June 1995 homicide of Suzanne McKenna. It is also undisputed that investigating officers devised a plan in which they lied to appellant about both their identity *and* the nature, subject matter, and scope of the interrogation in order to obtain a *Miranda* waiver. Indeed, they misled him into believing that they were not there to investigate any crime at all but for a purely routine administrative purpose. The officers gave appellant their true names but told him that they were investigators from a sex crimes unit who wanted to conduct a routine interview about his "past crimes and some of the sex registration laws and things like that." (People's Pretrial Exh. 3A [p. 1] (transcript of audiotape); People's Exhibit 38 (audiotape).) They assured appellant that the type of interview they wished to conduct was so routine that it was conducted with "every single sex registrant . . . ." (3RT 315-316; People's Pretrial Exhs. 3 and 3A [p. 2, ln. 25].) Based on these misrepresentations, appellant signed a *Miranda* waiver and made statements which were then admitted at trial over his objection.

"[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.) 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.* (1979) 442 U.S. 707, 725.)

The lies the officers told appellant were intended to convince appellant that he would be waiving his rights and agreeing to speak with them solely for the purpose of a routine pre-release interview that concerned his prior sex crimes and the requirement that he register as a sex offender when released. This intentional deception by the officers about the subject matter of the interview prevented appellant from understanding the consequences of waiving his rights– precisely the kind of deception that the United States Supreme Court has repeatedly held renders a waiver involuntary.

Respondent argues that courts considering the issue of when misrepresentations by police invalidate a *Miranda* waiver have drawn a distinction between misrepresentations that are coercive, deceptive, or otherwise affect a defendant's understanding of his rights and the consequences of waiver, on one hand, and misrepresentations that simply lead an accused to make an "unwise" decision to waive his rights, on the other. (RB 54; *Colorado v. Spring* (1987) 479 U.S. 564, 577.) Appellant agrees with respondent's analysis that "a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that might...[affect] his decision to confess." (*Spring* at p. 576; RB 52.) Indeed, *Spring* itself stands for the proposition that merely failing to inform a defendant of all of the possible subjects of the interrogation in advance does not constitute the kind of trickery or deception that *Miranda* prohibits.

However, respondent's argument entirely fails to address the central problem presented here, to wit, that these officers *intentionally* deceived appellant in order to obtain a *Miranda* waiver by concealing the fact that they were conducting a criminal investigation. This kind of intentional

trickery and deception plainly affected appellant's understanding of the nature of the rights he was asked to waive and the potential consequences of waiver.

As noted in his opening brief, appellant has not found any published case upholding a waiver where law enforcement officers investigating a crime falsely stated they wanted to speak to the defendant for any reason other than criminal investigation. Nor does respondent cite any such case. As discussed in greater detail below, the cases respondent cites, which purportedly involve trickery or police ruses (RB 54), all involve situations in which the officers *at least* informed the defendant they were investigating a crime. There is a fundamental difference between advising a defendant that he is about to be interrogated as part of a pending criminal investigation and advising him that he is being interviewed only about past crimes for strictly administrative or bureaucratic purposes. The first advisement at least alerts the suspect to the nature of his rights and the consequences of waiving them. The second advisement entirely misleads the subject into believing that he is not under criminal investigation *at all* and is merely discussing crimes for which he has already been convicted and punished and thus cannot be punished again. The second advisement not only fails to alert the defendant about the potential consequences of the waiver but entirely conceals those consequences, leading him to believe the interview will have no criminal consequences at all. By intentionally tricking appellant into lowering his guard by leading him to believe there could be no criminal consequences if he spoke to them, the officers committed precisely the kind of trickery and deceit which *Miranda* condemns.

It is also abundantly clear from the record that appellant would never have waived his rights and agreed to speak with these officers but for their

intentional deceit. Chicoine's testimony and the sequence of events after appellant signed the waiver plainly demonstrate that had the officers been forthright about their identity as homicide investigators and the subject matter of their intended interview, appellant would never have signed the waiver. After more than an hour of questioning about appellant's priors and post-release plans– questioning that was meant to support the investigators' ruse and lower appellant's defenses– Dudek asked appellant if he knew McKenna and whether anyone thought appellant had killed her. (People's Pretrial Exhs. 3 and 3A [p. 42-43].) Appellant admitted that he knew McKenna, that he had sex with her shortly before her death, and that his ex-wife thought he killed McKenna because appellant told her he knew what had happened to McKenna. (*Id.* at p. 34-44.) However, when questioned further about his ex-wife's suspicions, appellant finally understood the true nature of the interrogation, became "extremely nervous," got "an alarmed look on his face," and insisted that he be allowed to leave the interrogation room to use the restroom. (*Ibid.*; 3RT 329.) When he returned five minutes later, appellant immediately and unequivocally invoked his right to counsel. The detectives then cut off questioning, executed a search warrant, and left. (People's Trial Exhs. 3 and 3A [p. 44]; 3RT 332.) The timing and circumstances of appellant's invocation show once he understood the nature and consequences of waiving his *Miranda* rights in relation to the McKenna investigation, he was absolutely unwilling to do so. Because the officers' intentional deception induced appellant's misunderstanding at the time of waiver, the waiver was involuntary.

In his opening brief appellant also provided a thorough discussion of *People v. Tate* (2010) 49 Cal.4th 635, and argued both that *Tate* is distinguishable from this case and that, to the extent that it can be read to prohibit only those misrepresentations by police that are likely to induce

false statements, *Tate* is also not in accord with the U.S. Supreme Court's decisions in *Miranda* and its progeny, including *Colorado v. Spring* (1987) 479 U.S. 564, to the extent that those cases prohibit deception and trickery to obtain a waiver. (AOB 77-89.)

Respondent disagrees with both appellant's contentions and argues as follows:

> [A]ll courts to consider the issue have consistently drawn a distinction between information that is coercive or affects the accused [sic] understanding of his rights, and information that affects the wisdom of exercising or waiving those rights. [Citations.] Trickery or ruses, that merely affect the 'wisdom' of the decision to waive, be it a failure to convey information or a communication of misinformation are simply not relevant [citation]. The analysis employed by this Court in *Tate* is in accord.

(RB 54.)

Respondent cites a number of cases which she contends show that trickery or ruses that merely affect the "wisdom" of the decision to waive are irrelevant to the determination of the voluntariness of a waiver. (RB 54.) Appellant disagrees.

First of all, respondent argues that trickery and deceit are *acceptable* if they merely affect the "wisdom" of the defendant's waiver. (RB 54.) However, that is not what *Spring* held at all. In *Spring*, the U.S. Supreme Court upheld a *Miranda* waiver against an allegation of police trickery and deceit where federal agents arrested the defendant, advised him he was under investigation for federal firearms violations, and obtained a *Miranda* waiver. During the course of the interrogation, the agents asked the defendant if he had ever shot anyone and he admitted he had done so. Two months later, as a result of the federal investigation, he was investigated by Colorado law enforcement personnel for murder. The Supreme Court

rejected Spring's contention that his initial waiver was involuntary because he had not been informed that he would be questioned about topics other than firearms charges and that the Colorado investigation was fruit of the poisonous tree. The high court held that mere silence by the federal agents regarding some possible subjects of interrogation did not constitute the kind of trickery or deceit prohibited by *Miranda*. The court reasoned that "[h]ere, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature." (*Spring, supra*, 479 U.S. at p. 577.)

Contrary to respondent's contention, *Spring* does not endorse trickery or deceit by law enforcement under *any* circumstances. Rather, it says that additional information about all subjects of the interrogation that affect only the wisdom of a defendant's decision to waive his rights need not be provided to a defendant in order to obtain a valid waiver. However, *Spring* does not undermine or limit *Miranda's* prohibition on police trickery or deceit to obtain waivers; it merely says that silence about some possible subjects of an interrogation is not the same thing as trickery or deceit. Indeed, in *Spring* there was no intentional trickery or deceit at all. The agents warned Spring that they were investigating him for firearms charges, and it appears that the questions regarding whether he had ever shot anyone arose naturally during the court of the interrogation and were not intentionally concealed.

Moreover, as noted above, even assuming *arguendo* that some level of trickery and deceit is acceptable if the misrepresentations only affect the "wisdom" of waiving *Miranda* rights, all the cases cited by respondent in support of this argument (RB 54) either do not say this, are distinguishable from this case, or are actually favorable to appellant's position. For example, *Moran v. Burbine* (1986) 475 U.S. 412, 421 involved a situation

similar to *Spring* in which interrogators merely withheld information that might have been useful to the defendant (they did not disclose that the defendant's attorney had called the station). The court held this did not misrepresent the nature of the defendant's rights or the consequences of waiving them. The case does not say that police trickery or deceit are acceptable methods for obtaining waivers if they affect only the wisdom of a defendant's waiver, nor does the case ever draw a distinction between deception and withholding information that affects the wisdom of waiving rights. Indeed, the word "wisdom" does not appear anywhere in the decision. Accordingly, the case does not support respondent's proposition. Indeed, to the extent that the withholding of information about the defendant's attorney constituted a form of trickery or deceit, it was unrelated to the subject matter of the waiver.

The remaining three cases respondent cites are all from the 11th Circuit, and are distinguishable from this case. Respondent cites *Hart v. Attorney General of the State of Florida* (11th Cir. 2003) 323 F.3d 884, 894-895 and *United States v. Beale* (11th Cir. 1991) 921 F.2d 1412, 1435, in support of the proposition that the courts draw a distinction between information that is coercive or affects the accused's understanding of his rights and information that merely affects the wisdom of exercising or waiving those rights. What respondent does not say, however, is that in both of these cases the court held the defendant's waiver was *involuntary* due to police trickery or deceit.

In *Hart*, a waiver was held involuntary when a detective effectively contradicted the *Miranda* warnings by telling the defendant that having a lawyer present would be a "disadvantage" and that "honesty wouldn't hurt him." (*Hart, supra*, 323 F.3d at p. 894-895. Similarly, in *Beale*, the waiver was held involuntary when an agent told an illiterate defendant that signing

a waiver form "would not hurt him." (*Beale*, *supra*, 921 F.2d at p. 1435.) Neither case involved a misrepresentation regarding the scope or subject matter of the interrogation. However, in both cases, the police affirmatively misrepresented the consequences of the waiver, and the waiver was held involuntary for that reason. Once again, contrary to respondent's contention, in neither case did the court ever draw a distinction between trickery and information that only affects the wisdom of waiving rights, and once again the word "wisdom" never appears in either case.

The remaining case cited by respondent is *United States v. Farley* (11th Cir. 2010) 607 F.3d 1294. There, the defendant claimed his *Miranda* waiver was involuntary because the agents represented that they wanted to talk to him regarding his possible involvement in terrorism when, in fact, they were actually investigating him for sex crimes with children.

Regarding the *Miranda* issues the *Farley* court held as follows:

> Of course, it defies common sense to posit that Farley was actually "deceived" by Agent Paganucci's remark about terrorism. Farley's argument would have us believe he actually thought that by incredible coincidence the FBI had mistakenly identified him as a terrorist on the same day he just happened to be committing a serious crime that had nothing to do with terrorism. Given the number of times Farley had worried out loud about walking into a sting operation and being met with "cops and TV cameras," he had to know what was up from the moment the agents detained him.
>
> Even if we assume for the sake of discussion that Farley really thought the agents were investigating terrorism and nothing else when he waived his rights, his argument requires more to succeed. It also requires us to assume that if Farley had known that the agents suspected him of the crime he actually did commit, he would have kept his mouth shut. That assumption is belied by what actually happened. Once the direction of the agents' questioning made it clear that they suspected Farley of planning to have sex with a child, any effect the "terrorism" deception had must have ended. Farley

> had to know when the agents started questioning him about coming to Georgia to have sex with a minor that they were investigating whether he had come to Georgia to have sex with a minor. Among the warnings Farley acknowledged reading and understanding was that he had "the right to stop answering at any time" (emphasis added). At the point in the interview when Farley was questioned about the crime he actually had committed, he was aware of what he was being questioned about and knew that he was free to stop answering the questions. He chose to continue talking.

(*Farley, supra*, 607 F.3d at p. 1330.)

The foregoing quotation plainly shows that *Farley* is distinguishable from this case. First, the 11th Circuit appeared to find incredible Farley's contention that he had been advised only of the agents' intention to investigate him for terrorism and did not understand that the interview would deal with child sex crimes. However, even assuming for the sake of argument that Farley's contention had been factually correct, the case is similar to both *Spring* and *Moran v. Burbine*– and distinguishable from this one– in that the defendant actually was informed he was under investigation for a crime. Although he was not informed of all possible crimes or subjects which might be discussed during the interview, the agents did not deceive Farley into thinking this was merely an administrative interview rather than a criminal investigation. *Farley* also stands for the proposition that the analysis of whether a waiver should be deemed involuntary must include consideration of whether the record shows that the defendant would not have waived his rights had he been given a proper advisement.

Thus, *Farley* does not support respondent's contention, and the factors recited in the court's analysis actually militate in appellant's favor. Here, unlike *Farley*, the credibility of the defendant's contention that he

was intentionally misled or the nature of the misrepresentation is not in question. Both Detective Chicoine and respondent have admitted that the detectives intentionally concocted what Chicoine generously termed a "ruse" to induce appellant into waiving his rights. Unlike the situation in *Farley*, here law enforcement officers concealed the fact that the defendant was under investigation for a crime. Finally, again unlike the circumstances in *Farley*, the record plainly shows that if he had been properly advised that the detectives were actually there to investigate him for a crime– the McKenna homicide– appellant would never have waived his rights.

In short, respondent's contention that police trickery or deceit is acceptable if it merely affects the "wisdom" of the defendant's decision to waive is incorrect. *Spring* does not hold that, nor do the cases cited by respondent, which actually favor appellant's position.

Respondent contends that this Court's analysis in *Tate*, *supra*, 49 Cal.4th 635, is in accord with her analysis, and fails to address appellant's contentions that the case is both factually distinguishable and, to the extent it can be read as contradicting *Miranda*, was incorrectly decided. For this reason, appellant will not fully recapitulate here the more specific arguments he made with regard to *Tate* in his opening brief. Briefly, however, in *Tate* there was no obvious affirmative misrepresentation, except to the extent that officers represented that the victim had been "hurt" when she actually had been killed. Otherwise, the disclosures made by the officers at the time of the advisements, coupled with the fact that the defendant was being interrogated in the homicide department by officers he knew to be homicide detectives, were sufficient to put him on notice of the nature and scope of the questioning and the consequences of a waiver. To the extent that *Tate* can be read as prohibiting only misrepresentations likely to induce false statements, it is based upon state case law that predated

Miranda by at least four decades and is at odds with *Spring*.

Furthermore, as respondent acknowledges, coercive misrepresentations are another basis for invalidating a *Miranda* waiver. In his opening brief, appellant contended that the officers' lies on March 21 contained explicit threats meant to coerce appellant into waiving his *Miranda* rights. (AOB 88-89.) The audio recording of the interview clearly shows that while appellant was reviewing the waiver form, Detective Chicoine told him that if he failed to answer questions about his sex crimes and future plans, he could end up in one of Chicoine's "red files" of "guys that I'm going after." (People's Exhs. 3 and 3A [pp. 2-3].) This representation was plainly coercive and threatened that appellant would be a target of future police investigation unless he agreed to waive his *Miranda* rights and talk to the officers. The coercive nature of this advisement therefore provides a second basis for invalidating appellant's waiver.

Respondent argues in a footnote (RB 55, n. 6) that "[r]ead in context, Chicoine's remark could have been understood by appellant only to mean that once released from prison appellant should stay out of trouble." This contention defies credulity. Chicoine's statement advised appellant what would happen if he failed to answer questions about his sex crimes and future plans; it cannot possibly be read as a benign, avuncular advisement to stay out of trouble in the future. Chicoine threatened that if appellant refused to talk, he would thus be under greater police scrutiny and a greater threat of arrest in the future. Thus, while the waiver is plainly involuntary due to the officers' trickery and deceit, this coercive statement also renders the waiver involuntary for this separate reason.

B. After His March 21 Invocation, Appellant Never Reinitiated Contact with Officers or Provided a Voluntary Waiver

In his opening brief, appellant argued that on March 31, 2003, appellant never reinitiated contact with officers and that officers ignored appellant's second invocation of his right to counsel and, in violation of *Edwards v. Arizona* (1981) 571 U.S. 477, engaged in an impermissible "softening up" process which rendered any subsequent waiver involuntary.

Respondent argues that appellant's March 31 statements did not violate the *Edwards* rule. Specifically, she argues that (1) appellant reinitiated contact with law enforcement when they came to arrest him on March 31, (2) appellant did not reinvoke his rights during his transport to Alameda County's Eden Township Substation (ETS), and (3) appellant provided a valid waiver of his rights during interrogation at ETS. Video and audio recordings of officers' interactions with appellant clearly undermine each of these assertions.

C. Appellant Did Not Reinitiate Contact with Officers After His Unequivocal March 21 Invocation

Once a defendant has invoked his right to counsel, as appellant did on March 21, authorities may resume questioning only if "the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards, supra,* 451 U.S. at p. 484-485.) In his opening brief, appellant contended that he did not reinitiate contact with the detectives; indeed, the detectives initiated contact with appellant, who was incarcerated when they came to arrest him on March 31, 2003. Appellant made no attempt to contact any law enforcement officer or prison guard but was taken from his cell in handcuffs, handed over to Detectives Chicoine and Dudek, placed under arrest, and transported to the station by them.

However, respondent claims that appellant initiated "further communication" in an unrecorded, unmemorialized statement to the officers when they came to San Quentin Prison to arrest him. (RB 56.) She bases this contention on Chicoine's testimony that when the officers came to pick up appellant at the prison, appellant told them he had changed his mind and now wanted to talk to them.

Respondent contends that recordings made at ETS hours after the transfer substantiate her contention. However, in attempting to shift this Court's focus to the tape-recorded interview, respondent fails to take note of what occurred during the period *prior* to that interview. Respondent fails to explain or even mention the fact that Detective Chicoine's own report about appellant's arrest, as well as the recording made in the car mere moments after appellant supposedly reinitiated contact, both contradict both Chicoine's self-serving testimony regarding appellant's supposed statement at San Quentin and respondent's contention.

Before appellant addresses respondent's contentions, it is important to note that 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.)

Having invoked his right to counsel on May 21, appellant was entitled to a strong presumption that any subsequent waiver was involuntary. 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.) It is hornbook law that 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 .) The prosecution's evidence at the pretrial hearing failed to overcome the strong presumption that appellant's subsequent waiver was involuntary.

Detective Chicoine testified that on March 31, he and Dudek returned to San Quentin, this time to execute a warrant for appellant's arrest. According to Chicoine, when he encountered appellant for the first time since the March 21 invocation, appellant stated, "I want to talk to you now," and told the officers that "he had been meaning to call us. . . ." (3RT 343.) Detective Chicoine testified, "I believe[d] that he was reinitiating– he wanted to reinitiate the talks that we had talked with him before." (3RT 344.)

However, Chicoine also testified that he prepared a report memorializing his contact with appellant on March 31. (3RT 458; Defense Pretrial Exh. C.) With regard to the contact at the time of appellant's arrest, Chicoine's report states only:

> On 3/31/03 about 1300 hours, Dudek and I arrested Molano at San Quentin State Prison, pursuant to the arrest warrant. Dudek and I transported Molano to the Eden Township Substation, in San Leandro, for processing.

(Defense Pretrial Exh. C.) Chicoine later testified that there was no

mention of the critical fact of appellant's supposed reinitiation in his report because "I inadvertently left that out." (3RT 458.)

Respondent's argument fails to address the fact that Chicoine's report entirely omitted any mention of appellant's supposed reinitiation– a fact that renders Detective Chicoine's testimony patently incredible, particularly in view of his previous admission that only ten days earlier he and Dudek lied to appellant about their identities as homicide inspectors and their intention to question him about a homicide. At the time of appellant's arrest, Chicoine had 24 years of law enforcement experience. He plainly understood *Miranda* and *Edwards* and understood how to "game" the system well enough to believe that his unethical misrepresentations on March 21 would be upheld by the courts. He also understood the significance of appellant's invocation of the right to counsel and therefore cut off questioning once appellant had clearly invoked. Based on his many years of experience, it is inconceivable that Detective Chicoine would have failed to understand the significance of appellant's reinitiation at San Quentin or to feature it prominently in his report if, in fact, it had actually happened. (3RT 391-392, 458; Defense Pretrial Exh. C.) This fact alone is compelling evidence that at the time Chicoine wrote the report, he did not believe or claim that appellant reinitiated contact at the time of his arrest.

Moreover, the surreptitious audio recording begun literally moments after this contact makes it apparent that officers did not believe that appellant reinitiated contact with them at the prison. In that recording, it is Dudek, not appellant, who initiates the conversation. According to that recording, Dudek told appellant he and Chicoine were "not in a position" to make further inquiry and that appellant was "in control" of whether he wanted Dudek to tell him more 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?" (People's Pretrial Exh. 4, 4A [p. 4].) If appellant had actually told the detectives that he wanted to talk to them only minutes earlier, as Chicoine claimed during his testimony, 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 that appellant had changed his mind about speaking with them.[1]

Respondent takes appellant to task for his omission of any discussion of appellant's statements at the ETS, *after* appellant's arrest and transport, which respondent contends show appellant reinitiated contact and voluntarily waived his rights. (RB 57.) Respondent argues that discussion of these statements is "shockingly absent" from the portion of appellant's brief arguing that appellant did not reinitiate. Respondent conveniently ignores the fact that by the time appellant made these statements, the illegal softening-up process had already taken place. Appellant had already been improperly persuaded to waive his rights and his answers to the district attorney reflect that. Moreover, respondent's argument puts words in appellant's mouth. It was the district attorney who asked appellant if it was a "fair statement" to say that he "reinitiated" the discussion.[2] The mere fact

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[1]/ Respondent appears to argue that whether appellant reinitiated is an issue of fact to which appellate courts must defer if supported by substantial evidence. (RB 56.) To the contrary, the voluntariness of a confession is not an issue of fact but a question of law which appellate courts must independently review. (*Miller v. Fenton* (1985) 474 U.S. 104, 112-116 [discussing questions of law and fact and mixed questions in analyzing the voluntariness of confessions].)

[2]/Appellant's response was actually: "Ok. I, it, that would be fair because I asked
like if I will be straight up with you both like I was with them, right. I understand ok, I don't' have the money for a public defender, blah blah blah" (People's 6, 6A [p.5])

that appellant replied in the affirmative does not mean he had any understanding of either the legal or factual significance of the term, or indeed, even what the word "reinitiate" meant. In view of the softening up process, which was captured on tape, appellant's answers to questions at ETS are irrelevant to the question of whether his waiver at that time was voluntary.

The *Edwards* presumption of involuntariness is a strong one, and the prosecution's evidence failed to overcome this burden. Appellant did not reinitiate contact within the meaning of *Edwards*, and this Court must find that any statement made after the March 21 invocation is inadmissible. Respondent contends that this Court should apply the substantial evidence standard in its review of whether appellant reinitiated contact on March 31. (RB 51, 56.) However, an appellate court scrutinizes for substantial evidence only those questions which are purely or predominately factual. (*People v. Waidla* (2000) 22 Cal.4th. 690, 730.) The question of whether appellant reinitiated communication within the meaning of *Edwards* is a mixed question which is predominately legal and requires independent review. Moreover, the question of whether appellant reinitiated at San Quentin also could not properly have been resolved on the basis of a mere preponderance of the evidence; rather, the evidence must have been sufficient to overcome the strong presumption that appellant's post-invocation statements were involuntary, and there is no indication in the record that the trial court analyzed the question in view of this presumption. As appellant argued in his opening brief, he could not and did not reinitiate contact with officers because he was continuously in custody from the time of his initial invocation until he was approached by officers at San Quentin, and evidence that he reinitiated contact during the only brief moment when his statements were not being recorded is both inherently implausible, self-

serving, and contradicted by the weight of the other evidence. (AOB 91.)

However, even if this Court were to apply the substantial evidence test, given the facts surrounding appellant's March 31 arrest and interrogation, it is simply implausible that appellant reinitiated contact with the police as Chicoine later claimed, and implausible evidence does not constitute substantial evidence. (*Waidla, supra,* at 731.) Finally, even if this Court upholds the trial court's finding that appellant did reinitiate communications at San Quentin, appellant made no incriminating statements between the time of his arrest and his subsequent reinvocation during the car ride to ETS.

D. During the Car Ride from San Quentin to ETS, Officers Ignored Appellant's Invocation of His Right to Counsel

Perhaps even more remarkable than the fact that the audio recording of the car ride proves that appellant did not reinitiate contact is the fact that it also shows that appellant actually re-invoked his right to counsel, and that this second invocation was completely ignored by Dudek and Chicoine. This second unambiguous invocation required immediate termination of all further questioning.

Respondent argues that nothing appellant said during the car ride constitutes an unequivocal invocation and that even if appellant did make an unequivocal invocation, it was without effect because appellant was free from custodial interrogation and thus could not "anticipatorily" invoke his right to counsel. (RB 61-63.) This argument is clearly erroneous.

First, as appellant has shown, the audio recording includes an unequivocal invocation in 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.)

Respondent cites a number of cases in which the defendant made equivocal statements asking whether he could or should call a lawyer or suggesting that "maybe" he should call a lawyer. (RB 64-65; See, e.g., *Soffar v. Cockrell* (5th Cir. 2002) 300 F.3d 588, 591; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 24-25; *People v. Crittenden* (1994) 9 Cal.4th 83, 123-131, *Clark v. Murphy* (9th Cir. 2003) 331 F.3d. 1062, 1070-1072; *Davis v. United States*, (1994) 512 U.S. 452, 462.) However, while appellant at one point did ask whether he could sit down with a public defender before he was questioned, he went further than that, asserting in no uncertain terms that he "would feel more comfortable" speaking to a

public defender first, thus unequivocally invoking his right to counsel.

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 if appellant wanted to invoke his right to counsel, he could not do it until he was at ETS.

Respondent inserts a footnote contending that because of the poor quality of the tape she "cannot confirm or deny whether these words can be heard." (RB 59, fn. 8.) Appellant's counsel have both listened to the tape multiple times and maintain that the tape shows appellant made this second unequivocal invocation. Appellant submits that when this Court has had the exhibit transferred to it for its own review, the original tape will even more clearly reflect appellant's statement, "I would, I would feel more comfortable."[3]

Respondent claims that during the car ride appellant was in no position to invoke his right to counsel, no matter how clear and unambiguous his invocation, because he was not being subjected to a "custodial interrogation at the time." However, questioning by Dudek during the car ride was undoubtably custodial interrogation.

Appellant was certainly in custody– he had been told he was under arrest and was placed in the back of a police car wearing handcuffs, ankle bracelets, and waist chains– and respondent does not argue otherwise. (3RT 342, 356, 358-359, 405, 435-436, 442, 445; Defense Exh. C.) However, respondent contends the statements by the officers did not

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[3]/ In the event the judgment is affirmed on direct appeal, appellant intends to have an expert in tape recording analysis reduce the background noise to make the spoken words even clearer. Such an analysis would, of course, be outside the record on appeal and would only be properly presented in habeas corpus proceedings. However, appellant believes the existing tape, People Pretrial Exh. 4, is more than adequate to show a second invocation during the car ride as described above.

constitute "interrogation." Respondent is wrong.

"Interrogation" for *Miranda* purposes includes "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, emphasis added.)

In her argument on this point (RB 58-61), respondent begins with a transcript of the discussion of whether appellant would be permitted to speak to a public defender first (People's Pre-trial Exh. 4A, pp, 3-4; RB 58-59), and then quotes the transcript of a portion of the subsequent conversation. Inexplicably, respondent fails to include any of the discussion that took place *prior* to appellant's invocation, presented in its entirety in appellant's opening brief (AOB 50-55), which plainly constituted interrogation.

The following questioning began almost immediately when appellant and the officers entered the car, and it is absolutely clear that it was not a limited and focused inquiry necessary to some legitimate police procedure.

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.

(People's Pretrial Exhs. 4 and 4A [p. 1], emphasis added.)

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: Uh-huh.

(People's Pretrial Exhs. 4 and 4A pp. 1-2, emphasis added.[4])

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

DUDEK: I've seen better, I seen worse. 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.

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[4]/ The transcript prepared by the district attorney, which was admitted into evidence as exhibit 4A, includes more "unintelligibles" in this portion of the transcript. Where there are differences between the tape and the transcript, appellant has relied upon the tape recording itself, which is the actual evidence, rather than the district attorney's transcript.

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.

(People's Pretrial Exh. 4 and 4A [pp. 1-2], emphasis added.)

Respondent argues that the interaction in the car cannot be deemed interrogation because "no discussion of the crimes occurred during the ride" and describes all communications in the car as simply the officers' responses to questioning by appellant. (RB 63.) This is a clear misrepresentation of the facts. There was no discussion of the McKenna's death during the car ride only because appellant refused to engage in such discussion. Respondent ignores the fact that, as noted above, from the very moment the tape began, Dudek initiated the conversation and repeatedly asked appellant if he had any questions, if he knew what was going on, if he understood the charges against him, and if he wanted to talk them about McKenna's death. To say that Dudek should have known that these questions were reasonably likely to elicit an incriminating response from appellant is an understatement. It is more accurate to say that the questions were obviously calculated to do so. Dudek did not ask appellant if he had

"any questions" or if he "underst[oo]d the charges" because he wanted to aid appellant's understanding of his predicament, he asked because "obviously we'd like to have an explanation" about McKenna's death. Dudek's repeated efforts to get appellant talking about his case constitute interrogation.

Moreover, in a portion of the conversation subsequent to the invocation, which respondent again omits, the officers continue to attempt to persuade appellant to waive his rights and speak. Dudek asked about appellant's "4.0 whiz kid" daughter; appellant's oldest son, Carl Molano, Jr., who was then in prison[5]; a friend who had put money on appellant's account in prison; and appellant's art work. (People's Pretrial Exh. 4A p.4-5, 6-7.) 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 p. 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.) As noted below, the officers also disparaged the victim, Suzanne McKenna, describing her as "not an angel." (People's Pretrial

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

Exhs. 4 and 4A [p. 3].)

Respondent's contention that the foregoing attempts to exploit appellant's feelings for his family did not constitute "interrogation" is meritless. The conversation was begun by Dudek, not by appellant, and included several statements which were plainly designed to elicit information and others intended to encourage appellant to waive his rights and make a statement in order to resolve what the officers tried to persuade him were his own family issues. None of this discussion falls within the category of innocent questioning, such as whether appellant would like a glass of water, but instead constituted police-initiated interrogation within the meaning of *Innis*.

E. The Totality of the Circumstances Rendered March 31 Waiver at ETS Involuntary

At ETS, Dudek and Chicoine finally succeeded in convincing appellant to talk to them about the McKenna case, though appellant made no express waiver and signed no waiver form.[6] Appellant told the officers that on the day of McKenna's death he had smoked rock cocaine while 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 and culminated with McKenna's accidental death. (*Id.* at p. 13-16.) Soon thereafter, a deputy district attorney and D.A.'s investigator arrived at ETS and appellant made a substantially similar statement to them. (People's Pretrial Exh. 6 and 6A.)

As discussed above, the record in this case shows that the investigating officers lied to appellant in order to obtain the initial waiver of

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[6]/ See AOB 57-61.

his rights, twice ignored appellant's invocations of his right to counsel, and continued to badger him to revoke that invocation. While these factors alone would be enough to render any subsequent waiver involuntary, appellant has shown that during the car ride Dudek and Chicoine also engaged in impermissible "softening up" tactics. Taken together, these circumstances render appellant's statements on March 31 involuntary.

1. "Softening Up"

Respondent argues that the detective did not attempt to soften appellant's resolve with improper tactics. She attempts to distinguish appellant's case from *People v. Honeycutt* (1977) 20 Cal.3d 150, in which investigating officers engaged the accused in conversation about past events and former acquaintances in an effort to ingratiate themselves, then disparaged the victim by saying that he was a homosexual who was suspected of a homicide. (*Id.* at p. 160-161.) Respondent argues that because Detectives Dudek and Chicoine "were courteous," did not employ a "good cop, bad cop" ploy, and did not disparage the victim, there was no "softening up" within the meaning of *Honeycutt*. However, Dudek and Chicoine's efforts to soften appellant's resolve go far beyond those described in *Honeycutt*.

As this Court has explained, "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." (*People v. Enriquez* (1977) 19 Cal.3d 221, 238, *overruled on an unrelated point* in *People v. Cromer* (2001) 24 Cal.4th 889, 901, n. 3.) In this case, beginning with their very first contact with appellant on March 21, Dudek and Chicoine used a number of tactics to attempt to soften appellant's resolve

and persuade him to discuss the McKenna case.

First, contrary to respondent's assertion, Dudek and Chicoine repeatedly disparaged Suzanne McKenna, a ploy designed to minimize the crime, ingratiate themselves with appellant, and gain his trust.[7] During the March 21 interview, they told appellant that they knew McKenna to be a drug user and, referring to group sex, asked appellant if McKenna was "into two dudes and her or anything like that." (People's Pretrial Exhs. 3 and 3A [p. 41].) Then, 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].)

Second, Dudek and Chicoine attempted to ingratiate themselves to appellant and provoke feelings of guilt by engaging him in discussion about his children, an emotional appeal closely akin to the "Christian burial speech" the officers improperly employed in *Brewer v. Williams* (1977) 430 U.S. 387. During the March 21 interview, appellant had told the officers he wanted to mend his relationship with his children. (People's Pretrial Exh. 3.) Accordingly, during the car ride on March 31, after appellant refused to engage with Dudek about McKenna's death and again invoked his right to counsel, Dudek deliberately used this information to persuade appellant to revoke his invocation, using the conversation about appellant's children to exploit appellant's desire to mend his relationship with them.

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[7]/ The third edition of Inbau & Reid, *Criminal Interrogation and Confessions* (3d ed. 1986), the standard law enforcement text on interrogations in effect at the time of this interrogation, devotes a chapter to tactics and techniques that can be used to induce a defendant to confess by stressing various "themes." The fourth of these "themes" is to "sympathize with suspect by condemning others," including "condemning the victim." More specifically, the manual urges the interrogator to disparage the morals of the victim in a rape case by suggesting to the suspect "that the rape victim had acted like she might be a prostitute and that the suspect had assumed she was a willing partner." (*Id.*, at p. 106-11.)

Just as Dudek used appellant's children to induce appellant to make statements about McKenna's death (discussed above), so too did he use them in an illegal effort to soften appellant's resolve. 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, "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.) He told appellant, "It's gonna be [] a 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 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.)

As appellant has shown officers 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.

F. All Other Evidence of the Crime Was Circumstantial, Making Admission of Appellant's Statements Extraordinarily Prejudicial

Respondent finally argues that any error in the admission of appellant's statements is harmless because other inculpatory evidence established that appellant raped McKenna and strangled her to death. Respondent is wrong.

First, as respondent acknowledges, on appeal the erroneous admission of statements made in violation of *Miranda* requires application of the *Chapman* standard, and respondent bears the burden of proving beyond a reasonable doubt that the error was harmless. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Chapman v. California* (1967) 386 U.S. 18, 23-24.) This heavy burden requires respondent to show that admission of appellant's statements was "unimportant in relation to everything else the jury considered on the issue in question." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.)

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.) In his opening brief, appellant argued that without admission of his statements, the prosecution could not have presented evidence sufficient for a murder conviction beyond a reasonable doubt or any 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.

While ostensibly acknowledging the burden the state bears, respondent recites the evidence in the case, some of which offers no proof

whatsoever of the identity of McKenna's killer, while the rest is merely circumstantial evidence.

Although appellant maintained that McKenna's death was accidental, his statements where characterized by the prosecutor as admitting the act of killing and thus are closely analogous to a confession. In this case, appellant's statements are uniquely and devastatingly prejudicial because they provide the only substantial evidence that McKenna was raped, which is to say, the only basis for the felony murder charge and, and most importantly, the rape special circumstance that made appellant eligible for the death penalty.

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 indicates 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. 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 and overturn appellant's death sentence.

II. ADMISSION OF THE EVIDENCE OF THE RAPES OF ANN HOON AND MABEL LOVEJOY AND THE CORPORAL INJURY OF BRENDA MOLANO VIOLATED APPELLANT'S DUE PROCESS.

In pre-trial filings, the prosecution sought to introduce evidence of appellant's three prior convictions, to wit, the 1982 rape of Ann Hoon, the 1987 rape of Mabel Lovejoy and, by separate motion, the 1996 corporal injury upon Brenda Molano. The Hoon and Lovejoy priors were proffered under Evidence Code section 1108 (6CT 1469-1483) and the Brenda

Molano prior was offered pursuant to Evidence Code section 1101(b) (6CT 1435-1455). The defense objected to this evidence, arguing that the prior offenses were not relevant under section 1101(b), were otherwise inadmissible under section 352 (6CT 1311-1314), and because the prior sex offenses were inadmissible under section 352, they were not made admissible by section 1108. (6CT 1374-1381.) The defense also argued in the alternative that if any evidence of these three incidents was admitted, it should be limited to only those facts of the sexual assaults relevant to appellant's propensity to rape because any other evidence was irrelevant and unduly prejudicial under sections 350 and 352. (7CT 1518-1523.) The court ultimately ruled that the Hoon and Lovejoy incidents were of "extremely strong" probative value and were admissible under section 1108 and that the Brenda Molano incident was admissible under section 1101(b) 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. (7CT 1525; 2RT 192-193.)

During the guilt phase of the jury trial, the prosecution offered evidence of all three incidents, including appellant's statements, a recording of the 911 call in the Lovejoy case, and the testimony of all three victims, two of appellant's sons, seven law enforcement officers and one medical doctor.

In his opening brief, appellant argued that because section 1108 is unconstitutional and because the corporal injury case was irrelevant to any purpose permitted by section 1101(b), admission of this evidence violated appellant's right to due process.

A. Admission of Two Prior Rape Convictions Under Evidence Code Section 1108 Violated Due Process.

In his opening brief, appellant acknowledged that this Court has upheld section Evidence Code section 1108 against similar constitutional challenges in the past (see *People v. Falsetta* (1999) 21 Cal.4th 903, 911), but requested that the Court revisit the issue for the reasons set forth in the opening brief. (AOB 150.) 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 was required to raise the issue on direct appeal in order to preserve it for federal review.

Respondent does not address appellant's specific reasons for requesting that this Court revisit its decision in *Falsetta.* Instead, respondent relies on *Falsetta* and some federal court decisions to argue that the trial court ruled properly. To the extent respondent's argument is that the issue is waived because not raised by trial counsel below, respondent is incorrect. As appellant asserted in his opening brief, a criminal conviction cannot be based upon a statute that is unconstitutional under a federal or state Due Process Clause. (*District of Columbia v. Heller* (2008) 554 U.S. 570.) Consequently, no objection need be made to preserve the issue. (*People v. Vera* (1997) 15 Cal.4th 269, 279; *Nissan Motor Corp. v. New Motor Vehicle Board* (1984) 153 Cal.App.3d 109, 115.)

Because respondent offers no other argument, appellant need not repeat all the arguments recited in the opening brief. Nevertheless, appellant asserts again that the centuries-old rule excluding propensity evidence 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.)

Due process demands some limitation on propensity evidence, and section 352 provides the promise of restraint. History, however, shows that promise has proved to be an empty one. As appellant showed in his opening brief, appellate decisions in the 15 years since *Falsetta* was decided have proven that section 352 does not provide the safeguard anticipated by *Falsetta*. Not a single post-*Falsetta* appellate challenge to admission of section 1108 evidence has been successful. The confidence expressed by this Court in *Falsetta*– that Evidence Code section 352 would meaningfully limit propensity evidence– is therefore unwarranted. When the only limitation placed on such evidence is only theoretical, it offers no protection against a due process violation. Section 352 does not insulate section 1108 from claims that it violates due process, and this Court should revisit the issue.

B. Appellant's Spousal Abuse Conviction Was Improperly Admitted Pursuant to Evidence Code 1101(b).

In addition to the prior rape convictions admitted under section 1108, the trial court also admitted evidence of appellant's 1996 conviction for corporal injury on his wife, Brenda Molano, pursuant to section 1101(b). In a written motion, the prosecutor argued the prior rapes and the spousal abuse conviction "demonstrate [appellant's] intent, absence of mistake of accident, and plan pursuant to Evidence Section 1101(b)." (6CT 1449.) In oral argument, the prosecutor contended that evidence of the choking of Brenda Molano was relevant on the questions of modus operandi, intent, and absence of accident or mistake. (2RT 113-114.) Over defense objection, the trial court found evidence of the spousal injury admissible under section 1101(b) 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.)

To establish the facts underlying the conviction for spousal abuse, the prosecution presented testimony from Mrs. Molano, appellant's two young sons, and a probation officer who testified to appellant's statement about the incident. This evidence showed that on June 7, 1996, appellant, who was then on parole, admitted to his wife that he was using drugs. Brenda Molano became upset by this information. In the argument that followed, appellant choked her into unconsciousness. One of her sons called 911, and she was transported for emergency room treatment. Appellant later pleaded guilty to corporal injury to a spouse.

In his opening brief, appellant argued that because this evidence was not sufficiently similar to the charged offense, it was not made admissible by section 1101(b), and its admission violated appellant's due process rights. Respondent argues that the details of the corporal injury incident were relevant evidence of appellant's intent and even if improperly admitted, the error is harmless. For the reasons set out below, she is wrong.

Section 1101(b) makes admissible evidence of uncharged offenses that 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).) In addition to being relevant, such evidence must be of probative value that is not outweighed by the danger of prejudice. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

For analytical purposes, this Court has often grouped section 1101(b) factors into three categories– identity, common design or plan, and intent– and has established a sliding scale of similarity which must be analyzed in

order to establish the admissibility of prior conduct, depending upon which of those factors the prosecution seeks to prove. *(Ewoldt, supra*, 7 Cal.4th 380.) The highest degree of similarity is required for evidence of identity; the evidence must be so unique to the defendant that it serves as a kind of "signature" and suggests no one else would have committed the same offense in the same way. (*Id.* at p. 403.) An intermediate but still substantial 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 be sufficient to support the inference that the defendant probably harbored the same intent in each instance. *(Ibid.)* It is for this reason respondent contends the 1996 conviction was relevant and properly admitted as evidence of appellant's intent. However, the record shows that the trial court rejected the prosecutor's argument that the 1996 conviction was relevant to intent.

1. The Trial Court Did Not Admit the 1996 Spousal Abuse Conviction to Prove Intent.

Appellant contends that the admission of this evidence was not only a violation of due process and highly prejudicial, but a misapplication of the principles underlying the admissibility of "other crimes" evidence. Morever, respondent's argument that "appellant's prior conviction for spousal abuse was properly admitted on the issue of appellant's intent and to refute the defense that McKenna's death by strangulation was accidental" (RB 72) misstates the trial court's decision and misrepresents the applicable law.

Despite the prosecutor's repeated urging, the trial court declined to find the spousal abuse conviction relevant to intent. Instead, the court found that it was relevant to show that "strangulation is a method employed by the defendant when facing psychological dissonance" and to rebut appellant's statement that McKenna's death by strangulation was accidental. (2RT 193.)

To the extent the court's ruling characterized strangulation as a "method employed" by appellant in prior cases, the applicable standard for admissibility would be *Ewoldt's* test for analyzing evidence of identity or, at a minimum, its test for admissibility of evidence of common plan or design.

As appellant noted in his opening brief, he has found no precedent from this Court which clearly indicates what analysis under *Ewoldt* is used to determine the admissibility of prior conduct for purposes of negating claims of accident or to show absence of mistake. It appears that respondent's argument assumes that any refutation of appellant's claim of mistake or accident automatically establishes intent to kill. This interpretation strains credulity and the mistake or accident at issue here does not fall within the ambit of Ewoldt's analysis for purposes of establishing evidence of intent.

First, as this Court stated in *Ewoldt,* the recurrence of a similar result tends to negate accident and establish intent. (*Ewoldt, supra,* at p. 402; citing 2 *Wigmore on Evidence* (Chadbourn rev. ed. 1979) § 300, p. 238.) Here, the facts underlying the charged and uncharged crimes were different and produced very different results. The prosecution's theory was that the McKenna case was a rape and intentional killing by strangulation. In contrast, the 1996 case involved choking in the course of a domestic violence incident and bore no similarities to the capital charges. Using the 1996 incident to infer anything about mistake, accident or appellant's intent

to kill in 1995 is a quantum leap in logic that cannot withstand scrutiny. There is no recurrence of a similar result. There was no indication that appellant attempted to kill his spouse, nor did she suffer any life-threatening injuries. Thus, the 1996 conviction was not probative of intent to kill and was inadmissible as proof of intent under the *Ewoldt* analysis.

Secondly, the intent the prosecution sought to prove in this case was the specific intent to murder, while the corporal injury incident was evidence only of the general intent required to commit that crime. Evidence of this general intent crime provided "only a description of the particular act without any reference to an intent to do a further act or achieve a further consequence." (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 717.) Thus, evidence of the 1996 incident provided no evidence of any relevant intent at all and not even a scintilla of evidence that appellant harbored the specific intent to murder.

Finally, assuming *arguendo* that the trial court admitted evidence of the 1996 conviction as relevant to appellant's intent to kill McKenna, as respondent claims, the ruling would be erroneous. 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." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403, citing *People v. Robbins* (1988) 45 Cal.3d 867, 879.) Under the prosecution's own theory, appellant's intent in the McKenna case was to kill, while his intent in the spousal abuse case was to immobilize his wife so that she would not report his drug use to his probation officer. (22RT 3111.)

Because the trial court rejected this argument below, and because evidence of the corporal injury on Brenda Molano provided no evidence of appellant's intent to kill Suzanne McKenna, respondent's argument and analysis must be rejected.

2. The Corporal Injury Conviction Provided No Evidence of Common Plan or Design

Respondent does not answer appellant's argument that the 1996 conviction was not sufficiently similar to the McKenna killing to establish a common plan or design. Instead, as discussed above, she claims that the conviction was admitted solely as proof of appellant's intent to kill McKenna, and makes no attempt to reconcile that contention with the trial court's decision to admit the evidence of the 1996 conviction because "strangulation is a method employed by the defendant when facing psychological dissonance." (2RT 193.) Appellant submits the trial court's language makes clear that the court relied on a "common design or plan" analysis, and that evidence of the 1996 conviction was not admissible under that theory.

In order to be relevant to establish that defendant employed a design or plan common to both the prior and charged conduct, there must be both "similarity in the results" and "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 individual manifestations." (*Ewoldt, supra,* 7 Cal.4th at p. 402.) Plainly, under the *Ewoldt* analysis, the 1996 corporal assault offense was not sufficiently similar to the McKenna killing to establish common plan or design. As discussed above, the similarity of results required either to meet the lower standard for proof of intent or the standard of proof for common design or plan does not exist here. The "common design or plan" theory of relevance therefore fails for this reason alone.

The mere concurrence of one similar feature is not enough to show common design or plan, and in this case, the two incidents share no concurrent features other than the fact of the choking. The prosecutor argued that the 1996 assault occurred when appellant returned home under

the influence of drugs and alcohol, feared his wife would contact his parole officer and report him, and choked her into unconsciousness and tied her up so he could get away. (22RT 3111.) By contrast, his theory in the McKenna killing was that appellant went to the victim's house, apparently used alcohol and cocaine with her, had sex with the her, and at some point choked her to death. Appellant never tied up McKenna, and obviously never killed or intended to kill Brenda Molano. Given the obvious lack of similarity both as to results and as to any concurrence of common features, 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's belief that this single similarity was sufficient. Because neither a similarity in results nor a concurrence of common features exists here, the trial court's decision to admit evidence of appellant's prior conviction for spousal abuse was in error.

Appellant asserts that the trial court's ruling resulted in the improper admission of other crime evidence to show propensity– the very thing prohibited by the federal due process clause and the relevant case law. This was extremely prejudicial, and appellant's conviction must be reversed. 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." (*Chapman v. California* (1967) 486 U.S. 18, 24.) Respondent has not carried this burden, nor has she even attempted to. Instead, she urges this court to inquire whether it is reasonably probable that the jury would have reached a more favorable verdict. (RB 75; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The *Watson* test applies exclusively to errors of state law, but *Chapman* supplants the *Watson* test in the case of federal constitutional error. When, as here, the

question involves a fundamental due process right, *Chapman* is the appropriate standard.

It is impossible for respondent to show that the admission of prior corporal injury conviction and surrounding circumstances was harmless beyond a reasonable doubt. First, the jury almost certainly considered it as evidence of appellant's intent. Not only was the jury expressly instructed that they could consider the evidence of the 1996 corporal assault in determining whether appellant intended to kill McKenna (8CT 1650; 22RT 3175; CALCRIM No. 375), but the prosecutor relied on it in his closing argument as evidence of intent, telling the jury that "[t]he 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 was ready to silence her. Use that to evaluate his various statements. . . ." (22RT 3111-3112.) Because the jury did just that, and used inadmissible evidence to evaluate appellant's statements, respondent cannot show the error to have been harmless beyond a reasonable doubt. Reversal is required.

III. THE COURT WAS REQUIRED TO CORRECTLY INSTRUCT THE JURY ON THE DEFENSE OF IMPERFECT CONSENT AND ITS FAILURE TO DO SO COMPELS REVERSAL.

In his opening brief, appellant argued that the trial court erred in giving CALCRIM No. 1194 without modifying it to include a proper instruction on the defense of imperfect consent. Respondent contends that the error was not preserved for appeal, that no such defense as imperfect consent exists, that such an instruction would have contradicted the defense of actual consent, and that any error was harmless. All of these contentions are incorrect.

A. The Issue Was Not Waived.

Respondent makes a brief, reflexive argument that the issue has not been preserved for appeal, contending that appellant "has either invited any alleged error or waived it." (RB 79.) Appellant anticipated this contention in his opening brief and has already shown it to be meritless.

No objection is required to preserve an instructional error for appellate review if the error arises from a legally incorrect instruction given by the court. 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. "It is of course virtually axiomatic that a court may give only such instructions as are correct statements of the law. [Citation]." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) The trial court is required to correct or tailor an instruction to the particular facts of the case even if the proposed instruction submitted by the defense is incorrect. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law rather than deny outright]; Witkin & Epstein, *Cal. Crim. Law* (2d Ed. 1988) § 2954, p. 3628.) Even where a trial court has no sua sponte duty to instruct on a given issue, 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; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Montiel* (93) 5 Cal.4th 877, 942.) Accordingly, this issue was not waived.

Nor was this invited error. "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; 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 tactical reason for requesting the erroneous instruction. Accordingly, respondent's contention that the error is either waived or invited must be rejected.

B. Imperfect Consent is a Defense to Rape Felony Murder and the Corresponding Special Circumstance Because Mistake of Fact is a Defense to All Specific Intent Crimes.

Respondent contends that even if the issue was preserved for review, there was no error because there is no imperfect consent defense to rape felony murder or the rape special circumstance. Respondent is wrong.

This court has repeatedly held that when specific intent is an element of a particular crime, an "unreasonable" mistake of fact such as an unreasonable but bona fide belief in consent negates the specific intent required for the crime. (See, e.g., *People v. Mares* (2007) 155 Cal.App.4th 1007, 1010; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1426; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10-11; CALJIC No. 4.35 [reasonableness requirement should be deleted from instruction on mistake of fact when specific intent crime is involved]; CALCRIM No. 3406 [if specific intent or knowledge is at issue, belief required for mistake of fact need not be reasonable].) [8]

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[8]/ In the text and in a footnote (RB 81, and n. 14), respondent implies that mistake of fact has only been recognized in the context of theft cases and appears to contend that appellant is asking this Court to "expand" this defense to rape felony murder and rape special circumstances. Appellant is not asking the Court to expand anything, and respondent's contention is disingenuous at best. Mistake of fact is recognized in Penal Code section 26(3) and is a defense to all specific intent crimes to the extent that the mistake negates an element of the offense. (See Witkin, *California Criminal Law* (4th ed. 2012), vol. 4, "Defenses," "Mistake of Fact," and cases there cited.) Furthermore, respondent herself later

Citing *People v. Mayberry* (1975) 15 Cal.4th 143, and *People v. Williams* (1992) 4 Cal.4th 354, respondent argues that rape is a general intent crime and in that context only a reasonable belief in consent is sufficient to negate consent. (RB 80-81.) Appellant agrees that if appellant had been charged with rape, as were the defendants in *Mayberry* and *Williams*, unreasonable belief in consent would not have been a defense to that crime. But appellant was not charged with rape; he was charged with rape felony murder and a rape special circumstance. Both of these offenses require specific intent, and that intent is negated by mistake of fact, such as an unreasonable belief in consent.

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cites cases such as *People v. Beltran* (2013) 56 Cal.4th 935, 951, which show that unreasonable belief in the need to defend oneself, or "imperfect" self-defense, has been an established defense in homicide cases for a century at least. (RB 82.) See also, *People v. Beardslee* (1991) 53 Cal.3d 68, 87 [honest but unreasonable belief victims are dead when blows inflicted negates intent to kill]; *People v. Scott* (1983) 146 Cal.App.3d 823 [unreasonable belief, induced by unknowingly ingesting a hallucinogen, of need to commandeer two vehicles to protect President's life negates intent to steal].)

Respondent argues that, to date,[9] this Court has not recognized a defense of unreasonable belief in consent in the context of rape felony murder or rape special circumstances. Respondent claims there are public policy reasons not to recognize the defense here. (RB 81-83.) However, the cases upon which respondent relies– *Mayberry* and *Williams, supra,* and *People v. Beltran* (2013) 56 Cal.4th 935, 951, a case involving voluntary manslaughter– are inapposite and do not support respondent's argument.

As noted above, *Mayberry* and *Williams* both involved a charge of rape– a general intent crime– and therefore have no relevance to whether an unreasonable mistake of fact such as "imperfect" consent is a defense against a specific intent crime such as rape felony murder or the rape special circumstance. *Beltran,* which involved "heat of passion" voluntary manslaughter, actually supports appellant's position. In that case, the attorney general argued that the standard of provocation required to negate malice and reduce murder to voluntary manslaughter was too low and

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[9]/ Appellant also has found no decision by this Court specifically stating that unreasonable belief in consent negates the specific intent to rape required for either rape felony murder or the rape special circumstance. It appears that the specific question has simply not been raised in this Court.

However, in *People v. Sojka* (2011) 196 Cal.App.4th 733, the Court of Appeal for the First Appellate District recognized in dicta that unreasonable mistake of fact negates the specific intent required for attempted rape. The Court of Appeal specifically held that the failure of a trial court in an attempted rape case to instruct on a defense of mistaken but reasonable belief in consent to negate specific intent to rape was reversible error. In dicta, the Court of Appeal also noted that neither the prosecutor nor the defense attorney "informed the jury that Sojka's mistaken but *unreasonable* belief in consent was a defense to attempted rape by force." (*Id.*, at p. 739, emphasis added.) In addition, appellant notes that the Attorney General's office has previously conceded, albeit in an unpublished case, that "[b]ecause attempted rape is a specific intent crime, any honestly held belief in consent, even an unreasonable one, negates the requisite specific intent." (*People v. Rodgers,* 2003 Cal.App.Unpub. LEXIS 11057.) Accordingly, it appears that respondent has taken the opposite position from that asserted here in previous cases.

should be raised to the standard of whether an ordinary person would be moved to kill under the circumstances. However, although respondent does not mention the fact, this Court in *Beltran* specifically *rejected* the attorney general's contention and reaffirmed the standard set forth nearly a century ago in *People v. Logan* (1917) 175 Cal. 45, 49, which focuses not on whether an ordinary person of average disposition would *kill*, but rather on how an ordinary person would *react* if their reason and judgment were obscured by heat of passion.

Not only did this Court reject the attorney general's argument in *Beltran*, it reaffirmed that the *Logan* standard in "heat-of-passion" voluntary manslaughter "is consistent with the *other* recognized form of voluntary manslaughter: a killing in the actual but unreasonable belief in the need for self-defense." (*Beltran, supra*, 56 Cal.4th at p. 951, emphasis added.) This Court reiterated that in that form of voluntary manslaughter an unreasonable mistake of fact defense is available– in that context, the actual but unreasonable belief in the need for self-defense, or "imperfect" self defense.[10] (*Beltran, supra*, 56 Cal.4th at p. 951.) *Beltran* thus supports appellant's contention that an unreasonable mistake of fact defense is available in specific intent crimes.

Respondent finally offers what she terms a public policy argument, reasoning that in other contexts in which this Court has permitted consideration of an honest but unreasonable belief in the need to use violence, culpability is merely mitigated and the defendant is not exonerated, and that the defense therefore should not be available here.

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[10]/ Respondent's failure to note that *Beltran* specifically reaffirmed unreasonable self-defense as a mistake of fact defense in the context of voluntary manslaughter is difficult to understand in view of the fact that two of the attorneys general who represented respondent in that case are also named on the cover of respondent's brief in this case.

(RB 82.) The contention is puzzling, since the prosecution also argued a theory of intentional murder, and the correct instruction would not exonerate him of that charge. Moreover, the unreasonable consent defense does not apply to the crime of rape itself, but only to rape felony murder and the rape special circumstance. Ordinarily a defendant charged with either this specific intent crime or this specific intent special circumstance is also charged with rape, and a defense of unreasonable belief in consent obviously will not exonerate the defendant of the underlying general intent rape charge. Appellant does not know why the prosecution charged appellant with rape felony murder and a rape special circumstance but not with rape, but regardless of the prosecution's motivation for omitting any rape charge, the law must be consistently applied. Respondent offers no logical reason why unreasonable mistake of fact should be a defense in all specific intent crimes except the ones in this case.

C. As Appellant Showed in His Opening Brief, the Evidence At Trial Amply Supported an Unreasonable Consent Defense.

Respondent acknowledges the court's responsibility to correctly instruct the jury, but argues the evidence did not support an unreasonable consent defense. The contention is meritless.

Respondent refers only to appellant's statements to officers and the district attorney that the sexual acts in which he engaged with Suzanne McKenna, including "rough sex," were all consensual, arguing there was no evidence he unreasonably but honestly believed she consented. (RB 84-85.) Respondent is cherry-picking the evidence and failing to acknowledge evidence of appellant's prior acts that the prosecution itself presented.

Appellant's statements and other evidence showed he sincerely believed McKenna had consented. Indeed, as explained below, even the

judge appeared to believe that McKenna actually may have initially consented and then later withdrawn her consent. As for the unreasonable nature of appellant's apparently sincere belief in consent, the prosecution's own witnesses testified appellant had an established pattern of unreasonably believing women he had raped had consented. The evidence of unreasonable belief in consent is not merely substantial, but persuasive.

Appellant told law enforcement officers that he and McKenna 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 consented to have sex, or could have initially consented and then revoked that consent. 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.)

In his statement accompanying his denial of the automatic motion for modification of the verdict, Judge Hymer impliedly acknowledged the possibility that McKenna may have initially consented to have sex with appellant, stating 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." (9CT 2079, emphasis added.)

George Fox, the investigator in the Anne Hoon case, testified that appellant told him Ms. Hoon flirted with, teased, and enticed him into having sex with her. (19RT 2903-2905.) Appellant recalled that she led him into her bedroom and told him to remove his clothes, then had consensual sex with him. (19RT 2904.) Appellant said afterwards he 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 prosecution's own evidence thus supported the conclusion that appellant has a history of unreasonably believing that women with whom he has had sex consented to do so when in fact they had not, particularly under circumstances where, as here, appellant was under the influence of drugs and alcohol or in another psychologically altered state. 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 under the influence of drugs and alcohol and in a state of "psychological dissonance" at the time (14RT 2033-2034 [appellant's statement that he and McKenna were high]; 13RT 1892-1893 [whiskey bottle found at scene]; 13RT 1919, 1923 [autopsy showed victim had .15 blood alcohol and methamphetamine in her system at death]), made all the more compelling the conclusion that appellant unreasonably believed McKenna had consented on this occasion or had not withdrawn her initial consent.

Given these facts, a properly instructed jury, free to consider all relevant evidence, could have concluded that it could not say beyond a reasonable doubt that appellant did not have a good faith, albeit unreasonable, belief that Ms. McKenna consented to have sex with him. 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. Thus, the failure to properly instruct the jury was prejudicial and denied appellant's right to present a complete defense to the charges.

D. The Error Compels Reversal.

In his opening brief, appellant contended that the error is of federal constitutional magnitude and requires the application of the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24. (AOB 191.) Specifically, appellant contended that the trial court's erroneous instruction deprived him of an accurate instruction on his theory of the case and of a meaningful opportunity to present a complete defense. In addition, the error lessened the prosecution's burden of proof in violation of appellant's rights to due process and trial by jury and his right to present a defense under the Fifth, Sixth, and Fourteenth Amendments. Because of the heightened requirements of due process and reliability in capital cases (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305), the error also deprived appellant of his Eighth Amendment right to a fair and reliable determination of guilt and penalty, as well as of his right to be spared cruel and unusual punishments.

Citing *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051, respondent argues that the error is merely one of state law and therefore is reversible only if there was a reasonable probability of a more favorable

result absent the error. Appellant disagrees. *Whitehurst* involved an instruction on the scope of a parent's permissible use of corporal punishment against a child. It did not implicate due process. Moreover, the case did not involve capital punishment, and therefore the Eighth Amendment was not implicated. Similarly, in *People v. Breverman* (1998) 19 Cal.4th 142, 165, which respondent also cites, this Court specifically limited the holding there– that a trial court's failure to instruct on lesser included offenses is merely state law error– to *noncapital* cases. Indeed, as this court recently noted in *People v. Duff* (2014) 58 Cal.4th 527, 648, and contrary to respondent's *Breverman* contention, in a capital case it is federal constitutional error to fail to instruct on lesser included offenses which are supported by substantial evidence, a situation closely analogous to this case, where appellant was deprived of an instruction on a defense. (See *Schad v. Arizona* (1991) 501 U.S. 624, 648.) This Court also has found that instructional error limiting consideration of a defendant's mental state defense in a capital case constitutes federal constitutional error. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1247.) Appellant contends the error here deprived appellant of a defense and is of federal constitutional magnitude. Respondent cannot show the error to have been harmless beyond a reasonable doubt, and the error therefore requires reversal.

However, even assuming *arguendo* that respondent's standard of prejudice were correct, reversal would still be required. Respondent's assertion that the error was harmless relies entirely upon her contention that there was insufficient evidence from which the jury could have found appellant honestly but unreasonably believed McKenna had consented. (RB 85.) However, as appellant has shown in the opening brief and in subpart C above, there was compelling evidence supporting appellant's

claim that he believed Ms. McKenna consented and that he had a history of unreasonably believing rape victims had consented to have sex with him. Thus, the proper instruction should have been given and respondent's contention of harmless error must be rejected.

Respondent's only other fact-specific argument– that appellant's prior rape convictions make it improbable that a jury would have found he honestly but unreasonably believed in consent– must also be rejected. Contrary to respondent's argument, the fact that appellant mistakenly or unreasonably believed that Ms. Hoon and Ms. Lovejoy had both consented when they had not suggests that, particularly when under the influence of drugs and alcohol, as he was in this case, appellant honestly but unreasonably misperceives consent. The fact that the evidence might be interpreted as respondent views it does not alter the conclusion that there was substantial evidence from which a jury could have accepted an imperfect consent defense and there is a reasonable probability that the proper instruction would have resulted in a more favorable outcome. This was a question of fact to be decided by the jury and the failure to properly instruct the jury denied appellant's right to present a defense and lessened the state's burden to prove every element of the crimes charged beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364; *Carella v. California* (1989) 491 U.S. 263, 266.)

Furthermore, it is clear that the jury struggled specifically with the special circumstance finding. The jury retired to begin guilt phase deliberations in the afternoon of August 16 and continued deliberating all day on August 17, whereupon they adjourned for the weekend. (7CT 1623, 1625.) On the morning of August 20, 2007, the jury sent the judge a note asking "What is the effect of lack of unanimity on the special circumstance: it is deemed to be a vote of 'not true' or the jury is

considered not to have come to a decision?" (7CT 1676.) At 10:05 a.m. that morning, Judge Hymer responded with a written note stating "As to the special circumstance allegation: There must be a unanimous verdict of either 'True' or 'Note True.' If the jury cannot unanimously so agree the result would be a mistrial as to that allegation." (7CT 1677.) The jury returned its verdict at 11:35 that morning, an hour and a half later. (7CT 1679.)

The foregoing makes clear that after deliberating for a considerable time, the jury was not in agreement with regard to the special circumstance allegation. The fact that they returned their verdict shortly after receiving the judge's response to their inquiry shows that the special circumstance issue was likely the only issue, or at least the most significant issue, on which they were in disagreement. When the record shows the jury is concerned with an issue and an error occurs during a trial that implicates that particular issue, it cannot be said that the error was harmless. (See, e.g., *People v. Marcus* (1978) 82 Cal.App.3d 477, 480.) Similarly, when a jury deliberates for a considerable period of time, or if it appears that the jury was deadlocked on an issue at some point, any error– particularly the issue on which the jury is deadlocked– is substantially likely to have been prejudicial. (See *People v. Bennett* (1969) 276 Cal.App.2d 172, 176 [jury foreman's earlier opinion jury was deadlocked indicates error prejudicial]; *People v. Collins* (1968) 68 Cal.2d 319, 332 [eight hours of deliberations indicative of prejudice from error].)

In short, the instructional error in this case affected the very issue which the jury had the most difficulty resolving– an issue on which they appear to have been deadlocked after a considerable period of deliberation. Accordingly, under any prejudice standard, reversal is required.

VI. THE PROSECUTION WITNESS'S OUTBURST IS ATTRIBUTABLE TO THE PROSECUTOR AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS.

In his opening brief, appellant showed the testimony of Ron McKenna that Patti Dutoit's death was a suicide attributable to appellant's murder of Suzanne McKenna constituted a species of prosecutorial misconduct. Because no admonishment or instruction could compel the jury to disregard such highly inflammatory evidence, and because the court's supposedly "curative" instruction actually exacerbated the harm, the trial court's failure to grant appellant's mistrial motions resulted in a violation of his due process rights.

Respondent cannot and does not contest the fact that victim impact evidence was presented to appellant's jury in direct violation of an order by the trial court. Instead, respondent reflexively argues the error was waived, there was no error, and that any error was harmless. (RB 87-91.) She also argues that the trial court did not abuse its discretion in denying appellant's mistrial motions. (RB 91-94.) Respondent is wrong on all counts.

A. Appellant's Claim Was Thoroughly Preserved for Review.

Given the circumstances surrounding the victim impact error in this case, respondent's argument that appellant has waived this issue on appeal is frivolous at best. As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless he objected on the same ground and in a timely fashion and requested that the jury be admonished to disregard the impropriety. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) As this Court has explained, the rule requires that a

defendant give the trial court an opportunity to correct the asserted error. (*People v. Young* (2005) 34 Cal.4th 1149, 1186.)

However, the question of whether this issue was preserved for appeal does not turn upon whether or not defense counsel specifically cried "misconduct" (see, e.g., *People v. Pearson* (2013) 56 Cal.4th 393, 434 [objections to admissibility of evidence for impeachment purposes preserves a prosecutorial misconduct claim for appeal]), but upon whether the trial court was apprised of the error and given a chance to remedy it. (See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 354.) A brief review of defense counsel's efforts to exclude the improper evidence, and then to remedy the prejudice caused by its subsequent presentation, shows that the court was fully apprised of the error and given ample opportunity to correct it.

Seven months after Suzanne McKenna's death, her sister, Patti Dutoit, died from an overdose of aspirin or a related drug. (6CT 1297-1298.) Dutoit was a long-term alcoholic, and there was no evidence she had committed suicide or that her death was related to McKenna's death in any way. Dutoit's death did not occur until seven months after McKenna's death, and a box on her death certificate that would have indicated suicide was not checked. (*Id.*) However, as the prosecutor was aware, her family believed that her death was a suicide in response to McKenna's murder. Thus, when the prosecutor gave notice of his intent to present victim impact evidence in the form of the testimony of McKenna's mother and siblings, defense counsel filed a motion in limine vigorously objecting to any reference to Dutoit's death as a suicide caused by McKenna's murder. (6CT 1291-1296.)

The trial court limited the prosecution to evidence that McKenna had a sister who died shortly after McKenna's death, but excluded

evidence of the supposed cause of Dutoit's death. (24RT 3255-3256.) The court warned the prosecutor that he "should caution witnesses not to use [his direct examination] as an excuse to say that she reacted by committing suicide . . . ." (24RT 3255-3257.)

The very next day, the prosecutor's first penalty phase witness, Ron McKenna, walked right through the court's order and told the jury that Dutiot's response to Suzanne's death was "[v]ery 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 and the court instructed the jury, "you are not to consider the suicide mentioned as in any way relating to the defendant Molano." (25RT 3311; 25RT 3334.) Direct examination resumed, and Ron McKenna's testimony was followed by the testimony of Suzanne McKenna's mother, Yvonne Searle, and sister, Lori McKenna.

When Lori McKenna had finished testifying, the defense moved for a mistral on the ground that Ron McKenna's testimony blaming appellant for Ms. Dutoit's death had prejudiced appellant and that the court's subsequent admonishment had failed to cure the prejudice. (26RT 3350-3359). The court denied the motion. (26RT 3359.) The defense also moved for an immediate jury instruction that "there was no connection between Patti's death and Carl Molano," but that motion was also denied. (26 RT 3350-3351.)

The following day, the defense renewed its motion for a mistrial. The court denied the renewed motion (27RT 3488-3495), and over a defense objection that the court's instruction was inadequate, decided to instruct the jury with a modified version of CALCRIM 222 after completion of the penalty phase presentation.

Finally, after appellant's death verdict, the defense again moved for a new trial on the grounds that the court's instructions were insufficient to cure the prejudice resulting from Ron McKenna's testimony. (8CT 1876-1679.) This motion was also denied. (31RT 3896.)

The initial motion in limine was sufficient by itself to preserve this issue for appeal. (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) However, in addition to the in limine motion, the defense also made a contemporaneous objection, requested further instruction, made two separate mistrial motions, and moved for a new trial on the specific ground that Ron McKenna's testimony violated the court's order. In short, the defense pursued every conceivable avenue of objection and remedy, and respondent's contention that this issue is waived on appeal must be rejected.

B. The Witness's Outburst Was Error Attributable to the Prosecutor.

Respondent argues that because the prosecutor did not intentionally elicit inadmissible evidence, there was no misconduct. (RB 89-91). Respondent misunderstands the nature of the misconduct in this case, which perhaps is more accurately described as prosecutorial "error." The prosecutor was responsible for admonishing his witnesses to comply with the court's order prohibiting them from attributing the suicide of Suzanne McKenna's sister to appellant's conduct. When the witness violated that order, the error was attributable to the prosecutor without regard to whether the prosecutor was personally culpable for the witness's misconduct.

This Court expressly discarded intentionality as a requirement for prosecutorial misconduct 35 years ago. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) In *People v. Hill*, this Court reviewed the law on prosecutorial misconduct and noted that, prior to *Bolton*, bad faith had been a prerequisite to appellate relief for prosecutorial misconduct and cited a number of cases to that effect. This Court then continued:

> [W]e overruled these prior cases and held a showing of bad faith was no longer required. [Citation.] In fashioning this new rule, we explained that "this emphasis on intentionality is misplaced. '[I]njury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'" [Citations.] Thus, "to the extent that cases in this jurisdiction imply that misconduct must be intentional before it constitutes reversible error, they are disapproved."

(*People v. Hill* (1997) 17 Cal.4th 800, 822.)

In a footnote to this opinion, this Court went on to disapprove three post-*Bolton* cases which either held or suggested that a showing of bad faith was required to establish prosecutorial misconduct explaining 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.)

Thus, contrary to respondent's assertions, no showing of intentionality or bad faith is required to raise this claim. Very simply, "[a] prosecutor is under a duty to guard against inadmissible statements from his witnesses and guilty of misconduct when he violates that duty." (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1170; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688).

Respondent now claims that the court "err[ed] on the side of caution" when it made this initial ruling and that "while Ron McKenna's remark violated the court's order, it was otherwise admissible victim impact evidence. . . ." (RB 93-94.) This argument lacks merit.

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 v. Tennessee* (1991) 501 U.S. 808, 825.) As this court has explained, due process requires that "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." (*People v. Haskett* (1982) 30 Cal. 3d 841, 864.)

Ron McKenna's testimony that Dutoit's death was a suicide caused by Carl Molano was certainly inadmissible. The trial court properly concluded that any evidence that Patti's Dutoit's death was a suicide in response to McKenna's murder was both irrelevant and inflammatory.[11] Thus, the trial court issued an order that the prosecutor should present no evidence that "[Dutoit] reacted by committing suicide or anything of that nature." (24RT 3257.)

The prosecutorial error was particularly egregious because McKenna's testimony 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. Although the death certificate bore a box which would have been checked if the death had

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[11]The trial court found that "the fact that the cause of [Dutoit's] death was suicide would invite an emotional response from the jury" (24RT 3256) and that evidence that Dutoit's death was a response to McKenna's murder was irrelevant because it "has no basis in fact" (8CT 1887; 27RT 3490).

been ruled a suicide, that box was unchecked. Thus, Ron McKenna's testimony characterizing Dutoit's death as a suicide was entirely speculative, lay opinion testimony that was not only unsupported by any evidence, but also contrary to the death certificate.

Moreover, even assuming *arguendo* that the death had been proved to be suicide, the attempt to contribute a causal connection to McKenna's killing was not merely speculative but was unsupported by the facts. The trial court understood that evidence attributing Dutoit's death to appellant would have been factually baseless and grossly inflammatory. It is for precisely these reasons that the trial court found the evidence to be inadmissible and ordered the prosecutor to prevent his witnesses from testifying that Dutoit's death was a suicide or was caused by appellant.

Respondent points to the prosecutor's statements assuring the court that he actually warned the witnesses not to make such statements. (RB 89.) However, the fact that the prosecutor's witnesses nevertheless referred to evidence that had been ruled inadmissible indicates that the prosecutor either failed to admonish them at all or failed to admonish them in a manner sufficient to achieve the goal. Indeed, had the prosecutor correctly admonished his victim impact witnesses that any reference Dutoit's supposed "suicide" would result in a mistrial of McKenna's alleged killer, it is highly improbable that any of his witnesses would have made such a reference. In any event, the prosecutor's failure to adequately admonish and control his witnesses, particularly after lengthy litigation on this specific issue, was misconduct on his part without regard to questions of culpability, intentionality, or bad faith.

C. The Resulting Prejudice Was Incurable and Was Further Exacerbated by the Court's Instruction and Additional Testimony.

No admonition or instruction could have effectively remedied the improper, inflammatory testimony that appellant was responsible for a second death, but the instruction the court gave "not to consider the suicide mentioned as in any way relating to the defendant Molano" (25RT 3311), actually exacerbated the harm. Although the court's earlier order excluded any evidence that Dutoit's death had been a suicide, this instruction effectively negated that order and improperly instructed the jury that Dutoit's death was in fact a suicide.

Furthermore, after this spontaneous and ill-considered instruction endorsed the false proposition that Dutoit's death was a suicide, each of the state's remaining witnesses repeatedly connected Dutoit's death to McKenna's as if the latter had caused the former. The witnesses stated that when Suzanne McKenna died, Dutoit lost her "lifeline." (25RT 3315, 3325.) A "lifeline" is something necessary for survival, and having heard evidence that McKenna was Dutoit's lifeline, the jury could hardly fail to conclude that there was a direct causal relationship between Suzanne McKenna's murder and Dutoit's death. This relationship was underscored when a photo of the sisters' side-by-side headstones was repeatedly shown to the jury during the prosecution's penalty phase presentation. (25RT 3311, 3327-3328; 26RT 3346.) This evidence was plainly irrelevant to any purpose other than improperly linking the two deaths in the juror's minds. Together with the supposedly curative instruction, this evidence so thoroughly undermined the court's earlier order as to render it a nullity.

In addition to arguing that there was no prosecutorial misconduct, respondent argues that the trial court did not abuse its discretion in failing to grant appellant's mistrial motions. (RB 91-96.) A trial court abuses its discretion when it fails to grant a mistrial after it is apprised of prejudice that is incurable by admonition or instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) As shown above, the court's instruction and the further testimony not only failed to cure but actually exacerbated the prejudice caused by Ron McKenna's improper testimony. Thus, even under the deferential abuse of discretion standard, appellant is entitled to a penalty phase reversal.

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 v. Tennessee* (1991) 501 U.S. 808, 825, 827.) The error here clearly violated appellant's due process rights and also rendered the penalty verdict arbitrary and unreliable in violation of the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) It is unclear whether respondent would have this Court apply the *Chapman* or *Watson* harmless-error standards (see RB 90, citing both standards), but clearly established law requires that in cases of federal constitutional error, the burden is on the respondent to show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) 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.

V. THE DEATH PENALTY AS APPLIED IN APPELLANT'S TRIAL VIOLATES THE UNITED STATES CONSTITUTION.

In his opening brief, appellant argued that many features of California's capital-sentencing scheme, both on their face and as applied in this case, violate the United States Constitution and international law. (AOB 221-248.) Respondent disagrees and contends that appellant has forfeited this claim. (RB 96-103.) First, appellant notes that he could not have forfeited this claim; Penal Code section 1259 provides in relevant part: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (*People v. Harris* (1981) 28 Cal. 3d 935.) Appellant otherwise considers this issue to be fully joined by the briefs on file with this court. For all of the reasons set forth in his opening brief, appellant's death judgment violates international law and the federal Constitution and must be reversed.

VI. THE JUDGMENT MUST BE REVERSED DUE TO CUMULATIVE ERROR

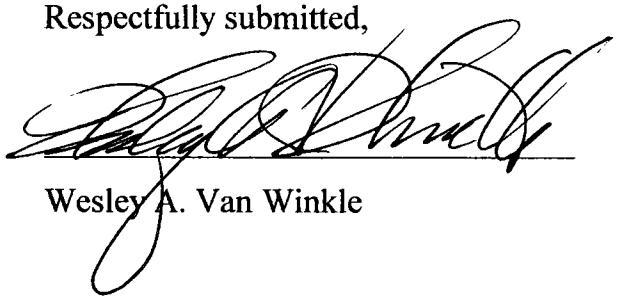
Respondent finally contends there was no cumulative error because, respondent says, none of the errors individually merit relief. Appellant reiterates that all his claims are meritorious and that cumulative error analysis is required.

CONCLUSION

For the reasons set forth herein, appellant respectfully requests that the judgment be reversed.

Dated: October 3, 2014

Respectfully submitted,



Wesley A. Van Winkle

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 reply 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 20,798 words.

Executed this 3rd day of October, 2014, 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 REPLY 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:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Berkeley, CA on October 6, 2014.

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