IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DAVID EARL WILLIAMS, Defendant and Appellant.	No. S029490 Los Angeles County Superior Court No. A 579310-01

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Los Angeles

The Honorable J.D. Smith, Judge Presiding

APPELLANT'S OPENING BRIEF

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PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. S029490**
	)	
Plaintiff and Respondent,	)	**Los Angeles**
	)	**County**
v.	)	**Superior Court**
	)	**No. A 579310-01**
	)	
DAVID EARL WILLIAMS,	)	
	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

This matter comes before the Court as the result of an automatic appeal by appellant David Earl Williams, following a judgment of death entered against him on October 20, 1992. (CT 2112-2116.)

The case originated on March 31, 1989, when a felony complaint was filed in the Los Angeles County Municipal Court for the Pasadena Judicial District, in Case No. A579310.

Count 1 of the complaint alleged that appellant had committed the first degree murder of Joanne Lacey, in violation of Penal Code section 187(a).[1] Three special circumstances were further alleged: that the murder was committed during the commission of a robbery, during the commission of arson, and during the commission of the crime of rape,[2] all within the

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[1]Hereinafter all references to the California Penal Code will be designated by the prefix PC followed by the appropriate Penal Code section number.

[2]The rape special circumstance was later dropped and replaced with a kidnaping special circumstance. See CT 490.

meaning of PC section 190.2(a)(17). Count 2 alleged that appellant had committed second degree robbery in violation of PC section 211. Count 3 alleged that appellant had committed the crime of arson causing great bodily injury, in violation of PC section 451(a). Count 4 alleged that appellant committed the crime of kidnaping for robbery in violation of PC section 209(b). (CT 476-478.) At his arraignment, appellant apparently entered a plea of not guilty,[3] and the preliminary hearing date was set.

Between December 4 through December 28, 1989, the preliminary hearing in this matter was held before Municipal Court Judge J.W. Morris. (CT 32- 474.) At the close of the hearing, the defense moved to dismiss all counts for insufficiency of evidence. (CT 471-473.) The motion was denied with respect to counts one through four, bail was denied and the superior court arraignment was set for January 12, 1990. (CT 473-474.)

On January 12, 1990, an information was filed in the Los Angeles Superior Court, alleging the first degree murder of Joanne Lacey, with three special circumstances: robbery (PC 211), arson (PC 447) and kidnaping (PC 207 and PC 209). It was further alleged that appellant personally used a firearm in the commission of the kidnaping, within the meaning of PC sections 1203.06(a)(1) and 12022.5,[4] causing that offense to become a serious felony within the meaning of PC section 1192.7(c)(8). Count 2

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[3]The appellate record contained no official record (i.e., no reporter's transcript or minute order) of the arraignment. The parties stipulated that the record is incomplete in this respect. (CT Supp. IV 36.) However, appellate counsel obtained a computerized docket from the municipal court, indicating a March 31, 1989, arraignment date. A copy, attached as an exhibit to the settled statement proposals, is found at CT Supp. IV 16.

[4]The PC section 12022.55 allegation, discharging a firearm from a motor vehicle, was dropped in the amended information that was filed this same day, January 12, 1990. (CT 480-484.)

alleged second degree robbery of Joanne Lacey. (PC 211.) Count 3 alleged arson causing great bodily injury and count 4 alleged kidnaping for robbery in violation of PC section 209(b). The information further alleged as to counts one through four that defendant had been previously convicted of rape by force, for purposes of PC sections 667(a), 667.5(b),[5] and 1203(e)(5). The information also alleged that the crimes were committed while appellant was on parole within the meaning of PC section 1203.085(a). (CT 485-489.)

On February 26, 1990, appellant requested, and was granted, pro per status. On March 27, 1990, Attorney Richard Leonard was appointed as appellant's advisory counsel. On July 13, 1990, appellant relinquished his pro per status and the trial court appointed Mr. Leonard as lead counsel and Charles Lloyd as second counsel.

On September 6, 1991, the trial court heard and denied appellant's motion to change venue out of the Northeast Judicial District. (CT 644-660; RT 240-244.) The court also heard appellant's motion to dismiss pursuant to PC section 995, on the grounds that the testimony of prosecution witness Margaret Williams was coerced and inadmissible, (CT 589) and on the grounds that the arson special circumstance applied only to the arson of an inhabited dwelling. (CT 599.) The judge denied the section 995 motion, with regard to Margaret Williams' testimony, but granted the motion with respect to the arson special circumstance, which was dismissed. (RT 247-251.) At that same hearing, the court granted a motion filed by the prosecution to amend the information to add a torture special circumstance. (RT 255-256.)

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[5]The amended information, filed the same day as the information, corrected this subsection to read PC section 667.5(a). (CT 480-4.)

On October 11, 1991, a second amended information was filed, adding a fifth count for kidnaping in violation of PC section 207a. (CT 495-499.) On October 11, 1991, appellant was arraigned on the second amended information, and denied the allegations. (RT 275.)

On October 29, 1991 jury selection began. (RT 280.) On November 12, 1991, defense attorney Charles Lloyd announced that lead counsel Richard Leonard had suffered two heart attacks days earlier. Consequently, the court declared a mistrial and dismissed the prospective jurors. (RT 368; CT 1973-1977.)

Nine months later, on August 12, 1992, a second jury selection began. (RT 481.) On August 19, 1992, 12 jurors and 4 alternate jurors were chosen and sworn. (RT 865-866; RT 926-927.) A five-day guilt phase trial began on August 24, 1992. (RT 933.) The defense presented no evidence. (RT 1285-1286.) Closing arguments were held on the afternoon of September 9, and on the following day, September 10, the jury was instructed and began deliberations at 11:00 a.m. (RT 1381.) After approximately three hours of deliberations, the jury returned guilty verdicts on all counts and found the special circumstances to be true. (RT 1384-1387; CT 1973-1977.)

On September 21, 1992, a four-day penalty trial began. The prosecution presented eight witnesses (RT 1401-1461) and the defense presented three witnesses. (RT 1463-1537.) On the afternoon of September 24, 1992, the jury began its penalty phase deliberations. The following day, at 11:20 a.m., the jury returned a verdict of death. (RT 1592-1593.)

On October 20, 1992, the court heard and denied appellant's motion for a new penalty phase trial. (RT 1601.) The automatic motion for

modification of penalty was submitted, without argument, by the defense. (RT 1602.) In response, the court found substantial aggravating factors but no mitigating factors (RT 1605), denied the motion to reduce penalty and pronounced the judgment of death. (RT 1602-1607.)

With respect to the non-capital counts, the sentences were ordered to run consecutively to the death sentence. (RT 1610.) The court selected Count 3, arson with great bodily injury, in violation of PC section 451(a), as the base term. As to this count, the court imposed the upper term of nine years based upon the aggravating factors. As to Count 2, second degree robbery, a violation of PC section 211, the court imposed one-third the mid-term of three years, or one year. As to Count 5, simple kidnaping, in violation of PC section 207, the court imposed one-third the mid-term of five years, or one year and eight months. Pursuant to PC section 654, the court stayed the sentence on Count 5.

Consecutive to the above ten-year determinate sentence, the court imposed, as to Count 1, the upper term of five years for the personal use of a firearm, a violation of PC section 12022.5. Pursuant to PC section 667(a), the court imposed an additional five years for the prior serious felony of forcible rape. Pursuant to PC section 667(b), the court imposed an additional year for the prior state prison term, for a total determinate sentence of 21 years. (RT 1610-1611.) With respect to Count 4, kidnaping for robbery, in violation of PC section 209(b), the court imposed life with the possibility of parole, to run consecutive to the determinate sentence. (RT 1612.)

The Notice of Appeal was filed on October 20, 1992. (RT 1617; CT 2118.) On March 6, 1998, the Office of the State Public Defender was appointed to represent appellant in his automatic appeal.

STATEMENT OF FACTS

A. The Guilt Phase Evidence

Joanne Lacey, a supervisor for the U.S. Postal Service, left the parking lot of her downtown Los Angeles workplace at about 7:15 p.m., on the evening of March 20, 1989. She drove away alone, in her brand new, blue Volvo 760. (RT 1036-1040.) A friend of Mrs. Lacey's, Faye Swain, testified that sometime between 7:40 and 8:00 p.m., that same evening, she spoke briefly with Mrs. Lacey at the Pasadena Mall. Mrs. Lacey was about to go into the J.C. Penney's store. She was wearing a black dress with white dots. (RT 1238.)

Shirley Bobbe testified that around 8:00 p.m., that same evening, she was leaving the parking lot of the Boys Market in Altadena. As she was pulling out, she remembered seeing a deep blue Volvo being driven by a black, middle-aged female. (RT 1057-59.)

Ruby Croskey, an employee of Security Pacific Bank, testified on the basis of bank records, that at 9:45 p.m., on the evening of March 20, 1989, $200 cash was withdrawn from the account of Joanne Lacey, using the Versateller machine at the Pasadena branch in the Orangewood Shopping Center. (RT 1053; RT 1061.) The money could be withdrawn by anyone having access to Mrs. Lacey's bank card and her code number. (RT 1055.) Another withdrawal was made at 9:46 p.m., and another at 9:48 p.m. (RT 1054.)

Mrs. Lacey was last seen alive on the night of March 20, by Carrie Runnels, a close friend of Mrs. Lacey's for 14 years. (RT 1063.) At about 10:35 p.m., that evening, Runnels received a phone call from Mrs. Lacey. (RT 1065.) Mrs. Lacey stated that she needed a favor. She sounded excited, as though she were in a hurry, and said, "Can you let me have

$500? I had an accident." (RT 1066.) Runnels, who had lent Mrs. Lacey money many times over the years (RT 1077), agreed and said she would bring her husband along. Mrs. Lacey said, "No. Come alone." (RT 1066.) The two women then arranged for a meeting place for the delivery of the money – at the intersection of Palm and Alta Loma in the City of Altadena – which was about a 5-10 minute drive from Runnels' house. (RT 1068.)

Runnels got dressed and drove towards that location. (RT 1069.) When she was only about a block and a half from her house, she noticed a car parked on the other side of the street with its parking lights on. She believed that the lights blinked. Runnels thought she recognized the car as Mrs. Lacey's Volvo (RT 1078) and slowed down. The other car then made a U-turn and pulled up behind her. As she pulled over to the side, the other car pulled up along side Runnels' car. (RT 1070.) Mrs. Lacey was in the front passenger seat of her vehicle and rolled the window down. She extended her hand out towards Runnels. Mrs. Lacey said nothing and Runnels handed her the $500 cash. (RT 1071-1072.) Mrs. Lacey looked either disgusted or sad. Runnels asked her three times if she was alright and each time Mrs. Lacey said yes. The third time she said, "Yes. I'll talk to you tomorrow." Then the car pulled away. Runnels did not get a good look at the driver and did not even identify the person as either male or female, only that the driver had long, shoulder length black hair. When asked if the person she saw that night was the appellant, David Williams, she could not say because she had not gotten a good look at the person's face. (RT 1079-1080.) The last time she saw Mrs. Lacey was at approximately 10:40 p.m. (RT 1074-1075.)

At about 11:00 p.m., Troy Cory was doing office work at his home on Rosemont Avenue in Pasadena, when he heard loud noises in the street

outside of his home: yelling, maybe music, "like a party going on." (RT 1098.) He heard loud voices,[6] and the words, "Let's get out of here," or "Get in there." He heard a loud muffled noise, like a motor cycle, and three gun shots. He called 911 and then heard a loud explosion, like dynamite. When he looked out his window he saw a huge fireball, shooting above the trees. He ran outside and saw that the fire was coming from a car parked across the street. He saw a gun lying in the street and some money. (RT 1097-1104.)

At 11:30 p.m., on March 20, 1989, the Pasadena Fire Department responded to a report of a car fire near the corner of Rosemont and Prospect Terrace in the city of Pasadena. (RT 953.) When the first engine arrived, the vehicle, a blue Volvo parked on the east side of Rosemont and headed northbound, was already completely engulfed in flames. After 15-20 minutes, the fire was under control. (RT 955.) Firefighters opened the trunk of the vehicle with a sledgehammer, and found a charred body inside. The Pasadena Police Department and arson investigators were notified. (RT 959.)

Pasadena Police Department Officer Jayce Ward testified that he arrived at the scene around midnight. (RT 962.) He observed that the burned vehicle had been a brand new dark blue Volvo that still had paper registration tags. (RT 962.) After homicide detectives arrived, the trunk was opened and the body of a large, black female, lying face down, was removed from the trunk of the vehicle. The body appeared to be nude, but

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[6]Initially, Troy Cory said that he could not make out the voices at all. (RT 1098.) Later he said he believed the voices had been male voices (RT 1099), but on cross examination said that he could have heard female voices also. "There might have been some mixed-in female voices. . . ." (RT 1105.)

black and white polka-dot clothing was found beneath the body. (RT 965.) The body was charred but still intact. Beneath the body, police found a briefcase containing papers and identification for Mrs. Joanne Lacey, along with her home address in Altadena. (RT 967.)

About three feet to the south and west of the Volvo, a loaded .22 caliber revolver (RT 981) was recovered. Three cartridges were found inside the revolver. Two of the cartridges were empty and one was a live round. (RT 964.) Also found near the scene were a gasoline container spout (RT 980), a bunch of loose change, a bag of pins, a gas cap, a gold neck chain and a paper bag with a receipt inside. (RT 983.) A twenty dollar bill was found lying in the street. (RT 989.)

Although the interior of the vehicle was almost completely destroyed by fire, a number of items were recovered from the front passenger floorboard area, including a bag of groceries from Boys Market, a bag from J.C. Penney's containing children's clothing, a lady's purse, a set of car keys and some miscellaneous papers. (RT 990.)

Pasadena Fire Investigator Robert Eisele testified that he arrived at the scene at about 12:35 a.m., on the morning of March 21, 1989. (RT 995.) The Volvo was completely gutted by fire. The hood of the car had not been burned except near the windshield. (RT 996.) The roof of the car had started to cave in due to the heat inside the car. The burn pattern on the driver's door indicated that the door had been opened during the fire. The area around the door handle showed relatively no damage to the paint. (RT 997.) Ash and debris on the pavement directly below the driver's door, was another indication that the door had been opened during the fire. (RT 999.) The inside of the trunk had also been damaged, but not as badly as the interior of the passenger compartment. (RT 998.)

Investigator Eisele noticed an odor of gasoline in the floor mats found in the car. They were sent to the L.A. County Sheriff's Department lab for testing (RT 1000) and were later determined to have gasoline in them. (RT 1236.) In Investigator Eisele's opinion, the fire was intentionally set by pouring gasoline in the passenger compartment and igniting it with a hand-held device, either a match or a cigarette lighter. (RT 1000-1001.)

With respect to the interior of the trunk, the cloth lining of the trunk was still intact on the left side, indicating there had been little heat on that side. (RT 1006.) On the right side, however, where the victim's head had been, the felt liner was completely burned away. Because the soot was also completely burned away, leaving just a white residue on the interior, Investigator Eisele testified that flame had been present on the right side of the trunk interior. The victim's forehead had been adhered to the fender well. (RT 1007.)

On March 23, 1989, at 9:00 a.m., Dr. Susan Selser, a physician with the Los Angeles County Coroner's Office, performed the autopsy on the body, later determined to be Joanne Lacey. (RT 1019.) Also present was Fire Investigator Kerwin Sato from the Pasadena Fire Department. In Dr. Selser's opinion the cause of death was inhalation of products of combustion and thermal burns. (RT 1021.) Dr. Selser testified that the body was partly charred and covered with soot. There were areas of skin slippage on the surface. Soot was found in the mouth and along the air passages of the nose, indicating the victim was alive at the time of the fire. (RT 1021.) Dr. Selser could not determine if the burns on the body were ante or post mortem. Most of the victim's burns were superficial thickness burns which do not go completely through the skin. Full thickness, or third-

degree burns, were mostly on the arm. (RT 1029.) It was possible that all of the burns were post mortem. (RT 1024.) Once the victim began inhaling smoke inside the trunk, she may have expired within a matter of minutes. Dr. Selser could only guess as to how long that may have taken, but thought that 10 minutes might have been the outside limit. (RT 1022-1023.)

The victim also had a non-fatal, ante mortem gunshot wound to the left hand. A small caliber lead bullet was still lodged in her hand, and had entered from the back. (RT 1026.) In addition, there was bruising at the base of the neck in the muscles of the left side, and some neck compression on the right side. Petechial hemorrhages on the mucosa of the larynx, which are small red dots on the inside of the upper airway, were also noted. These hemorrhages are sometimes seen in cases of strangulation, but are also seen in cases of intubation and cardiac deaths. (RT 1025-1026.)

Pasadena Police Department Lt. John Knebel, lead investigator on this case, testified that he arrived at the crime scene at approximately 1:00 a.m., on the morning of March 21, 1989. The Volvo was parked in a northwesterly direction on Rosemont and was completely gutted inside. (RT 1082.) Lt. Knebel was present when the body was removed from the trunk. Mrs. Lacey had no jewelry on her hands. The gun found at the scene was sent for fingerprint analysis to determine whether it was the gun that had fired the bullet found in Mrs. Lacey's hand. The gas spout was also sent for print analysis. (RT 1085.)

The fingerprint analyses came out negative, meaning no prints could be lifted (RT 1086), and at first there were no leads in the case. Through the local newspaper, *The Pasadena Star News*, the police asked the public for any information it might have in connection with the case. (RT 1086.)

Several days later, on March 24, 1989, the police received a call

from a Mr. John Wright. Wright said that his daughter had overheard a conversation, but was afraid to talk to the police. Wright said that he would attempt to convince his daughter to change her mind. The following day, at 6:45 a.m., a three-way conversation was arranged between Wright, his daughter, and Lt. Knebel. According to Wright's daughter, while she was at a Taco Bell, someone named Margaret Williams had talked about being paid money to purchase gasoline and to be a lookout while someone else burned a car. (RT 1087.)

Within a few hours of this conversation, Lt. Knebel and his partner Sgt. Salgado, drove to the residence of Margaret Williams. (RT 1088). Ms. Williams and another woman were seen driving away from her home. She was stopped, arrested, and taken into custody on an outstanding assault warrant. (RT 1088.) Four days later she was released. Before trial, she was granted immunity from prosecution if she "told the truth." (RT 1223.)

The arrest of Margaret Williams led to the arrest of appellant that same afternoon. At approximately 1:30 p.m., on Saturday, March 25, 1989, appellant was arrested as he was driving out of his driveway in a red Chevy Vega. Officers Salgado and Knebel made a traffic stop and placed him under arrest. There was collision damage to several parts of the car and it was impounded. At the time of his arrest, appellant had long, black, shoulder-length hair, combed straight back. (RT 1089.)

Appellant was interrogated, even though he asked for an attorney after being read his *Miranda* rights.[7] (RT 1092; CT Supp. II 74-75.) In this

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[7]Portions of the interrogations were recorded and transcribed. The audio tapes were admitted as People's Exhibit Nos. 56, 57 and 58, (RT 1282); the transcripts were admitted as People's Exhibit No. 55. (RT 1282.) At a pretrial hearing, the transcripts were admitted as People's Exhibit Nos. 4, 5 and 6. See CT Supp. II 74-124. Throughout this brief, those exhibits will be referenced.

initial tape recorded interview appellant denied involvement in the crime. (RT 1092-1094; CT Supp. II 74-93.) Two days later, on Monday, March 27, in further violation of appellant's *Miranda* rights, Lt. Knebel again interrogated appellant on tape. (RT 1117-1118; CT Supp. II 94-97.) The following day, Tuesday, March 28, the police conducted at least three more interviews with appellant, two of which were also tape recorded. (RT 1122; 1126-1129; 1132-1139; CT Supp. II 98-124.)

In the second of these Tuesday interviews, appellant told the police that a woman named Loretta Kelly had driven up in the blue Volvo and agreed to let him drive it. When he discovered that the car was stolen, he panicked because he was on parole and was concerned about his fingerprints being on a stolen car. He told Loretta they would have to burn the car and she agreed. They doused the car with gasoline and set it afire on a street near the Rose Bowl. He was burned in the process and they ran to Margaret Williams' house to treat his burns. Loretta had a large wad of money and jewelry and appellant took one of the bracelets. He later threw the bracelet in a storm drain on Garfield Street. (RT 1128-1130.)[8]

In the final interview that same day, appellant told the police that he and Loretta had robbed the victim together and that Loretta had forced the victim into the trunk. Appellant said that he helped to sprinkle the gasoline and that Loretta shot the victim through the trunk.[9] Loretta lit the gas

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[8] Lt. Knebel testified that the bracelet was later recovered by the police and identified as having belonged to the victim. (RT 1155-1156.)

[9]Loretta Kelly was not called as a witness in appellant's case, by either side. There is also no evidence that Loretta Kelly was ever charged for having participated in the crimes alleged in this case.

before appellant was ready, and he was burned in the process. (RT 1154.)[10]

Testifying under a grant of transactional immunity, Margaret Williams testified as follows: Appellant's brother, Charles Williams, is the father of Margaret's child. (RT 1204.) At about 2:00 a.m., on March 21, 1989, appellant and Loretta Kelly came to Margaret's home. Appellant smelled of gasoline and had a T-shirt wrapped around his hand. He went into her kitchen and put grease on what appeared to be burns on his hand. Appellant pulled money and jewelry from his pockets. He had mostly hundreds and twenties. (RT 1206-1210.)

When Margaret asked appellant what had happened, appellant replied that he had "robbed a bitch" and that he had "burnt the bitch up." (RT 1210.) He said that he had hit a lady's car and did not want her to call the police. Instead of retrieving his driver's license, he got his gun from his car, returned to the lady's car and told her to move over. He drove to her Versateller where he obtained $250. After that he picked up Loretta Kelly. The lady was saying, "Please don't hurt me; please don't kill me." Then the lady called her friend to meet them in Altadena and bring another $500. (RT 1212.) Appellant told Margaret that he had given Loretta Kelly $50 to watch out for him. (RT 1214.) He also said that he had paid someone else $100 to get $2 worth of gasoline for him. (RT 1221.) Margaret did not testify as to the identity of the person who purchased the gasoline.

Margaret described the jewelry that she saw as follows: a gold nugget-like bracelet, about half an inch thick; a diamond-shaped ring with a

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[10]This final interview, along with all of the other tape recorded interviews, was played to the jury. (RT 1115; RT 1120; RT 1137.) A transcript of each of these taped interviews, from all three days, was also admitted into evidence as People's Exhibit 55. (RT 1113; RT 1282.)

lot of diamonds on it; a gold ring with no diamonds; and a thin, gold, rope necklace, which appellant had given to Loretta. After hearing what had happened, Margaret gave appellant and Loretta rides home. (RT 1214-15.)

Two days later, Margaret saw her friend Jeanette at a Taco Bell. She told her about what had happened. Later in the week, Margaret read in the newspaper about the victim having been burned in her car. (RT 1218.)

The defense presented no evidence in the guilt phase of the trial.

B. The Penalty Phase Evidence

1. The Prosecution's Penalty Case

The prosecution's penalty phase evidence focused on a prior rape case, involving Raina Taylor, for which appellant had been convicted in 1983, and victim impact evidence from the family of Mrs. Lacey. Evidence of two prior felony convictions was also introduced.

a. The Prior Rape and Burglary Case.

Raina Taylor testified that in March of 1983, she was awakened at night in her bed, and was beaten, dragged from her bed, sodomized and raped by appellant. (RT 1408-1410; RT 1413.)

Three sheriff's officers also testified about this crime, including the officer who arrived at the scene in response to the report (RT 1420-1423), the officer who took the rape report at the emergency room (RT 1402-1403) and the officer who interrogated appellant following his arrest. (RT 1454-1459.) In addition, Shelby Fulcher, the co-defendant in the rape case, corroborated the victim's testimony. (RT 1424-1431.)

b. The Victim Impact Evidence in the Murder Case

Victim impact evidence was presented by the victim's 17-year old daughter (Amber Lacey), the victim's mother (Justie Johnson) and the victim's sister (Leola Johns.) Amber Lacey, age 13 at the time of her

mother's death and an only child, testified about the trauma of losing her mother when she was so young. After the first year, she said she was not the same. Although previously a good student, following her mother's death she developed a problem with her temper, got into fights at school and was suspended for the first time. Eventually, her father sent her to Berkeley to live with her maternal aunt. (RT 1438.) She had only recently learned of the details of her mother's death; this led to a psychological breakdown, for which she required medical assistance. (RT 1439.)

Justie Johnson, the victim's mother, had been living with her daughter for the five years before her death, helping her care for foster children. (RT 1442.) She testified that since her daughter's death she had become a different person, with trouble sleeping, worry and confusion. She was very close to her daughter. (RT 1443.)

Leola Johns, the victim's younger sister, described Mrs. Lacey as a very kind person with lots of friends. (RT 1445.) Her sister had a terrible fear of violence and guns, and once became hysterical when she found a gun that had left out on a table by mistake. (RT 1447.)

c. The Prior Felony Convictions.

A certified copy of the 1983 felony convictions, the residential burglary and rape of Raina Taylor, was admitted into evidence as PX 74. (RT 1395; RT 1448-1450.) In addition, People's Exhibit 75 (certified court documents and a California Youth Authority letter) was admitted, to prove a 1981 attempted residential burglary conviction. (RT 1449-1450.)

2. The Defense's Penalty Case.

The defense presented three witnesses in the penalty phase of the trial, appellant's wife, Evangeline Williams, correctional consultant James Park, and psychiatrist Claudewell Thomas.

a. Evangeline Williams.

Evangeline Williams testified that she had known appellant for 13 years, since she was 14 and he was 17 years old. (RT 1462.) Appellant's father was a drug addict and his mother died of a drug overdose, possibly a suicide. (RT 1466.) Appellant has four brothers and two sisters. (RT 1482.) At one point, all of his family members were incarcerated at the same time. (RT 1466.) Although appellant had not had a good work record, he was a talented painter and artist and had received awards for his artwork. (RT 1467-1468.)

On cross examination Evangeline Williams admitted that one of the reasons that she married appellant, after he had pleaded guilty in the burglary/rape case, was because she would be able to have conjugal visits with him while he was in prison. (RT 1480.) When appellant's mother died, appellant and his siblings were sent to live with their maternal grandmother, and later with an aunt. Appellant told Evangeline that his aunt had abused him and that he couldn't take it anymore so he came after her with a hammer and then ran away. (RT 1484.) According to Evangeline, appellant's grandmother had "nothing but hate for everybody," and did not seem to love the children at all, but only took them in for the welfare money she would receive. (RT 1485.) She let them run wild from an early age. Evangeline Williams said that appellant was of average intelligence but had very low self-esteem and she described him as "child-like." (RT 1488.) She said she loved him very much and felt that a life without parole sentence would adequately protect the public. (RT 1475.) She begged the jury to spare his life. (RT 1489.)

b. Correctional Consultant James Park

James Park testified that he had worked in the state

correctional system for forty years, doing everything from interviewing and classifying inmates to managing death row, planning new prisons, and researching more effective ways to deal with criminal populations. (RT 1492-1494.) He described the security measures that are employed in a Level 4 security prison, the type of prison where appellant would be housed if he were sentenced to life in prison without parole. Since Level 4 prisons were built, nine years before, there had not been a single escape. (RT 1495.) He described the type of work that inmates perform (RT 1497-1498) and described their living quarters. (RT 1499.)

On cross examination, Park agreed that even level 4 inmates could have televisions and radios, books, family visits, work privileges, library privileges, and basketball and handball on the exercise yard. He said that as prisoners age, they become better adjusted and are not involved in as many fights as when they are young. A man at age 30 would adjust well. (RT 1505-1508.)

c. Psychiatrist Caldewell Thomas

Dr. Thomas testified that appellant suffers from a borderline personality disorder, characterized by chaotic interpersonal relationships, a tendency to mood disorder and paranoid ideation. (RT 1518.) He described appellant as an adult who lives much of the time in the vulnerable world of the child, bombarded by impulses and threats that he cannot defend against. (RT 1519.) Dr. Thomas observed scars on appellant on both shoulders that were apparently the result of mistreatment by appellant's aunt, up until the age of 12. (RT 1520.)

Dr. Thomas reviewed appellant's artwork (Defense Exhibits C, G, H, and K through P) and noted that it demonstrated a "fair amount of skill, attention to detail." (RT 1520.) The fact that appellant had never received

any art training, in Dr. Thomas's opinion, indicated that appellant had a natural talent and a "fair amount of intelligence." (RT 1522.) The artwork also showed some confusion regarding gender identity. (RT 1523.) Although Dr. Thomas testified that appellant's defense to the threats he perceives in the world is "a reversion to inordinate rage," (RT 1519) he also concluded that in a structured setting, "his life could be spared without him being a danger to other people." (RT 1524.)

Dr. Thomas was of the opinion that appellant was a follower (RT 1526), that he suffered from low self-esteem and that his acts in this case were consistent with a person who had a tremendous amount of rage. (RT 1527.)

On cross examination Dr. Thomas stated that he had not conducted any testing of appellant other than the interview. His diagnosis of borderline personality disorder was based solely on what appellant had told him. (RT 1531.) Appellant had admitted using drugs. Dr. Thomas did not review prison records and had spoken with no family members other than appellant's wife. (RT 1533-1534.) Dr. Thomas said it would not surprise him to know that appellant had previously been diagnosed as antisocial. However, unlike those with an antisocial personality disorder, those with a borderline personality disorder will commit antisocial acts but feel guilty about it afterwards. (RT 1536-1537.) Both disorders come from childhood abuse. (RT 1537.)

* * * * *

ARGUMENT

GUILT PHASE ISSUES

I.

THE POLICE CONTINUED TO QUESTION APPELLANT AFTER HE HAD REQUESTED AN ATTORNEY. ALL SUBSEQUENT STATEMENTS WERE OBTAINED IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS AND SHOULD HAVE BEEN SUPPRESSED.

Miranda v. Arizona (1966) 384 U.S. 436, requires that if a suspect in custody requests counsel "the interrogation must cease until an attorney is present." (*Id.*, at p. 474.) Moreover, if, at any stage of the process the suspect "indicates in any manner that he does not wish to be interrogated," the police must stop the questioning. (*Id.*, at p. 445.) In *Rhode Island v. Innis* (1980) 446 U.S. 291, the Court refers to the "undisputed right" of an accused who has asked for counsel, to be free of interrogation "until he ha[s] consulted with a lawyer." (*Id.*, at p. 298.) *Edwards v. Arizona* (1981) 451 U.S. 477, further confirms that once the accused has "clearly asserted his right to counsel" he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.*, at pp. 484-485.) Moreover, having invoked his right to counsel, a suspect cannot be said to have validly waived that right "by showing only that he responded to further police-initiated custodial interrogation." (*Id.*, at p. 484.)

Interrogation under *Miranda* means "any words or actions on the part of the police. . .that the police should know are reasonably likely to

elicit an incriminating response from the suspect." (*Innis, supra,* 446 U.S. at p. 301.) If, after the right to counsel has been invoked, the police do "initiate an encounter in the absence of counsel (assuming there has been no break in custody) the suspect's statements are presumed involuntary and therefore inadmissible. . . even where the suspect executed a waiver." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177.)

In *Smith v. Illinois* (1984) 469 U.S. 91, 95, the Supreme Court called the *Edwards* rule a "rigid prophylactic rule," meant to be a "restraint on police interrogation." (*Id.*, n. 2.) *Edwards* set forth a "bright-line rule" that all questioning must cease once the right to counsel has been invoked. The Court's concern was that, without such a "bright-line prohibition,"

> the authorities through "badger[ing]" or "overreaching" - - explicit or subtle, deliberate or unintentional - - *might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.*

(*Smith, supra,* 469 U. S. at p. 98, emphasis added, citing *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044; *Fare v. Michael C.* (1979) 442 U.S. 707, 719.) See also *Michigan v. Mosely* (1975) 423 U.S. 96, 105-106 [the *Edwards* rule prevents police from "persisting in repeated *efforts to wear down [the accused's] resistance and make him change his mind.*"].

The reasoning of *Edwards* is further explained by the Court in *Michigan v. Harvey* (1990) 494 U.S. 344, 350:

> [The rule in *Edwards*] is based on the supposition that suspects who assert their right to counsel are *unlikely to waive that right voluntarily in subsequent interrogations.*

(*Id.*, emphasis added.) Most importantly, the admissibility of statements obtained *after* a suspect has requested counsel depends on "whether his 'right to cut off questioning' was 'scrupulously honored.'" (*Michigan v.*

Mosely (1975) 423 U.S. 96, 104, quoting *Miranda, supra,* 384 U.S. at pp. 474, 479.)

Appellant's confession was obtained in violation of these fundamental principles. Appellant's interrogation did not stop after he clearly and unequivocally asked for an attorney; instead the police simply continued asking questions, the first of which concerned appellant's request for counsel itself. The next questions returned to the topic of the murder investigation. Over the course of four days, the police ignored appellant's repeated requests for counsel, and used various tactics, including threats that he would "fry in the gas chamber" if he did not cooperate,[11] in order to extract appellant's confession.[12] Appellant ultimately succumbed to police pressure, and gave the police what they sought.

In ruling that appellant's statements were admissible, the trial court ignored the clear holding in *Edwards*, that a waiver cannot be obtained after a suspect has invoked his right to counsel unless counsel is present or the accused, rather than the police, has initiated further communication. The trial court simply found that appellant had waived his *Miranda* rights in the initial interrogation and admitted all subsequent statements. Appellant's statements were the centerpiece of the prosecution's case. Accordingly, appellant's conviction and death sentence must be reversed.

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[11]The coercive tactics of the police are addressed in Argument II, *infra*, and incorporated herein.

[12]All statements made by appellant after his requests for counsel were ignored "are *presumed involuntary and therefore inadmissible.*" (*McNeil v. Wisconsin, supra*, 501 U.S. at p. 177, emphasis added.) However, even without such a presumption, the coercive tactics used by the police rendered appellant's confession involuntary. This is addressed separately in Argument II, *infra*.

A. Factual Background[13]

Appellant was arrested without a warrant (RT 411), booked, and charged with murder (RT 411-412) on Saturday, March 25, 1989. That same afternoon, he was interrogated by Officers Jack Knebel (hereinafter "Knebel") and Lionel Salgado (hereinafter "Salgado"). In a tape-recorded interview, appellant was first read his *Miranda* rights. Then, the following conversation took place:

Knebel:	Do you wish to give up the right to speak to an attorney and have him present during questioning?
Appellant:	You talking about now?
Knebel:	*Do you want an attorney. . . here while you talk to us.*
Appellant:	*Yeah.*
Knebel:	*Yes you do?*
Appellant:	*Uh huh.*
Knebel:	*Are you sure?*
Appellant:	*Yes.*

(CT Supp. II 74-75, emphasis added.)

Although appellant confirmed three times that he wanted an attorney present while he was being questioned, Knebel ignored this request and instead, continued the interrogation by initiating further questioning:

Knebel:	You don't want to talk to us right now?
Appellant:	Yeah, I'll talk to you right now.
Knebel:	Without an attorney?
Appellant:	Yeah.

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[13]The conduct of the police in this case was egregious. In addition to obtaining appellant's confession in violation of his rights, they also coerced statements from Margaret Williams, a key prosecution witness. Appellant incorporates by reference herein the facts set forth in Argument III, *infra*, regarding the findings of both the preliminary hearing judge and trial judge that the statements of Margaret Williams were coerced.

Knebel:	Ok, let's be real clear. If you. . . if you want an attorney here while we're talking to you we'll wait 'till Monday and they'll send a public defender over, unless you can afford a private attorney, so he can act as your . . . your attorney.
Appellant:	No, I don't want to wait till Monday.
Knebel:	You don't want to wait till Monday.
Appellant:	No.
Knebel:	You want to talk now?
Appellant:	Yes.
Knebel:	Okay, do you want to talk now because you're free to give up your right to have an attorney here now?
Appellant:	Yes, yes, yes.

(CT Supp. II 75.)

The police then proceeded with the interview, without counsel present. During this thirty-minute interview, the officers repeatedly accused appellant of robbery, murder and burning the victim's car. Although appellant denied killing anyone, he did make certain admissions, which connected him to the alleged events of that evening: (1) that he had been at Margaret Williams' house on the night of the murder; (2) that he knew Loretta Kelly (the alleged co-perpetrator); and (3) that he had seen Loretta Monday night. (CT Supp. II 80-81.) The prosecution was able to use these admissions to support the testimony of its key witness, Margaret Williams, that Loretta Kelly and appellant had stopped by Margaret's apartment Monday night following the murder.

About half-way through the interview Knebel threatened appellant, telling him he would "fry in the gas chamber;" (CT Supp. II 82) Salgado said they had all the evidence they needed against him. At this point, appellant interrupted Salgado and demanded: "*I want to see my attorney*

cause you're all bullshitting now." (CT Supp. II 84, emphasis added.)

The interrogation, which never should have begun in the first place, should have stopped immediately. Instead, the police once again ignored appellant's request for counsel and successfully side-tracked appellant, by "tag-teaming" him. Salgado said, "I know. You know we have to show more than this. You're right." Then Knebel jumped in: "You want your attorney now?" (CT Supp. II 84.) Before giving appellant a chance to respond, Salgado interrupted, implying that the demand for counsel was an indication appellant was lying: "But what we wanted. . .[was] an opportunity here now to see if you wanted to tell the truth or not and *obviously you're not ready to tell the truth.*" (CT Supp. II 85, emphasis added.) And so, the conversation continued:

Appellant:	Tell the truth about what?
Salgado:	Well. . . Your. . .
Appellant:	I haven't killed nobody.
Salgado:	I'm not saying you killed anybody. You put her in the trunk.
Appellant:	I didn't put nobody in the trunk.
Knebel:	Wait a minute. Do you want your attorney now or do you want to talk to us?
Appellant:	I'll talk to him. But you sitting up here telling me that I done killed somebody.
Knebel:	You did.
Appellant:	No I didn't.
Knebel:	Do you want to talk to him without the attorney?
Appellant:	Oh yeah. I talk to him. (CT Supp. II 85.)

Having succeeded, for the *second* time, in persuading appellant to proceed without counsel, the police continued their accusations. Both officers specifically mentioned the gas chamber, telling appellant that the only thing that would save him from the gas chamber was admitting the crimes. (CT Supp. II 88.) Finally, appellant clearly told the police he did

not want to talk to them. When they asked him "Why did it turn the way it did?" appellant replied. "*I don't want to talk about it.*" (CT Supp. II 89-90, emphasis added.) Again, the interrogation should have stopped. However, just as before, the two officers continued their questioning, with Salgado repeating the very same question: "Tell me, David. . . why did it turn that way?" (CT Supp. II 90.)

The police employed a number of improper tactics to pressure appellant to confess to the robbery and murder, including more threatening references to the gas chamber (CT Supp. II 92-93); minimizing the moral seriousness of the offense ["I believe you didn't *mean* to kill her."] (CT Supp. II 87); telling appellant that if he confessed a judge or jury would go easier on him (CT Supp. II 88, 90-92); and confronting appellant with false evidence [implying they had fingerprint evidence;[14] saying three eye-witnesses saw him at the Versateller machine; and implying there was some evidence about the gasoline that appellant was not aware of ("You don't know what gasoline does, do you?")]. (CT Supp. II 90-92.)[15]

At the end of the interview, the police repeated that they did not believe him. Appellant asked them why and Salgado responded:

Salgado: You want to know why?

Appellant: Yeah.

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[14]As Officer Knebel later testified, they falsely told appellant they had fingerprint evidence against him "to attempt to persuade the defendant to tell the truth." (RT 1116.)

[15]These coercive police tactics are discussed at length in Argument II, *infra*. Argument I is based primarily on the *presumption* that, because the police ignored his previous requests for counsel, appellant did not voluntarily (1) waive his right to counsel or (2) confess to these crimes. However, these facts further support appellant's contention that he did not voluntarily waive his rights to counsel and to remain silent.

Salgado: It's 3-25-89, and it's 4:30, I'm turning the tape off. (CT Supp.II 92.) Whatever the police told appellant at this point, they apparently chose not to record it on tape. The tape of this first interview (People's Exhibit 56) was admitted into evidence at trial.[16] (RT 1115.)

Two days later, on Monday, March 27, 1989, the day on which appellant had been told that he could have a public defender, Knebel again brought appellant down from his cell to the detective bureau for further tape-recorded questioning. (RT 1117.) Appellant was not re-advised of his *Miranda* rights (RT 1166), nor did he withdraw his previous request for an attorney. Among other things, appellant was asked about the damage to his automobile. He told Knebel that the red car he had been driving had been hit before he bought it, and again admitted to being at Margaret Williams' house on the night of the murder. (CT Supp. II 95-96.) As with the first interview, the tape of this second interview (People's Exhibit 57) was played for the jury at appellant's trial. (RT 1120.)

The next day, Tuesday, March 28, 1989, appellant was still not provided with an attorney as he had requested. Instead, at approximately 8:45 a.m., Knebel and Salgado initiated further contact with appellant. They brought him out of his cell to examine his body for evidence of burns. (RT 416-417.) They discovered a pink spot on his left index finger and another on his left ankle. (RT 417; RT 1123.) Knebel and another officer transported appellant to Huntington Memorial Hospital to have the spots examined by Dr. Coffey. (RT 1123-1124.)

Knebel and Officer Richter then transported appellant back to the

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[16]The portion in which the police asked appellant about his prior conviction and prison sentence (CT Supp. II 79-80) was deleted from the tape and its transcript.

detective bureau and took several photographs of his hand and ankle. Afterwards, Knebel told appellant he was taking him back to his cell. (RT 1125.) According to Knebel, just as he was about to do this, appellant asked if he could speak some more with Knebel. (RT 1125-1126.) Knebel asked Detectives Cauchon and Richter to be present during this session. It was not tape-recorded, but Knebel testified that he

> reminded [appellant] of, and asked him if he remembered his constitutional rights. He said he did. I asked if he wanted to give up his right to remain silent. He said he did and said he wanted to talk to us.

(RT 1126.) This took place at about 10:00 a.m. on Tuesday, March 28.

According to Knebel, appellant then explained how he happened to be in the victim's car and why he burned it. (RT 1127.) He said that Loretta Kelly had driven up in a new blue Volvo, and appellant asked to drive it. While he was driving she told him it was a stolen car. Appellant was afraid he would get in trouble, so he suggested burning the car. (RT 1129.) The two of them purchased gasoline, doused the Volvo and Loretta lit the fire with a lighter. The explosion burned appellant on his hand and leg. Then he ran to Margaret Williams' house and told her about what had happened. There, he treated his burns and Margaret drove him over to a friend's house. Appellant said that Loretta had a large wad of money and jewelry. He took a bracelet from her and she also gave him some money. He threw the bracelet in a storm drain on Garfield, north of the freeway. (RT 1130.)

The officer's conversation with appellant lasted five to ten minutes and ended around 10:10 a.m. Afterwards, Knebel took appellant back to his cell and asked him if they could tape record the statement. Appellant

agreed (RT 1131), and at 12:45 p.m., Knebel and Salgado brought appellant back to the detective bureau for the taped interview. While they were escorting him, they continued to discuss the case with appellant (RT 1132) but it was not tape-recorded.

This third and final tape-recorded interview with appellant began at 1:15 p.m., that same day. The interview contained four segments, in between which the tape recorder was turned off, and then on again. At the start, appellant was read his *Miranda* rights and he agreed to talk to the police. Before the questioning began however, appellant asked that the tape be turned off. Appellant, still without an attorney although he had been in custody for four days, turned to Salgado for assistance: "You said you could help me, how can you help me?" According to Knebel, Salgado replied that the only way he could help him was if he told the truth and that it would look better in court if he told the whole truth rather than some truth and some lies. (RT 1133-1134; CT Supp.II 99.) Three minutes later (1:18 p.m.) the tape was turned back on (RT 1137) and the police conducted another 10-minute interrogation. The police believed the interview was finished, and so turned off the recorder. (RT 1138.)

According to Knebel, with the tape turned off, appellant continued to give more information, saying that he learned for the first time that there was a woman in the trunk of the car when he read it in the paper. Knebel asked to put that on tape and appellant agreed. (RT 1139.) After another two minutes or so, they went back on tape, from 1:30 (RT 1152) until 1:33 p.m., (RT 1153) and appellant added this information about reading the story in the newspaper. (CT Supp. II 113.)

The tape recorder then remained off for another six minutes. (CT Supp. II 117.) It is unclear what took place during this six minute interval,

but Knebel testified that Salgado had "another question to ask." (RT 1153.) The question had to do with the gun that was found at the crime scene. While the tape was turned off, Salgado continued to question appellant. According to Knebel, appellant began to cry and said that he had robbed the victim and that he wanted to go back on tape to explain. (RT 1153.) At 1:39 p.m., the last segment of the interview began; it contained appellant's full confession. Appellant said that he and Loretta had robbed the victim, together they put her in her trunk and that appellant helped to sprinkle the gas. Loretta shot the woman through the seat and, together, they burned the car. Appellant was burned in the process. This final interview ended at 1:45 p.m. (RT 1154.)

Three days later, on March 31, 1989, appellant was arraigned.[17]

People's Exhibit 58, which contains all four segments of this March 28th interview, was played for the jury and admitted into evidence. (RT 1137; RT 1139; RT 1282.)

Before trial, the prosecutor filed a motion under Penal Code section 402 to obtain a ruling on the admissibility of each of these three taped sessions: the Saturday, Monday and Tuesday interrogations. (CT 1836.) The 402 motion was heard on August 10-11, 1992. Witnesses were called and both sides presented arguments to the trial court. (RT 386-473.) The prosecutor's position was that (1) appellant had waived his *Miranda* rights (CT 1837-1839); (2) all of his statements had been voluntarily made (CT 1839-1841); and that (3) even if, in the first interview, he had effectively invoked his right to counsel, appellant had initiated the final interview,

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[17]As explained in footnote 3, *supra,* this date is not certain, but there is no indication in the record that appellant was arraigned at any time *before* March 31, 1989.

during which he had waived his rights and confessed. (CT 1843-1847.)

The trial court ruled that all three statements were admissible because there was no evidence of physical or psychological coercion[18] and appellant's *Miranda* rights had not been violated in any way. (RT 473.) With respect to appellant's repeated requests for counsel, the trial court acknowledged that there were "phases of the interrogation where he talked about asking for his attorney." (*Id.*) Nevertheless, ignoring the clear holding of *Edwards*, which examines the conduct of the *police* after a suspect has asked for counsel, the trial court simply focused on *appellant's* conduct: "[H]e goes right on and says he will talk to [the police officer]." (*Id.*) With respect to the second interrogation, the court found that the failure to re-advise appellant of his rights was not fatal because it was "a continuing investigation," (*Id.*) and that in the third interrogation, appellant "freely and voluntarily gives up his rights." (*Id.*)[19] All three tapes and their transcripts were admitted into evidence. (RT 1282.)

The following argument addresses only the error in the trial court's ruling that appellant voluntarily waived his *Miranda* rights. The undisputed facts demonstrate that, under the circumstances, appellant's statements are presumed to be involuntary and therefore, inadmissible. The other portion of the trial court's ruling, finding that there was no psychological coercion

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[18]The trial court did not find that "talking about the death penalty in any way forces the defendant." (RT 473.)

[19]Because the underlying facts necessary for resolving this issue are contained in the interrogation transcripts and are not in dispute, this Court may independently determine from the facts whether the challenged statements were unlawfully obtained. *See People v. Ochoa* (2001) 26 Cal.4th 398, 436; *People v. Weaver* (2001) 26 Cal.4th 876, 918-922. The trial court's failure to abide by *Edwards* and its progeny rendered its conclusion about the admissibility of appellant's statements erroneous.

used in the interrogation, is addressed in Argument II, *infra.* Under the totality of the circumstances, the admission of appellant's statements violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

B. In His First Interview, Appellant Twice Invoked His Right to Counsel and Later His Right to Remain Silent. Each Time, All Questioning Should Have Ceased.

As discussed above, a long line of Supreme Court decisions recognize several important principles: (1) when a suspect has stated clearly that he desires an attorney, the police must scrupulously honor that request by stopping *all questioning*; (2) simply showing that the suspect responded to *further* questioning does not establish a waiver of the previously asserted right to counsel; (3) the police may resume questioning only if the suspect initiates the communication, and voluntarily waives counsel, or if an attorney is present. These principles demonstrate that the Supreme Court fully understands the realities of the interrogation process: once the request for counsel has been made, if there is further police interrogation *without* counsel, a suspect's subsequent "waiver" of counsel is *probably not voluntary*. (*Michigan v. Harvey, supra,* 494 U.S. at p. 350.)

In this case, the state's own tape-recorded interview shows that in the first session, on Saturday, appellant asked for counsel at two separate times: once, right at the beginning, and a second time, half-way into the interview. In addition, near the end of the interview, appellant told the police he did not want to talk. In each of these three instances the police ignored appellant's requests and simply continued their questioning (and their threats). Not only was this a direct violation of *Miranda* and *Edwards*, which rendered the entire first interrogation inadmissible, but it also created an atmosphere by which appellant was continuously led to believe that counsel would *not* be appointed for him and that he had no choice but to

submit to further questioning, which ultimately led to his confession. Statements obtained under the circumstances which appellant faced are "presumed involuntary." (*McNeil v. Wisconsin*, *supra*, 501 U.S. at p. 177.)

1. Appellant's first demand for counsel.

Because there is no question about *whether* appellant asserted his right to counsel, under *Miranda* and *Edwards*, the police should have stopped interrogating appellant until an attorney was present. Quite simply, that did not happen here; instead, the officers kept asking questions. In fact, the police actually pushed appellant to change his mind by asking, "You don't want to talk to us now?" (CT Supp. II 74-75.)

It was precisely at this point that the "bright-line" rule of *Edwards* was violated. The police had absolutely no legitimate reason for asking this next question since there was nothing ambiguous about appellant's responses to them: He had made it clear he *did* want counsel. The fact that the police were successful in engaging appellant in further conversation (by asking, "You don't want to talk to us right now?"), does not establish a valid waiver of the previously asserted right to counsel. (*Edwards, supra*, 451 U.S. at p. 484.) Because the police asked the next question, and because it was *not* one that was needed to clarify an ambiguous response, everything that appellant said after that point should have been ruled inadmissible. Nevertheless, for purposes of further analysis, it is useful to look at the rest of the session.

The police prepared a trap, and appellant fell into it. When appellant agreed to talk to the police "right now," he could not have known that by agreeing to do so, he might be jeopardizing his previous demand for counsel. Under the guise of making themselves "real clear," the police explained that appellant could talk "right now" without counsel, or wait

until Monday for an attorney. By making matters "clear" to appellant, the police succeeded in getting him to agree to the former option. Doing so violated the letter and the spirit of the *Miranda*, which announced that "any evidence that the accused was threatened, tricked or *cajoled into a waiver* will, of course, show that the defendant *did not voluntarily waiver his privilege*." (*Miranda, supra,* 384 U.S. at 476, emphasis added.) Since the police "cajoled" appellant into withdrawing his request for counsel, it cannot be said that he did so voluntarily. The police may not "give the prerequisite warnings with one breath and then, with the next, undercut them," with clever but improper tactics. (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 890.)

More specifically, "[w]hen a defendant has invoked his rights, the police . . . cannot ask whether he wants to talk about the case *without a lawyer*." (*Desire v. Attorney General of California* (9th Cir. 1992) 969 F.2d 802, 804-805, *citing Smith v. Illinois* (1984) 469 U.S. 91, 93, emphasis added.)

The prosecutor, in her pretrial motion, argued that the police had simply given appellant an accurate description of the law, in telling him that he would not have counsel available until the following Monday. (CT 1838.) It was this providing of "accurate" information, she argued, that led to appellant's relinquishment of his right to counsel. The prosecutor cited *Duckworth v. Eagan*[20] (1989) 492 U.S. 195, for the proposition that this sort

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[20]*Duckworth* involved the validity of a *Miranda* warning card which contained information about the process for appointing counsel. Since the defendant signed the waiver, the only issue was whether the wording on the card had improperly implied that the suspect could *not* have counsel unless he were formally charged. The Court found that the information was accurate and met the requirements of a valid *Miranda* warning.

information-providing by the police was permissible, and that appellant's subsequent waiver was therefore valid. (CT 1838) *Duckworth*, however, is not on point for several critical reasons: (1) The "information-providing" by the police in *Duckworth* did not occur *after* the suspect had already invoked his right to counsel, as was true in appellant's case. Rather, the information was contained on the *Miranda* warning card itself, necessarily given to the suspect *before* he had to decide whether or not to invoke his rights. (2) In *Duckworth*, after the suspect read the printed *Miranda* form, he signed the waiver of his rights. Consequently, the *Duckworth* Court never evaluated the type of police conduct presented here: providing information to the suspect to induce him to talk, *after* he had asked for counsel.

Duckworth's observation that an attorney need not be "producible on call . . ." (*Id.*, at p. 204), is not an invitation for the police to gratuitously explain the appointment process to a suspect who has already demanded counsel. Since appellant *did not ask the police* about when his counsel would be appointed, the police had no grounds for continuing their interrogation, regardless of whether or not doing so included offering "accurate" information. Once appellant had stated *three times* that he wanted an attorney, the police had only one option: to return appellant to his cell until an attorney was present.

The conduct of the police cannot be justified on the grounds that they had a duty to inform appellant as to when an attorney might be made available to him. This Court has been clear in pointing out that "[t]he *Miranda* rules do not also require the police to keep a suspect abreast of his various options for legal representation." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1046.) *Bradford* held that the police had no duty to advise

the suspect that an attorney had been hired by a relative and was outside waiting to see the suspect. Kept in the dark, the suspect waived his right to counsel and spoke to the police. See also *Moran v. Burbine* (1986) 475 U.S. 412, in which Justice O'Connor wrote: "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him [decide] whether to speak or stand by his rights." (*Id.*, at p. 422.)

Just as the police have no *duty* to provide this information, neither do they have the *right* to provide it after a suspect has unequivocally requested an attorney. This is especially so when the unsolicited information they choose to provide might reasonably cause the suspect to reconsider his previously asserted *Miranda* rights. In no event can the police simply continue to *ask questions.*[21]

Yet this is precisely what the police officers did in appellant's case. Right after asking for an attorney, the police asked appellant two more questions: (1) "You don't want to talk to us right now?" and (2) "Without an attorney?" These impermissible questions, in violation of *Miranda*, effectively manipulated appellant into continuing the interrogation without counsel. In *Smith v. Illinois, supra,* 469 U.S. at p. 99, the Supreme Court called this type of police conduct "intolerable." Quoting one of the state court justices, the Court said:

> "No authority, and no logic, permits the interrogator to proceed. . . *on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt* on his

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[21]In particular, the police cannot ask a suspect who has already asserted his *Miranda* rights whether he is willing to talk *without* a lawyer. (*Desire, supra,* 969 F.2d at pp. 804-805.)

> initial statement that he wished to speak through an attorney or not at all."

(*Id.*, citing *People v. Smith* (1984) 102 Ill.2d 365 at p. 376 (Simon, J., dissenting), emphasis added; *Robinson v. Borg* (9th Cir. 1990) 918 F.2d 1387, 1391.)

The recent case of *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995, is particularly instructive. After being advised of his rights, Alvarez asked the police, "Can I get an attorney right now, man?" and also, "You can have [an] attorney right now?" The police responded that one could be appointed for him. The defendant then asked, "Well, like right now you got one?" The police said one would be appointed at the arraignment. *Then the police asked if he would talk to them without a lawyer*, and he agreed. (*Id.*, at p. 996-997.)

The first issue was whether *Alvarez* had *clearly* requested counsel. The Ninth Circuit held that since the defendant's three questions about counsel were "an unequivocal request for an attorney," (*Id.*, at p. 998), the police should have immediately discontinued the interview. Because they did not, his ultimate agreement to talk to them was held not to be a valid waiver of his right to counsel. Since his "subsequent *Miranda* waivers. . . were in response to further police initiated questioning, these waivers are without effect." (*Id.*) Therefore, his later confession was inadmissible.

The facts in appellant's case are even more compelling than in *Alvarez* because, unlike *Alvarez*, appellant's requests for counsel were not in the form of a question, and therefore not subject to interpretation or claims of ambiguity. Appellant responded "yes" three times to the question, "Do you want an attorney here while you talk to us?" Under the reasoning of *Alvarez, supra,* the fact that appellant finally agreed to talk to the police,

then -- without counsel -- does not amount to a valid waiver.

Moreover, even if this Court were to give every benefit of the doubt to the police officers, and characterize their conduct as simply trying to explain the process,[22] rather than trying to pressure appellant into proceeding without counsel, their conduct a few minutes later in the interrogation leaves no doubt about what the police were doing.

2. Appellant's second demand for counsel.

About half-way through this first 30-minute interview (RT 400), the officers began to make strong accusations, telling appellant that he would "fry in the gas chamber," and that they had all the evidence they needed. This prompted appellant to demand counsel once again: "*I want to see my attorney* cause you're all bullshitting now." (CT Supp.II 84.) Once again, this was an unambiguous request for counsel, and the police had but one option: to end the session and return appellant to his cell.[23] Instead, the police attempted "an end run" around *Miranda,* misleading appellant as to the consequences of asking for an attorney, misleading him as to the consequences of not cooperating with them, and otherwise trying to frighten him into confessing.

As before, even though appellant's demand was unambiguous ("I want to see my attorney"), the police actually interrupted each other in their

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[22]The police cannot claim they were trying to "clarify" anything, since appellant expressed no confusion and asked no questions about his right to counsel. Nor did the police simply provide neutral information to appellant. Appellant's request for counsel was followed by more *questions*.

[23]Or, in the words of Judge Kozinski, "[the police] must cease their interrogation as soon as the suspect asserts his right to counsel, and then hope he changes his mind on his own." (*Colazzo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 427 (conc. opn, of Kozinski).)

zeal to side-track appellant and talk him out of an attorney. Salgado told appellant, "I know. You know we have to show more than this. You're right." Knebel then jumped in, asking appellant the superfluous question, "You want your attorney now?" Then Salgado jumped back in, before allowing an answer to this unnecessary question, by expressing his disappointment in appellant's renewed request for counsel: "But what we wanted. . .[was] an opportunity here now to see if you wanted to tell the truth or not *and obviously you're not ready to tell the truth.*" (*Id.,* at p. 85.) By preventing appellant from answering, and then characterizing appellant's renewed demand for counsel as an indication that he was not being truthful, they convinced appellant to continue with the interrogation, without counsel present. If this were a permissible course of conduct for police questioning, then police would rarely, if ever, be inclined to honor a suspect's request for counsel and *Edwards* would be "rendered meaningless." (*United States v. Gomez* (11th Cir. 1991) 927 F.2d. 1530, 1539.)

Far from "scrupulously honoring" appellant's request for counsel, the police affirmatively acted to talk him out of it. The Supreme Court has never held this sequence of events to constitute a valid waiver of the right to counsel. It has repeatedly held otherwise: "[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." (*Davis v. United States* (1994) 512 U.S. 452, 458, citing *Edwards, supra,* 451 U.S. at pp. 484-485.) A valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if he has been advised of his rights." (*Edwards, supra,* 451 U.S. at p. 484.)

The Ninth Circuit has also adopted this reasoning. See, e.g., *Desire v. Attorney General of California, supra*, 969 F.2d at pp. 804-805 [defendant's "*unhonored request for counsel* vitiated his subsequent decision to talk without counsel's presence," (emphasis added)] and *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1529 ["[W]aiver cannot be found from a suspect's continued response to questions, even if he is again advised of his rights."]

3. Appellant's Statement That He Did Not Want to Talk.

After twice having his clear and unambiguous requests for an attorney ignored, the appellant was subjected to further pressure[24] from the police to confess in this initial Saturday afternoon interrogation session. The police assured him that the only thing that could save him from the gas chamber was a confession. If he confessed, they told him, the jury would "not be so hard" on him. (CT Supp. II 88.) They wanted to know how he had met the victim and why things had turned out the way they had. At that point, appellant said, "*I don't want to talk about* it." (CT Supp. II 90, emphasis added.) Once again, given appellant's clear statement of his desire not to be questioned, the police should have immediately ended the interrogation. *Miranda* holds that at any point in the interrogation, the suspect may assert his right to counsel or to remain silent. Even if he has answered *some* questions, once he no longer wants to talk, the police must honor his wishes:

The mere fact that he may have answered some questions or

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[24]The pressure tactics used by the police were considerable and are discussed at length in Argument II, *infra,* which specifically addresses the coercive aspects of the interrogation process during this week that appellant was held without access to counsel and without being arraigned.

> volunteered some statements on his own *does not deprive him of the right to refrain from answering any further inquiries* until he has consulted with an attorney and thereafter consents to be questioned.

(*Miranda, supra,* 384 U.S. at p. 445, emphasis added.)

In summary, appellant's first interview contains four unequivocal requests for an attorney and a final request to stop the questioning. None of these requests were honored, much less "scrupulously." Each request simply triggered immediate, and ultimately successful, efforts by the police to pressure appellant into changing his mind and proceeding with the interrogation without a lawyer. A suspect whose request for counsel is not honored cannot be said to have "waived" that request simply because he succumbs to further police-initiated questioning and pressure. Such "waivers" are invalid when they are elicited, as they were here, through continued, unlawful interrogation.

The trial court, in its review of this first session, had only this to say about appellant's requests for counsel: "And in those phases of the interrogation where he talked about asking for his attorney, *he goes right on and says he will talk to [the police]*." (RT 473, emphasis added.) Although it was undisputed that continued police interrogation *preceded* appellant's purported waiver, the trial court ignored the holdings of *Miranda* and *Edwards* that, that under such circumstances, all questioning must cease. The trial court's holding that the contents of the first interview was admissible was clearly in error.

C. Appellant's Second Taped Interview on Monday Was Obtained in Violation of *Miranda*. The Trial Court Should Have Suppressed the Second Interview.

Although the police had told appellant, during the Saturday interrogation, that a public defender could be appointed on Monday (CT

Supp. II 75), appellant saw no sign of an attorney on Monday. Instead, the same two police officers returned for more questioning. At 9:00 a.m., Knebel brought appellant back out of his cell to an interview room in the detective bureau (RT 1117; RT 414). (RT 1166.) According to Knebel, appellant was not advised of his right to remain silent, nor his right to have an attorney present, nor did he indicate that he was waiving those rights. (RT 1166.) Knebel simply informed appellant that he had questions for him about his car and that he would be taping the conversation. (RT 1118.) The tape and the transcript of that entire conversation was admitted into evidence and the tape was played for the jury. (RT 1121.) Because the trial court erroneously held that appellant had waived his right to counsel in the first interview, the court viewed this second interview as simply part of "a continuing investigation," which was therefore, also admissible.

The trial court erred in admitting this second, Monday morning (March 27), interview as well. Under *Edwards*, once the accused has asked for counsel, the questioning must cease until an attorney is present or unless the accused, on his own, has initiated the conversation. Since Detective Knebel confirmed that this interview was initiated by him, not appellant, and since no attorney was provided, appellant's entire statement was inadmissible under the Fifth Amendment and should have been suppressed.

D. Since Appellant's Request For a Lawyer Was Not Honored, the State May Not Claim That Appellant "Initiated" the Conversation in Which He Finally Confessed. The Trial Court's Admission of the Confession Was Prejudicial Error.

When a suspect has asked for a lawyer, "the subsequent procedure is clear. . . . [T] interrogation must cease." (*Miranda, supra,* 384 U.S. at p. 473-474.) The police may not "undercut the prophylactic rule of *Miranda*

by refusing to accept a suspect's assertion of the right to counsel." (*Colazzo v. Estelle*, *supra*, 940 F.2d at p. 426 (conc. opn. of Kozinski, J.).) The police may not do anything to try to talk him out of his desire for counsel. Their only option is to honor his request for counsel and "hope he changes his mind *on his own*." (*Id.*, at p. 427.) If, *on his own,* the suspect does change his mind and *initiates* contact with the police, *Edwards* provides an exception to the general rule that a suspect who has previously asked for a lawyer may not be further questioned without counsel present.

Judge Kozinski referred to this initiation exception as an "escape hatch" (*Id.*) for the police, when they have been forced by the suspect's assertion of his *Miranda* rights to stop an interrogation. However, recognizing that "*Edwards* is designed to prevent police. . . badgering," Judge Kozinski's admonition is especially pertinent here:

> If police want to keep the *Edwards* escape hatch open, they must *cease their interrogation as soon as the suspect asserts his right to counsel,* and then hope he changes his mind *on his own*. Any other rule would invite police misconduct and enmesh the courts in the type of metaphysical unscrambling[25] of which this case is a perfect example.

(*Id.*, emphasis added.) This means that the State may benefit from the "initiation" exception, only if the authorities have refrained from all questioning of the suspect prior to that time. This rule is based on the presumption that suspects who have already asked for counsel are not likely

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[25]The Supreme Court made a similar observation in *Minnick v. Mississippi* (1990) 498 U.S. 146, 151: "The [*Edwards*] rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." This observation lends further support to appellant's claim that when the police continue to interrogate, a *presumption* arises that the resulting statements were made *involuntarily*.

to waive that right *voluntarily* in subsequent interrogations. (*Michigan v. Harvey, supra,* 494 U.S. at p. 350.)

In appellant's case, because the facts are not in dispute, this Court must independently determine whether appellant's statements were obtained in violation of his constitutional rights. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128.) A review of the facts makes it clear that, under *Edwards,* admission of any of appellant's statements, including the final taped interview, was error.

Tuesday, March 28, was appellant's fourth day in custody. His Saturday requests for counsel were ignored, making all of his statements to the police on that first day inadmissible. Although appellant was told that a public defender could be sent over on Monday, that never happened. Monday just brought continued interrogation, still without counsel. Appellant's Monday interview was inadmissible as well.

Left without counsel, the only "legal advice" offered to appellant came from the investigating officers. Their advice was to avoid the gas chamber by confessing to the murder and showing remorse. (CT Supp. II 87-93.) At the close of the Saturday session, Salgado had urged appellant to talk to him at a later time: "I want you to think about it and if you change your mind and you want to talk about [the victim] with me all you have to do is tell the jailor." (CT Supp. II 93.) Because appellant had previously requested counsel, even this "advice," an invitation for appellant to speak to the police without counsel, was improper communication, prohibited by *Edwards. (Edwards, supra,* 451 U.S. at p. 485 ["communication, exchanges, or conversations" may not be initiated by the police after suspect has invoked right to counsel]; *People v. Boyer* (1989) 48 Cal.3d 247, 274 [after suspect had invoked right to counsel, there was no custodial reason

why police had to approach him again to "tell him a couple of things" about the investigation].)

By Tuesday morning, appellant's situation was as follows: He still had no attorney, it was day four and he had not been arraigned,[26] and the police had not let up on their pressure. At 8:45 a.m., Tuesday morning, Knebel and Salgado, reinitiated contact with appellant. They brought him out of his cell for further investigative purposes - - this time to examine his body for any evidence of recent burns. (RT 416-417.) First the officers examined him, then appellant was taken to the hospital, so that a physician could examine him again. (RT 1123-1124.) Following the medical exam, appellant was taken back to the detective bureau so that his hands and feet could be photographed. (RT 1125.)

These events, particularly in the context of (1) the officers' utter disregard of appellant's efforts to obtain counsel; (2) their disregard of his statement that he did not wish to talk; (3) their prior threats that he would be sent to the gas chamber if he did not cooperate and confess; and (4) other tactics specified in Argument II, *infra*, most likely had the effect of making appellant feel powerless; that the walls were closing in on him; that the police did indeed have all the evidence they needed to convict him. The pressure on him was undoubtedly compounded by the fact that this was his *fourth day* in police custody without counsel, and without having been brought before a magistrate.

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[26]Although the delay in arraignment was not an issue raised by trial counsel and is therefore not being raised in this appeal, it appears appellant was not arraigned until at least March 31, 1989, possibly later. See footnote 3, *supra*. This delay is just one more aspect of appellant's situation that could only have added to the pressures he was facing.

According to Knebel, right after the photography session, as appellant was being returned to his cell around 10:00 a.m., he asked if he could speak to Knebel *some more*. (RT 1125-1126.) Knebel of course agreed, and

> asked [appellant] if he remembered his constitutional rights. He said he did. I asked if he wanted to give up his right to remain silent.[27] He said he did and said he wanted to talk to us.

(RT 1126.) They spoke for five to ten minutes informally, and then appellant agreed to have his statement tape-recorded. That taped session, at 1:15 p.m., contained appellant's full confession.

Assuming that appellant *did in fact* ask to talk to Knebel at 10:00 a.m., from an *Edwards* standpoint, that communication did not constitute a legally effective "initiation," so as to result in a valid waiver of appellant's previously invoked right to counsel. The Supreme Court has made clear that if, and only if, *Edwards'* "rigid prophylactic rule" has been honored, may the state later raise the issue of whether or not the suspect subsequently "initiated" the conversation which led to his un-counseled statements.

In appellant's case, not only was his request to speak further with the police the direct result of their unlawful questioning and badgering,[28] but more importantly, his confession was inadmissible as a matter of law under *Edwards*. Because Knebel and Salgado did not honor appellant's request

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[27]Knebel's trial testimony was that he only asked appellant if he'd give up his right to *silence*. At the pretrial hearing, Knebel testified differently, saying that he asked appellant if he'd give up his right to remain silent and *also* talk without an attorney. (RT 418.) Because this testimony is inconsistent, and since it is the State's burden to establish that appellant waived *both* rights, this inconsistency should be resolved in appellant's favor.

[28]See Argument II, *infra*.

for counsel by ending the very first interrogation session, the so-called "escape hatch" closed. The fact that four days later, following repeated contacts by the police, appellant eventually asked to talk again with Knebel, right after the police had again contacted him, is of no legal consequence. Appellant's waiver and confession is presumed to be involuntary and therefore inadmissible. (*McNeil v. Wisconsin, supra*, 501 U.S. at p. 177.)

The logic of this reasoning was expressed well by the 11th Circuit in *United States v. Gomez* (1991) 927 F.2d 1530, 1538-1539:

> Although *Edwards* permits further interrogation if the accused initiates the conversation (citation omitted), the validity of this waiver *logically depends on the accused being free from further interrogation*. In other words, the "initiation" must come *prior* to the further interrogation; initiation only becomes an issue *if the agents follow Edwards* and cease interrogation upon a request for counsel. Once the agents have, as here, violated *Edwards*, *no claim that the accused "initiated" more conversation will be heard*. Indeed, *Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and then claim that the consequent response by the accused represented initiation and permitted a waiver of the asserted counsel right.

The above-quoted excerpt from *Gomez* describes precisely the situation which took place while appellant was in custody.

Because the police ignored appellant's first, second, third and fourth requests for counsel, and instead took the opportunity to convince him to proceed *without* counsel, the prosecution may not benefit from these violations of *Miranda* and *Edwards*. Nor may they take advantage of that portion of *Edwards* which permits the police to speak to a suspect without counsel *if the suspect has initiated* the conversation. This is true *only if* the police have respected the "rigid" rule of *Edwards*, by ending their

questioning as soon as the suspect has asked for counsel.

In this case, the police only stopped their interview sessions when *they* chose to stop. When they had more questions or desired further contact with appellant, they simply went back to his cell to obtain whatever further information they needed. For four days, they kept appellant *incommunicado* and left him with the unmistakable impression that it was pointless to ask for counsel or otherwise seek help from anyone other than themselves.

It is no wonder that when the final taped interview began Tuesday afternoon, appellant's first question to Salgado was, "You said you could help me, how can you help me?" (CT Supp. II 99.) This inquiry shows that by Tuesday, when the police returned, had him physically examined and showed no sign of honoring his request for counsel, appellant had concluded that he would not be given an attorney and had only the police officers to "help" him. No doubt, that is just what the police had hoped would happen. They wanted him to feel isolated so that he would rely strictly on *their* advice: to avoid the gas chamber by confessing.

What took place during appellant's custody is precisely the scenario that *Miranda* and *Edwards* sought to prevent, and which was strongly condemned by the Supreme Court in *Arizona v. Roberson* (1988) 486 U.S. 675. In *Roberson*, the Court explained the dangers involved in ignoring a suspect's demand for counsel and then keeping him in custody for days, without counsel. For a suspect who has already asked for counsel, "further interrogation without counsel having been provided *will surely exacerbate whatever compulsion to speak the suspect may be feeling.*" (*Roberson, supra,* 486 U.S. at p. 686, emphasis added.) Nor was it likely, the Court opined, that fresh *Miranda* warnings would "reassure" such a suspect that

his rights would be respected. This was especially true, the Court noted, where "a period of three days elapsed between the unsatisfied request for counsel and the interrogation" which led to the incriminating statement. (*Id.*)

In a footnote the Court conceded that the right to counsel, in order to protect the Fifth Amendment right against self-incrimination, was "not absolute." There are times when providing counsel immediately is simply not possible. However,

> "[i]f authorities concluded that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege *so long as they do not question him during that time."* (*Miranda, supra,* 384 U.S. at p. 474, emphasis added.)

(*Roberson, supra,* 486 U.S. at p. 686, n. 6.). *Roberson* thus confirms what *Edwards* and many other cases hold: that the failure to promptly provide counsel, after one has been requested, is only permissible *if the police stop all interrogation. Roberson* speaks directly to the type of police misconduct that took place in appellant's case and requires that appellant's confession be suppressed.

This Court, as well, has recognized the importance of scrupulously honoring a suspect's request for a lawyer, before permitting the state to claim that the suspect has "initiated" contact with the police. In *People v. Boyer* (1989) 48 Cal.3d 247, the police interrogated the defendant for over an hour, stating their belief in his guilt and repeatedly accusing him of lying. The defendant insisted he was innocent and finally invoked his *Miranda* rights. For a significant period the police "ignored several explicit requests by defendant to remain silent and consult a lawyer." (*Id.,* at p.

272.) However, the interrogation eventually ended and the defendant was taken for fingerprinting.

Shortly thereafter, the police officer called the defendant back into the interrogation room to "tell him a couple of things." (*Id.*, at p. 274.) Although the officer made it clear he could not question the defendant because of the *Miranda* invocation, the officer told the defendant about the status of the investigation, including information from a new witness. Then the officer turned to leave the room. The defendant *asked the officer to come back in*, and blurted out, "I did it." (*Id.*).

Rather than finding this an "initiation" of contact by the defendant, this Court acknowledged that under *Edwards*, "defendant's statement was the result of the authorities' improper resumption of contact and questioning." (*Id.*)

> The People suggest that because [the officer] gave no opportunity for response, and had ended the encounter by turning away, defendant must be deemed to have "initiated" a new conversation by calling Lewis back. Our concurrence in that view would violate the spirit of *Edwards*. It would allow circumvention of the prophylactic rule against new approaches by the authorities once the suspect has invoked his *Miranda* right to counsel.

(*Id.*, at p. 275.) The ruling in *Boyer* is a proper application of the clear-cut rules of *Miranda* and *Edwards* and should be applied in appellant's case as well. The record shows that the police not only ignored appellant's several requests for counsel, but actively encouraged him to proceed without counsel. No claim that appellant "initiated" another conversation may be heard. (*United States v. Gomez, supra,* 927 F.2d at p. 1539.) The trial court's application of the law was in error. All three of appellant's statements should have been suppressed.

E. Admission of Appellant's Statements Was Prejudicial.

By definition, an incriminating response is any response, whether inculpatory or exculpatory "that the prosecution may seek to introduce at trial." (*Rhode Island v. Innis, supra*, 446 U.S. at p. 301, n. 5.) As the *Miranda* Court pointed out, if a statement made by the defendant was "truly exculpatory" it would never be used by the prosecution. (*Miranda*, supra, 384 U.S. at p. 477.) Although some of appellant's statements were less prejudicial than his eventual confession, all three tape-recorded interrogations contained incriminating responses made by appellant and, taken together, they were all used as powerful evidence against him, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

In determining the prejudicial effect of the trial court's error in admitting appellant's three recorded statements, this Court applies the harmless beyond a reasonable doubt test of *Chapman v. California* (1967) 386 U.S. 18, 21-22. (*People v. Lujan* (2001) 92 Cal. App.4th 1389, 1403, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 292.) Because the jury was presented with all three taped statements together, their prejudicial effect should be considered together as well. Nevertheless, even if the tape-recordings are reviewed individually, it is apparent that they all contained evidence that helped to convict appellant and sentence him to death.

The first session on Saturday contained damaging admissions that corroborated the otherwise unreliable testimony of Margaret Williams that appellant had come to her house on the night of the murder and that he was with Loretta Kelly. (CT Supp. II 80-81.) Appellant's second taped interview on Monday morning also contained prejudicial admissions:

appellant finally admitted ownership of the vehicle[29] which the prosecution claimed had been involved in a collision with the victim's car, (*Id.*, at p. 95) and he admitted that this car had collision damage. (*Id.*, at p. 96.) Appellant also repeated his earlier statement that Margaret Williams had dropped him off somewhere Monday night. (*Id.*, at p. 94.) All of these admissions were powerful pieces of corroborative evidence elicited directly from the accused.

The third interview was, of course, the *coup de grace*. It contained a full confession by appellant which virtually guaranteed his conviction. A "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." (*Id.* at p. 296.) Without appellant's own statements, particularly the confession, the prosecution would have been left with very little evidence that appellant was the perpetrator of the robbery and murder.

Margaret Williams placed the blame on appellant, but without appellant's statements her testimony was uncorroborated and less likely to be believed, particularly since she was an accomplice who had every reason to shift the blame from herself and onto appellant. Other than appellant's confession and the incriminating, but unreliable, statements of Margaret Williams, there was very little evidence to convict appellant of this crime.

There was virtually no physical evidence[30] connecting appellant to the victim, other than testimony that a small smear of red paint found on the victim's car was "similar" to the paint on appellant's car, and "could have

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[29]Appellant had previously said the "red car" belonged to Loretta. (CT Supp. II 86.)

[30]For a thorough discussion of the physical evidence in this case, see Argument IV, C., beginning on page 90, *infra*.

come" from that source. (RT 1180.) This was hardly enough physical evidence to establish that appellant was guilty of robbery and murder. Moreover, although it was the prosecution's theory that the marks on appellant's finger and ankle were burns, there was no expert testimony to support this theory.[31]

Under no circumstances could it be said that admission of the tape-recorded interviews, which led up to and included appellant's full confession, was harmless beyond a reasonable doubt. The interrogation sessions were the heart of the prosecution's case. The trial court's error in admitting the interviews requires that appellant's conviction and death sentence be reversed and that appellant be granted a new trial without the inclusion of this highly prejudicial evidence.

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[31]The doctors who examined the marks, Dr. Coffey and Dr. Jackson (RT 1124-5), were never called to testify. The one burn expert who *did* testify, Dr. Davies, never addressed the topic of appellant's alleged burns. (RT 1241)

II.

POLICE COERCION RENDERED ALL OF APPELLANT'S STATEMENTS INADMISSIBLE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS. THE TRIAL COURT'S DETERMINATION THAT THE STATEMENTS WERE VOLUNTARY WAS REVERSIBLE ERROR.

The Self-Incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) Statements obtained through compulsion are inadmissible against the accused for any purpose. (*Bram v. United States* (1897) 168 U.S. 532; *Mincey v. Arizona* (1978) 437 U.S. 385, 398.)

The Due Process Clause of the Fourteenth Amendment incorporates the Fifth Amendment privilege against self-incrimination (*Malloy v. Hogan* (1964) 378 U.S. 1), and *Miranda v. Arizona, supra,* 384 U.S. at p. 467, confirms that this privilege applies to state custodial interrogations. If a confession is the product of coercive police activity, it is involuntary and subject to exclusion at trial. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.)

Under some circumstances, a suspect's statements are *presumed* to be involuntary, and therefore inadmissible. The failure to administer *Miranda* warnings creates an irrebuttable presumption of compulsion (*Oregon v. Elstad* (1985) 470 U.S. 298, 307) such that unwarned statements which might otherwise be deemed voluntary must nevertheless be excluded from the prosecution's case in chief. (*Id.*) Thus, while a *Miranda* violation does not in itself constitute coercion, this "legal presumption of coercion" (*Id.,* at fn. 1) affords a bright-line rule, requiring the suppression of the unwarned statements, without regard to whether the statements were

voluntary within the meaning of the Fifth Amendment.

Similarly, in *Edwards v. Arizona, supra,* 451 U.S. 476, the Supreme Court established a second prophylactic layer for the *Miranda* right to counsel, by announcing another bright-line rule. Once a suspect has *asserted* his right to counsel, the interrogation must cease and the police may not approach the suspect for further interrogation, unless counsel is present. If they do approach the suspect, and counsel is not present, a *presumption* arises that all statements obtained thereafter are involuntary and inadmissible, regardless of whether or not the statements would otherwise be considered voluntary under traditional standards.[32] (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 176-177.)

Appellant has previously established in Argument I that his statements are presumptively involuntary under the bright-line rule of *Edwards.* However, assuming for argument only, that this presumption is held not to apply here, appellant's confession was also involuntary because it was the product of a four-day effort by the police to break his will. Their successful tactics pressured appellant into making statements that he never would have made otherwise. Their conduct caused appellant to incriminate himself, in violation his Fifth and Fourteenth Amendment rights. As such all of his statements should have been suppressed.

In determining whether a statement is the product of police coercion, the courts employ the totality of the circumstances analysis, first announced in *Brown v. Mississippi* (1936) 297 U.S. 278. (See, e.g., *Arizona v.*

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[32]"The [*Edwards]* rule . . . conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." (*Minnick* v. *Mississippi* (1990) 498 U.S. 146, 151.)

Fulminante (1991) 499 U.S. 279, 285-286; *People v. Williams* (1997) 16 Cal.4th 635, 659-660; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) "The test. . . is 'whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.' " (*Amaya-Ruiz v. Stewart* (9th cir. 1997) 121 F.3d 486, 494, quoting *Derrick v. Peterson* (9th Cir.1990) 924 F.2d 813, 817.

The central issue upon which the courts focus is the "crucial element of police overreaching." (*Colorado v. Connelly* (1986) 479 U.S. 157, 163.) "While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." (*Id.* at p. 163-164.) Among the factors this Court considers, all of which were present in appellant's case, is whether "a statement was obtained despite the defendant's *invocation of the right to counsel*," (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041, emphasis added.) See also *Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [voluntariness analysis includes considering "failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation."].

In addition, this Court recognizes a "presumption of coercion created by prolonged police custody." (*People v. Bradford, supra*, 14 Cal.4th at p. 1041, citing *Arizona v. Roberson, supra*, 486 U.S. at p. 686.) Evidence which indicates a suspect's "eagerness to talk" *(People v. Bradford, supra*, 14 Cal.4th at p. 1041) may tend to refute a claim that police coercion produced the confession. On the other hand, insistence on one's innocence, requests for counsel, and a reluctance to talk at the point the police begin making their accusations (e.g., saying "I don't want to talk about it" [CT

Supp. II 89-90]) would all help to support a claim of coercion.[33]

Further, while giving false information to a suspect does not, by itself, render the resulting statement involuntary, " 'such deception is a factor which weighs against a finding of voluntariness [citations].' " *(People v. Thompson* (1990) 50 Cal.3d 134, 167, quoting *People v. Hogan* (1982) 31 Cal.3d 815, 840-841.) Finally, in *People v. Avena* (1996) 13 Cal.4th 394,420, this Court said: "Of course, '[a] [c]onfession induced by the threats of prosecution for a capital crime [has] been held inadmissible [citation omitted].' "

It is the prosecutor's burden to prove, by a preponderance of the evidence, that statements obtained from the suspect were voluntary. (*People v. Williams, supra,* 16 Cal.4th at 659, citing *Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Markham* (1989) 49 Cal.3d 63, 71.) The prosecutor in appellant's case failed to meet that burden and the trial court erred in ruling that there was "no evidence of physical or psychological coercion" employed by the police during appellant's interrogation.

A review of the circumstances surrounding appellant's lengthy period of custodial interrogation, particularly in the context of his repeated

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[33]See, e.g., *People v. Boyer* (1989) 48 Cal.3d 247, 273-274. Although this Court found Boyer's confession inadmissible because of the *Edwards* violation, it also noted all of the police pressures that were brought to bear on the suspect prior to his confession. The police had "subjected [Boyer] to over an hour of intensive interrogation, during which the police repeatedly accused him of lying and professed their firm belief in his guilt. He vehemently maintained his innocence and finally invoked his *Miranda* rights to silence and counsel. For a significant time, his pleas were ignored, and the questioning continued over his objection. When interrogation finally ceased, and while he was still in the coercive environment of custody, defendant was taken for 'voluntary' fingerprinting. He was then returned to the interrogation area. . . . There is no evidence that defendant sought to discuss the case further with the authorities during this period." After that, Boyer's "initiation" was held to be of no effect. (*Id.*)

attempts to invoke his *Miranda* rights, demonstrates that appellant's statements were involuntary. Their admission into evidence violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

A. The Tactics Used By the Police Were Precisely Those Described and Condemned in *Miranda v. Arizona.*

The *Miranda* decision involved three cases in which the police obtained incriminating statements from a suspect who had not been fully apprised of his rights. In deciding the admissibility of those statements, the Supreme Court took a close look at the custodial interrogation environment, particularly the various psychological pressure tactics which the police often used to coerce confessions. The Court found that many of these interrogation techniques, described at length in police manuals, were used "for no other purpose than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation," which the Court found no less "destructive of human dignity" than physical intimidation. (*Miranda, supra,* 384 U.S. at p. 457.)

Although the police in appellant's case read him his rights at the beginning of the first tape-recorded session, because they promptly ignored his invocation of those rights, appellant was in no better position than the suspects in the *Miranda* case, who were *not* fully informed of their rights. Arguably, appellant was in a worse position. (See, e.g., *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1243 ["With his requests to see a lawyer disregarded, Cooper was a prisoner in a totalitarian nightmare, where the police no longer obeyed the Constitution, but instead followed their own judgment, treating suspects according to their whims."]

Though the officers who interrogated appellant *uttered* the words of the *Miranda* warnings, their subsequent conduct showed appellant that the

warnings were meaningless. In fact, *Miranda* provided no buffer between appellant and the officers' desire to extract a confession. Appellant discovered that his attempts to invoke the *Miranda* rights were futile.

Thus, because appellant's *Miranda* invocation fell on deaf ears, the pressure tactics described in *Miranda* are especially relevant here. Knebel and Salgado used all of the following techniques to break appellant's will and secure his confession:

1. **Keeping the suspect *incomunicado***

Miranda notes that the principal factor "contributing to a successful interrogation" is keeping the suspect deprived of all psychological advantage by interrogating him alone, in private, and preferably in the investigator's office. (*Miranda, supra,* 384 U.S. at p. 449-450.) In the present case, throughout the entire period of appellant's interrogation, between Saturday and Tuesday, he was kept *incommunicado*, in police custody, without access to an attorney or anyone else upon whom he could rely. He only had contact with police officers and the doctor who examined him at the officers' request. (See Knebel's testimony, RT 1091-1095; RT 1112-1137). When he was brought out of his cell for questioning, he was taken to the detective bureau interview room and was handcuffed to his chair. (RT 414; RT 1091-1092; RT 1117.)

2. **Displaying confidence in suspect's guilt**

"To highlight the isolation and unfamiliar surroundings," police manuals suggest that interrogators "display an air of confidence in the suspect's guilt and . . . maintain only an interest in confirming certain details." (*Miranda, supra,* 384 U.S. at p. 450.) The suspect's guilt should be presented to him as a "fact" already known by the police. The "interrogator should direct his comments toward the reasons *why* the subject

committed the act, rather than court failure by asking the subject *whether* he did it." (*Id.*, emphasis added.) This was precisely how the officers presented themselves to appellant. They immediately expressed their belief in his guilt. In the same sentence that they told him that a woman had been robbed and murdered, they told appellant he would be going to prison or "fry in the gas chamber." (CT Supp.II 82.) Expressing no doubt that they had the right person, the police only focused on "why" he committed the murder: "Why did you have to kill the woman, she gave you the money?" (*Id.*, at p. 84); "Why did it turn the way it did?" (*Id.*, at p. 89.) The police appeared to only need the details: "Loretta was with you when you torched the car. Was Margaret with you too?" (*Id.*, at p. 83.)

3. **Minimizing the moral seriousness of the crime**

Police manuals instruct officers to "minimize the moral seriousness of the offense." (*Miranda, supra,* 384 U.S. at p. 450.) Sometimes this is accomplished by suggesting that the suspect did not mean to do the act, or that he was in a state of mind that might lessen his responsibility. (*Id.*) Officer Salgado used this technique on appellant, telling him that he should confess because he probably did not *intend* for the victim to die: "So when you say, 'I didn't kill the woman,' I believe you *didn't mean to kill her*. . . I know . . . *you didn't mean to kill her*, David. (*Id.*, at p. 87-88.)

Police manuals also suggest that the suspect be offered "legal excuses for his actions in order to obtain an initial admission of guilt." Then, after the suspect has obtained an admission, the police are advised to confront the suspect with the evidence that negates the very excuse that they suggested. (*Miranda, supra,* 384 U.S. at p. 451-452.)

The police used this strategy on appellant, suggesting that although he may have put the victim in the trunk of her car, he did not mean for her

to die in the way that she did. (CT Supp. II 87-88.) This tactic was effective in persuading appellant to admit, at the beginning of the third taped interview on Tuesday afternoon, that although he drove the victim's car, and helped to set it on fire, he did not know that the victim was inside of the trunk. (*Id.*, at pp. 102-107; 112.) Later, the police confronted appellant with questions about the gun found at the scene. (*Id.*, at pp. 116-117.) This led to appellant's final admissions that the gun was his, and that he and Loretta had robbed the woman and put her in the trunk of her car. (*Id.*, at pp. 117-121.) By pushing appellant to first admit to the less serious crimes, they were able to later pressure appellant into the full confession of robbery and murder.

4. **Keeping suspect in custody for days**

Miranda recognized the coercive effect of keeping a suspect in custody for days, while interrogating him throughout this period. Quoting again from a police interrogation manual, the Court noted this instruction: "In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion." (*Miranda, supra,* 384 U.S. at p. 451.)

Here, appellant's interrogation took place over a four-day period, beginning on Saturday and concluding with his confession on Tuesday. During this period, officers returned to his cell and brought him out several times, each time to gather more incriminating information from appellant. (RT 1122-1126.) By the fourth day, appellant's confession was inevitable.

In *People v. Bradford, supra*, 14 Cal.4th at p. 1041, this Court acknowledged that there is a "presumption of coercion created by prolonged

police custody." *Bradford* cross-referenced *Arizona v.Roberson, supra,* 486 U.S. at p. 686, where a lapse of *three days* between the "unsatisfied request for counsel and the [subsequent] interrogation" in which the defendant confessed, was considered *prolonged*, and sufficient to create a presumption of coercion that could not be overcome by merely repeating the *Miranda* warnings.

In appellant's case, *four* days elapsed between his "unsatisfied request for counsel" and his eventual confession. The fact that he was subjected to further police interrogation and badgering in between, only makes his case more compelling than that of the defendant's in *Roberson*, where no further police contact took place in the interim.

5. **"Good cop" - "bad cop" technique**

This technique ("Mutt and Jeff" act) requires two agents acting in concert. One speaks in a friendly, familiar way, while the other is "the relentless investigator, who knows the subject is guilty and is not going to waste any time." (*Miranda, supra,* 384 U.S. at p. 452.) The friendly cop solicits the suspect's cooperation by suggesting certain benefits. The heavy-handed approach used by the unfriendly cop, thrusts the suspect in the good cop's court, and pressures the suspect into seeking out that cop's advice and help.

In appellant's case, the two police officers alternated their interrogation styles between Knebel's hostile approach ["Why did you have to kill the woman; she gave you the money?" (CT Supp. II 84)], and Salgado's friendly approach . Salgado addressed appellant by his first name, and urged him to cooperate, to confess and to show remorse, so that the jury would go easier on him:

David, listen to me. . . I'm gonna tell you the truth, ok. . . I

> don't lie to anybody. (*Id.* at p. 85). . . [T]alk to us and tell us what . . . only God knows right now. . . . The only thing that's going to help you right now, David. . . is to tell the truth and I'll tell you why. . . (*Id.,* at p. 87.) [W]hen the jury and the judge looks at this, that you admitted you were wrong and you told the truth, they're not gonna be so hard on you.

(*Id.* at p. 88.)

The officers' role-playing was effective. Appellant perceived their opposite roles and expressed a desire to deal only with the one, not the other. When appellant asked for an attorney and Salgado talked appellant out of it ["we wanted to see if you wanted to tell the truth. . . (*Id.*, at p. 85)], appellant finally relented and said he would be willing to talk to Salgado, but not to Knebel: "I'll talk to him. But you sittin' up here telling me that I done killed somebody." (*Id.,* at p. 85.)

As the "friendly cop," Salgado also offered to be continuously available to appellant, if he decided he wanted to talk about the victim. Appellant simply had to "tell the jailor." (*Id.*, at p. 93.) Remembering this friendly offer, when appellant asked to speak "some more" with the investigator, he began his final interview with a question to Salgado, "You said you could help me; how can you help?" (*Id.*, at p. 99.) Kept isolated, with only the police officers available to him, appellant sought out "help" from the only person left, the "friendly" cop.

6. **Discouraging the suspect from seeking counsel**

When a suspect has indicated a desire to speak to an attorney, the manuals advise the police to actually *affirm* the rights of the suspect. This will surprise the subject, who is expecting the police to react unfavorably to the request. This technique "usually has a very undermining effect." (*Miranda, supra,* 384 U.S. at p. 453.) By appearing especially fair, the

police are able to "psychologically condition" the suspect to receive their advice. Then, when the police suggest that an attorney shouldn't be necessary, unless the suspect has "something to hide," or unless the suspect is unwilling to just "tell the truth," most suspects will not persist in their demand for counsel. (*Id.,* at p. 454.)

In appellant's case, the police used a form of this technique to convince him to keep talking, without counsel. After Knebel accused appellant of murder and having lied about it, appellant became agitated and demanded an attorney: "I want to see my attorney cause you're all bullshitting now." (CT Supp. II 84.) Salgado quickly jumped in, to "affirm" appellant's rights. He agreed with appellant that they had to have more than hearsay evidence: "I know. You know we have to show more than this. You're right. . . ." (*Id.*) But then, Salgado quickly turned his attention to the request for counsel and expressed his "hope" that appellant would be willing to simply tell the truth. Salgado told appellant that by asking for a lawyer, it was "obvious" that appellant was "not ready to tell the truth." (*Id.,* at pp. 84-85.) Appellant responded by agreeing to talk to Salgado, but not to Knebel, since Knebel was the one taking the hard line with appellant. (*Id.*) The technique worked well. Appellant was side-tracked from his demand for counsel; and, in his desire to show Salgado that he was "telling the truth," appellant agreed to continue talking to him.

7. **Deceptive interrogation practices**

Miranda notes that interrogators are sometimes instructed to obtain a confession by using deception or trickery. One such technique involves placing the suspect in a line-up in which a previously-coached witness identifies the suspect. (*Miranda, supra,* 384 U.S. at p. 453.) A similar ruse was used in appellant's case. The officers claimed to have certain evidence

establishing appellant's guilt, when in fact that evidence did not exist.

For example, Salgado told appellant, "Do you realize that we have certain evidence that you don't even know about that puts you there? Do you realize that?" (CT Supp. II 90.) When appellant replied that such evidence was not possible since he "wasn't there," the officer said, "You don't know what gasoline does, do you?" (*Id.*) When appellant said that he didn't, the officer said, "I know you don't or else you wouldn't be sitting here lying like you are." (*Id.*) The police were obviously trying to convince appellant that they had discovered some unusual type of evidence, related to the properties of gasoline, that proved appellant had been at the crime scene. In fact, there was no such evidence.

Appellant's attempt to find out what the officer meant by this was ignored, as Knebel then suggested to appellant that his *fingerprints* were discovered: "Do you know what fingerprints are?" (*Id.*) When appellant said that he did, Knebel simply told appellant to "think about fingerprints." (*Id.*, at p. 91.) Again, there was no fingerprint evidence obtained in this case.[34] The police admitted that they lied to appellant in order to pressure him into confessing. (RT 1116.)

Finally, the police falsely represented that they had three eye-witnesses who could identify appellant at the ATM machine where they claimed he had withdrawn money from the victim's bank account. They told appellant, "Three people came up right after you guys finished getting the two-hundred and they saw you face to face. Yeah, you don't know that

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[34]See the testimony of the State's fingerprint expert at RT 1148.

do you?" (*Id.*, at p. 92.) This statement was also false.[35]

"The compulsion proscribed by *Miranda* includes deception by the police. (Citation omitted) [indicting police tactics . . . such as using fictitious witnesses or false accusations]." (*Illinois v. Perkins* (1990) 496 U.S. 292, 306.) As previously noted, this Court has also recognized that the use of deception or false information "is a factor which weighs against a finding of voluntariness." (*People v. Thompson, supra*, 50 Cal.3d at p.167.) The police used classic deception techniques to pressure appellant into confessing. Eventually, appellant succumbed to the pressure.

8. **Threats of the gas chamber**

Since the *Miranda* decision dealt specifically with the types of techniques that were mentioned in police interrogation manuals for effectively breaking the will of a suspect in custody, threatening the suspect with "the gas chamber" was not separately addressed. However, this Court recognized in *People v. Avena, supra*, 13 Cal.4th at p. 420, that a confession obtained through threats of capital punishment should certainly not be admitted. Yet that is precisely what took place in appellant's case. See also, *People v. Hinds* (1984) 154 Cal.App.3d 222, 238:

> Threats, *express or implied*, of heavy punishment, accompanied by promises or suggestions of leniency or other advantage *if a confession is given*, render a statement inadmissible. Such tactics are distinguishable from mere exhortation to tell the truth.

(Emphasis added.) In *Hinds*, the detectives' "thinly-veiled threat of the

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[35]One man, Jay Zima, testified at trial that he used the ATM machine where the victim's money was last withdrawn at about 9:46 p.m., on the evening of March 20, 1989. He only vaguely recalled that there was a man and a woman ahead of him in line that night. (RT 1230.)

death penalty," combined with implied promises that telling his side of the story would improve his prospects, were held to be two of the pressures that motivated the defendant to confess and which rendered his confession involuntary. (*Id.*, at p. 239.)

In the present case, the officers told appellant that the *only thing that would save him from the gas chamber* was a confession. (CT Supp. II 88.) Knebel began these threats fifteen minutes into the first interrogation. (*Id.*, at p. 82.) The gas chamber was mentioned five times in the first session.[36] (CT Supp.II 82-93.) The officers said:

> And you're going to go to prison. . . . you're going to fry in the *gas chamber* (*Id.*, at p. 82). . . . You are going to be found guilty and when they find you guilty *the only thing that's going to save you*. . . save you from, you know, spending the rest of your life in prison. . . or the *gas chamber.* Or. . . the *gas chamber* is for you, right now, to tell us the truth about this and *why you did it* (*Id.*, at p. 88) . . . [T]he jury's going to say, you ain't worth saving, give him the *gas chamber.* (*Id.*, at p. 92.)
> . . . Well David, that's what's going to send you to the *gas chamber."* (*Id.,* at p. 93.)

In summary, virtually every coercive police tactic described in *Miranda* was used in appellant's case. In addition, the police officers repeatedly threatened appellant with the gas chamber and assured him that the judge or jury would go easier on him if he simply confessed and showed remorse. The fact that this four-day ordeal began with the standard *Miranda* warnings is not particularly significant, since appellant's attempts to invoke those rights were repeatedly ignored.

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[36]The first interview lasted 30 minutes, from 4:00 to 4:30 p.m. (RT 400.) The transcript of this interrogation was twenty pages long. References to the gas chamber began half-way through, on the ninth page. (CT Supp. II 82.)

These tactics, combined with the officers' ongoing efforts to convince appellant that he did not need, and could not get, the assistance of counsel, resulted in appellant's belief that the only way to save his life was by confessing to the police. His confession was the direct result of unconstitutional police questioning, threats, promises of leniency and other improper and coercive tactics which overcame his will.

B. The Trial Court's Ruling Admitting Appellant's Statements Was in Error and Highly Prejudicial.

At the pretrial hearing in which the admissibility of appellant's statements was litigated, the defense argued that appellant's statements were coerced from him by the police officers and that the officers told him what to say. (RT 470.) The prosecutor argued that the police simply encouraged appellant to tell the truth and show remorse and that "having thought about it for three days while in custody" appellant decided he would be better off "indicating that he showed some remorse." (RT 472.) The trial judge ruled that all of appellant's statements to the police were admissible because, from the police tapes and their transcripts, he found "no evidence of physical or psychological coercion." (RT 473.) The trial court's ruling was in error.

On appeal this Court reviews independently the trial court's determination on the ultimate legal issue of voluntariness. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) While any factual findings by the trial court regarding the circumstances of the interrogation are reviewed under the "deferential substantial evidence standard," (*Id.*, at p. 660) in this case the trial court failed to make any factual findings. It simply observed that appellant "freely banter[ed] back and forth" with the officers and "carefully exonerated himself when it [was] appropriate." (RT 472.) Other

than the trial court's finding that the officers' "talking about the death penalty" was not coercive (RT 473), (which itself was simply another legal conclusion), the court failed to make any finding whatsoever about the conduct of the police officers. Focusing only on *appellant's responses* to the improper police tactics, the trial court simply concluded that all of appellant's statements had been made voluntarily "with no coercion on behalf of the officers." (RT 473.)

The trial court failed to consider the totality of the circumstances, all of which have been discussed herein. The trial court ignored the various coercive tactics used by the police to overcome appellant's will, all of which have been recognized by this Court and the U.S. Supreme Court as being relevant to a proper determination of whether a defendant's statements are voluntary. In this case, those tactics were successful in securing appellant's confession in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. Because all of his statements were involuntary, they were inadmissible.

As was previously discussed in Argument I, part E, admission of appellant's statements, particularly his confession, could not have been any more prejudicial. It cannot be said that the error in admitting his statements was harmless beyond a reasonable doubt. Appellant's conviction and death sentence must be reversed.

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III.

THE TESTIMONY OF MARGARET WILLIAMS, THE KEY PROSECUTION WITNESS, WAS THE PRODUCT OF POLICE COERCION, WAS INHERENTLY UNRELIABLE, AND DEPRIVED APPELLANT OF A FAIR TRIAL.

Margaret Williams was the key prosecution witness. Although both the preliminary hearing judge and the trial court found that her statement to the police implicating appellant was coerced, her testimony which tracked that statement was nevertheless deemed admissible. This was error and the admission of Margaret Williams' testimony violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

A. Facts

On March 24, a few days after the murder of Joanne Lacey, the police received a phone call from John Wright. Mr. Wright explained that his daughter had overheard a conversation pertaining to the burning of an automobile. His daughter had heard Margaret Williams state that she was paid money to purchase gasoline and to act as a lookout while someone burned a car. Based upon this information from Mr. Wright's daughter, the police arrested Margaret Williams (hereinafter Margaret) on March 25, 1989. She was their first suspect in this murder case. (RT 1087-1088.)

In the initial police interview, the police obtained a *Miranda* waiver from Margaret (CT Supp.II 36-37) and informed her that she had been overheard at the Taco Bell speaking to her friend Loretta Kelly about the woman who had been killed. (*Id.*, at pp. 37-38.) At first, Margaret denied everything: she denied having had a conversation with anyone; she denied having been at a Taco Bell with Loretta; she denied having had any conversation about gasoline or burning a car. (*Id.*, at p. 38.) In response, the

police told Margaret that she was not "in any trouble," but that she would be if she didn't tell them the truth. (*Id.*, at p. 39.)

Very soon thereafter, the police told Margaret that they did not believe her, (*Id.*, at p. 42) and that if she knew anything about a murder, she should tell them, "*unless you were involved and you're afraid that you [are] going to get yourself in trouble.*" (*Id.*, at p. 43, emphasis added.) She assured them that she was not afraid of going to jail; that she had been there before. They asked her about her children, but she said that her mom would take care of her kids. (*Id.*, at p. 44.) Again, they told her that she was not in trouble, but explained that her friend Jeanette had said Margaret had admitted, in front of another witness, her involvement in the car burning. Margaret kept insisting that Jeanette was lying. (*Id.*, at pp. 44- 45.)

Then the police accused Margaret of lying to them (*Id.*, at p. 45) and told her that the bottom line was that she was "*in a lot of trouble*" and was going to be *booked for first degree murder* and would not be able to call her mother. (*Id.*, at p. 47.) Margaret immediately began crying and expressing concern about her children, so the police told her: "*We don't think you killed anybody but the law says that . . . if you have information. . . and you're not telling us, you're just as guilty as the person that [did it]. . . .*" (*Id.*, at p. 48, emphasis added.) They told her they believed she was a witness to what had happened and that she knew who was responsible: "*I believe you saw that car burn up.*" (*Id.*, at pp. 49-50, emphasis added.) They also told her that she was "*going to be in jail for [the real killers] no matter what.*" (*Id.*, at p. 51, emphasis added.) A second time they told her, "*You are going to be in jail. There is no bail.*" Margaret told the police they were "trying to put words in [her] mouth." (*Id.*, at p. 54, emphasis added.) But they insisted that they had to "*file*

murder one" on her. (*Id.*, at p. 55, emphasis added.) Then, they explained:

> *If you don't want to be in jail* and you don't want to take the fall for this, *like you're going to*, then you talk to us right now, right here and then we will tell you the truth. Ok. *Because you know what we want. We don't want you; we want the person that did this*. You know that. So just tell us the truth. . ."

(*Id.*, at p. 56, emphasis added.)

In response, Margaret asked the police, "What do you want me to tell you? Cause I want to go home." (*Id.*) Although she claimed to know nothing about gasoline, or who "killed the lady," she said that her brother-in-law, David, and a friend, Loretta, had come to her house with money and jewelry that David said he had gotten from some lady. As soon as she offered this much information, the officer told her, "Sweetheart, now listen to me. Listen to me carefully. *You're not in any trouble*, ok. Ok, *you're not in any trouble*; all we want is the truth." (*Id.*, at p. 57, emphasis added.)

Margaret described the jewelry that she had seen that evening and said that Loretta had fifty dollars that she was paid to "watch out." (*Id.*, at p. 59.) Margaret said appellant had "a couple hundred" dollars and paid "somebody a hundred dollars to go get some gas. I don't know I was not there." (*Id.*, at p. 62.) Margaret told the police that at around two in the morning, she had dropped Loretta off on Summit and appellant off at the corner of El Molino and Del Mar. (*Id.*, at p. 63.) The police then ended the tape recorded interview. Margaret remained in custody.

Three days later, on Tuesday, March 28, at 8:30 a.m., the police returned to the jail and interrogated Margaret again. For the most part, Margaret repeated what she had told the police in the first interview, supplying a few more details. (*Id.*, at p. 65.)

At the preliminary hearing held on December 8, 1989, the prosecutor called Margaret Williams to testify against appellant. The defense objected, on the grounds that her testimony was the product of police coercion, and therefore inadmissible. (CT 272-275.) The court overruled the objection and allowed her testimony. During cross-examination, she admitted that the only reason she had spoken to the police was because they had continually threatened her, especially threatening to file first degree murder charges against her. (CT 306.) Margaret confirmed that the police came to her again at the Pasadena jail and asked her many of the same questions. When asked if they used any threats against her, she replied, "Yes. Two days later, yes." And when asked why she had finally spoken to them she testified, "Because I wanted to be home, [go] home to my kids." (CT 307.)

She further confirmed that it was her understanding that if she spoke to the police, they would not file murder charges against her. (CT 308.) She initially did not want to talk to them because she "didn't want to have anything to do with it." (CT 309.) She explained that she was "frightened" about talking (CT 310), because, in her own words, "I didn't want to leave my kids and my mom by talking." The only threats she received were from the police, that they would file charges against her if she didn't talk to them.

She did *not* receive threats from anyone about *not talking about what she had heard.* (CT 311.) When the police came to her the second time, she cooperated with them because she believed that she was going to be able to go home. (CT 318.) By the second interview, she believed that the police had accepted her statement that she had not participated in the crime. (CT 319.)

Nevertheless, even as she was testifying at the preliminary hearing, Margaret stated that she felt she had *no choice* but to testify then; that if she

had a choice, she would not have done so (CT 352); that she was *still* fearful of the police and recognized that they had power over her "on the streets." (CT 353.) She believed if she did not cooperate with the prosecutor, the police would still "bother her." (CT 354.) Moreover, when asked if she had any idea what it meant to be granted immunity, she confirmed that she did not. (CT 375.) She did, however, fully understand what the prosecutor meant when she said that Margaret could be charged with perjury. When asked what that meant, she replied, "Lying." (CT 375.)

Thus, while Margaret *did not* understand that the repeated threats to prosecute her for murder were no longer in effect, she *did* understand that the prosecutor was keeping her in line by letting her know that she could still be charged with perjury, if she lied. Margaret fully understood what the police and the prosecutor were looking for from her and she obliged.

At the preliminary hearing, Judge Morris ruled that although there was coercion in the initial interview, Margaret's testimony was admissible because there had been "sufficient attenuation." (CT 368.) The court noted that the prosecutor was using Margaret's live testimony, not the original coerced statement, "although *that testimony arguably could have come from the original coercion.*" (CT 368, emphasis added.) That, of course, was exactly the point.

The issue was litigated a second time, just prior to trial. The prosecutor filed a motion under Evidence Code § 402, along with points and authorities asking that Margaret's testimony be admitted. (CT 1856) At the hearing the defense argued that since Judge Morris had previously ruled that Margaret's original statement to the police was coerced, and the content of the statement had not changed, the trial court should exclude her current testimony as being the product of coercion. (RT 390-391.)

The trial court did agree with Judge Morris's finding that Margaret's statement had been coerced :

> [T]he techniques used by the Pasadena Police Department, this holding over her the fact she couldn't see her children and they talk about God a lot and also words like – there are some other words in there – the court finds that the confession,[37] if not coerced, it certainly held her in a position of doing what they wanted her to do. *If the legal effect is coercion, the court finds that to be true and finds that the magistrate acting at the preliminary hearing correctly found that to be the case.*

(RT 393, emphasis added.)

Nevertheless, the trial court also agreed with the earlier ruling that because nine months had passed between the police interrogation and Margaret's preliminary hearing testimony, any coercive effect was sufficiently attenuated. Finding that "her [preliminary hearing] testimony was freely and voluntarily given, that she didn't feel under the coercion of the police or anybody else. . . ," the trial court allowed Margaret's testimony against appellant, which mirrored her coerced statement to the police. (RT 394.) This ruling was in error.

B. Margaret Williams' Testimony Was the Product of Police Coercion, Was Unreliable, And Should Not Have Been Admitted Against Appellant.

A defendant has standing to assert that his own due process right to a fair trial has been violated when, as here, the trial is infected by the

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[37]Although the trial judge used the word "confession" in describing Margaret's statement to the police, he later corrected himself, calling it merely a statement ["I don't think it is a confession because she is not the defendant. I don't know how it could be a confession."]. (RT 394.) While the judge was correct in concluding Margaret's statement was not a confession (she placed all responsibility for the crimes on others and did not implicate herself in any way), his reasoning (that it was *not* a confession because she was *not* a defendant) was in error.

admission of involuntary statements coerced from a third party. (*People v. Jenkins* (2000) 22 Cal.4th 900, 966; *People v. Badgett* (1995) 10 Cal.4th 330, 344 [third party's testimony may be excluded where coercion has affected the third party's trial testimony]; *People v. Douglas* (1990) 50 Cal.3d 468, 499 [admission at trial of improperly obtained statements of a third party which results in a fundamentally unfair trial violates a defendant's Fifth Amendment right to a fair trial.] Thus, this Court has affirmed that

> if the defendant seeks to exclude a third party's testimony on the ground the testimony is somehow coerced or involuntary, "[a]ny basis for excluding [the third party's] testimony must be found in a federal constitutional right *personal* to defendant." (Citation omitted, emphasis in quotation.) Further, the basis of the claim must be that *coercion has affected the third party's trial testimony.*

(*People v. Badgett, supra*, 10 Cal.4th at p. 344, emphasis added.) As discussed below, there is no question that coercion *affected* Margaret Williams' trial testimony.

Margaret initially denied knowing anything about the crimes that took place. However, after being threatened with murder charges and losing her children, she told the police what they wanted to hear. Her fear of the police and of prosecution had not subsided nine months after her first interrogation, when she testified at the preliminary hearing. Her testimony, like her original statement, was unreliable and should have been excluded as such. Instead, the state was allowed to benefit from its own abuse of police power. With threats and intimidation, the state obtained unreliable testimony which was essential to appellant's conviction.

In *People v. Jenkins, supra*, 22 Cal.4th 900, the defendant moved to suppress certain evidence, on the grounds that it was the "fruit" of

statements that had been coerced from Duane Moody, a co-defendant whose case had been severed from Jenkins' before trial. Jenkins sought to exclude: (1) several of Moody's statements to the police; (2) evidence which was discovered through Moody [the murder weapon and evidence related to the vehicle used in the crime]; and (3) the testimony of two other witnesses (the Woodsons) who were also identified by Moody.

The trial court found that one of Moody's statements had been coerced by the police. That statement, and a later one, deemed to be "fruit of the earlier coerced statement," [*Id.*, at p. 964]) were excluded from evidence. However, with respect to the weapon, the car, and the Woodsons' testimony, the trial court admitted all of that evidence. It ruled that such evidence would have inevitably been discovered during the course of a lawfully conducted investigation. (*Id.*, at p. 965.)

On appeal, this Court agreed that the physical evidence and the Woodsons' testimony was properly admitted into evidence. It was admissible, however, not because of the inevitable discovery rule, but because Jenkins had no due process right to the exclusion of that evidence. (*Id.*) Because the only person whose statement had been coerced was Moody, and Moody had not been called to testify, there were no grounds for attacking the other evidence. It was not enough to say that, but for Moody's coerced statement, the evidence would not have been discovered. In this Court's words:

> [D]efendant did not seek to exclude statements of the third party. Moody did not testify, nor was evidence of his involuntary statement to the police presented in evidence.

(*Id.*, at p. 967.) Rather, Jenkins' claim was based strictly on the theory that the challenged evidence was the "fruit of the poisonous tree." However,

that doctrine applies only when it is raised by the person whose own Fifth Amendment privilege has been violated. It is a judicially-created rule that is meant to deter unlawful police conduct, but may not be raised on the basis of a violation of a third-party's rights. Jenkins had standing only if he could show that the challenged evidence, obtained via Moody, was itself unreliable. Jenkins, however, could not make that claim. His theory was simply that the evidence was the "fruit" of Moody's involuntary statement.

Appellant, on the other hand, *is* making the type of claim that the *Jenkins* Court said could give rise to a due process claim: when testimony *affected by coercion* is actually presented at the defendant's trial. Margaret's testimony was very much "affected by" coercion, which, in turn, directly undermined its reliability.

In *Jenkins*, this Court indicated that if Moody himself had been called to testify, it would have been an entirely different matter: "Moody did not testify, nor was evidence of his involuntary statements to the police presented in evidence." Noting that "coercion of a statement is far less likely to render physical evidence unreliable than it is likely *to affect the reliability of trial testimony*," (*Id.*, at p. 967, emphasis added), this Court found no basis for excluding the evidence.

Jenkins left open the possibility that a due process claim could arise out of circumstances such as those presented here by appellant - - when a witness was shown to be subject to "police coercion before or during trial." (*Id.*, at p. 968.) That is what took place in the case of Margaret Williams.

Every time she was asked, Margaret admitted that she would not have given a statement, and would not have testified in court, but for her fear of the police. Her own testimony at the preliminary hearing contradicted the finding that her fear of prosecution, as well as her fear of

the authorities in general, had been attenuated with the passage of time. She testified that she had no idea what the immunity agreement was all about. However, she knew exactly what it meant to be prosecuted for perjury. From the time of her first interrogation, until she testified at appellant's trial, Margaret did what she had to do to avoid prosecution for murder.

It defies logic to believe that an *unreliable*, coerced statement can automatically become *reliable* with no more than the passage of time. Margaret Williams had everything to lose and nothing to gain by changing her original story to the police. Regardless of whether the passage of time was one hour or one year, Margaret's fear of a murder charge, fear of the police, and fear that she could be separated from her children, would have been just as real at the time of her arrest, as it was at the preliminary hearing, and as it was at appellant's trial.

When the police first questioned Margaret, they suspected her of being a full participant in the crime. The informant had claimed that at the Taco Bell, Margaret admitted to being paid money to buy gasoline and to act as a lookout in this crime. When Margaret denied everything, including even having been at the Taco Bell, the police threatened her with first degree murder charges, assured her that she *would* go to jail and reminded her that there would be no one to take care of her children. When she began crying, they shifted their tactic, telling her that they did not believe that she was the one who had done the killing and urging her to place the blame on others.

Without regard to who was in fact responsible for the murder, the police let Margaret know that *she would be free to go if she would only assign blame to someone else*. Desperate to avoid prosecution, going to

prison, and leaving her children motherless, Margaret Williams named her brother-in-law, appellant David Williams, as the killer. The police made it clear what information they wanted from her, and Margaret obliged. ("*What do you want me to tell you. Cause I want to go home.*" [CT Supp.II 56, emphasis added.]) Her words were unquestionably the product of coercive police tactics.

The fact that Margaret Williams continued to repeat the same story throughout the preliminary hearing and trial does not support the State's claim that her testimony was no longer the product of coercion. Her repetition of the police-coerced story simply demonstrates that Margaret figured out (1) that she was in serious trouble and could be charged with murder and (2) that placing blame on appellant was her "get out of jail free card." Once her situation, and its solution, became clear, Margaret had absolutely no motivation to change her story -- so she didn't.

Margaret's testimony at the preliminary hearing confirmed that she was *still* afraid of the police. (CT 353.) She felt that *even if she cooperated*, they still would not leave her alone; so that if she did *not cooperate* they would certainly bother her. (CT 354.) After her release from custody, the only reason she was willing to speak again to the prosecutor was because she "didn't want to get involved in a murder charge or get put in jail again." (CT 348.) The logic behind the trial court's finding of "attenuation" cannot stand. Once Margaret made the decision to save herself and implicate appellant, realistically, she was forever locked into that position.

The courts have recognized that, as a practical matter, coerced testimony from a key witness may well be *less reliable*, than a coerced confession from a defendant:

> Given the proposition that a coerced confession is unreliable and must, therefore, be excluded, it is illogical to permit the use of evidence coerced from a witness. *Such evidence is no more reliable or trustworthy than is a coerced confession. As a practical matter it may well be less reliable. So-called key witnesses are often potential defendants as well.* Their interest in self-preservation may motivate them to avoid or reduce the likelihood of direct involvement by *laying the blame elsewhere.* Even a witness not faced with potential prosecution may be less motivated toward resisting coercion than would a target defendant. He may succumb to undue pressure *for no other reason than to be left alone and allowed to go on his way.*

(*LaFrance v. Bolinger* (D.Mass.1973) 365 F.Supp. 198, 205, emphasis added.) In *Jenkins, supra,* this Court cited *LaFrance* with approval, for the proposition that "in some instances, 'courts analyzing claims of third party coercion have expressed some concern to assure the integrity of the judicial system' by vindicating a due process right of the defendant in this context." (*Jenkins, supra,* 22 Cal.4th at p. 968.)

Margaret Williams exactly fits the description of the pressured witnessed described in *LaFrance.* As a *potential* defendant, she had everything to gain by sticking to her original coerced statement to the police. While a defendant who confesses to a crime obviously suffers drastic consequences from his own confession, a *potential* defendant who places the blame on *someone else*, suffers no ill consequences from her statement. She has nothing to lose and everything to gain. While she may be reluctant to implicate someone else, and only willing to speak under pressure, when it becomes clear that her only choice is to implicate someone else, or suffer the consequences herself, the choice is easy.

Regardless of immunity agreements or statements of reassurance from the prosecutor or the police, a person who fears being prosecuted for

murder, and suddenly finds that by implicating someone else the problem goes away, is certainly not going to later change her story, only to risk the same, or perhaps additional, consequences.

Thus, to whatever extent the original coerced statement is deemed unreliable, so too must the later statement. Since Margaret would have had no reason to change her original story to the police, a story that all parties and the trial court agreed was the result of unlawful coercion, her later identical story was similarly tainted by the threats from the police. It cannot be said that coercion did not affect Margaret's trial testimony.

> Coerced testimony from any source is inherently unreliable and, therefore, suspect beyond redemption. *Such testimony merits no consideration in the judicial process.*

(*LaFrance v. Bohlinger, supra,* 365 F.Supp. at p. 205, emphasis added.)

Appellant had a Fourteenth Amendment right to a fair trial, that is, one in which the evidence was reliable, and *not* the product of coercive police tactics. Instead, appellant was convicted on the basis his own forced confession, and the unreliable testimony of a witness who had every reason to shift the blame to appellant. Margaret Williams's testimony should have been excluded.

C. Admission of Margaret Williams' Testimony Was Prejudicial to Appellant.

Other than the audio tapes of appellant's own coerced statements (Argument I and II, *supra*) Margaret Williams' testimony was the centerpiece of the prosecution's case. She was clearly the State's most important witness. Her "eye witness" account of her encounter with appellant on the night of the murder, her description of the events leading up to the victim's death, told in considerable detail, had to have had a profound impact on the jury. Because it cannot be said that her testimony

could not have "contributed to the conviction," it cannot be said that the trial court's decision allowing her testimony was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Without it, there would have been very little evidence, other than appellant's equally inadmissible confession, to connect appellant to the crimes. A full discussion of the remaining evidence, found in Argument IV, C., *infra,* demonstrates that, except for the evidence obtained through police coercion, there was insufficient evidence to convict appellant. Appellant's conviction and death sentence must be reversed.

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IV.

THE TRIAL COURT'S FAILURE TO GIVE THE NECESSARY ACCOMPLICE INSTRUCTIONS WITH RESPECT TO THE TESTIMONY OF MARGARET WILLIAMS DENIED APPELLANT A FAIR TRIAL.

As set forth in the previous argument, Margaret Williams' testimony was the product of police coercion, inherently unreliable, and should not have been admitted. However, given that her testimony *was* allowed, the trial court should have at least provided the jury with the requisite accomplice instructions regarding her testimony.

A. Facts

The witness whose testimony was most critical to the prosecution's case was appellant's common law sister-in-law, Margaret Williams. She testified that very early on March 21, 1989, appellant and Loretta Kelly came to her home. According to Margaret, appellant had cash and jewelry in his pockets, smelled of gasoline and had a burn on his hand. She asked him what happened and he told her he "robbed a bitch," and "burned the bitch up." (RT 1210.) Margaret testified in great detail about everything that had allegedly taken place between the victim and appellant that evening. Although other evidence suggested that Margaret was privy to these details because she had participated in the crime,[38] the clear implication from Margaret's testimony was that everything she knew about the crime had come to her second-hand, through appellant, during his brief visit that morning. (RT 1209-1214.)

Appellant allegedly told Margaret that he had had a car collision with

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[38]Specifically, the informant's statement to officer Knebel was that Margaret had admitted to being paid to get gas and be a lookout, for the car burning. (RT 1087.)

the victim; that she had wanted to call the police, and that appellant had wanted to avoid police involvement. Appellant had told the victim he would get his driver's license, but instead had gotten his gun and had forced her to move over in the seat. (RT 1210.) Appellant went on to describe the trip to the victim's Versateller to obtain $250 cash, and the victim's call to a friend to obtain another $500. According to Margaret, appellant said he had given Loretta Kelly $50 to act as a lookout and that he had paid someone else $100 to buy $2 worth of gasoline. (RT 1211-1214.) Margaret also testified that appellant had told her the victim had said, "Please don't hurt me. Please don't kill me," (RT 1212) and that appellant had told Margaret that he and Loretta had set the car on fire together, burning himself in the process. (RT 1221.)

Margaret Williams testified that she herself had been arrested and booked.[39] (RT 1220; 1222.) Four days later, she was released. Nine months after her arrest she was subpoened to testify, advised of her rights by an attorney, and granted immunity. She was told if she testified truthfully she would not be prosecuted. (RT 1222.)

B. There Was Sufficient Evidence That Margaret Williams Was An Accomplice. The Trial Court Had a *Sua Sponte* Duty To Instruct the Jury Accordingly.

It is well settled that the trial court has a *sua sponte* duty to instruct the jury on the pertinent principles of law regarding accomplice testimony, whenever there is sufficient evidence to find that a witness who implicates a

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[39]Margaret did not testify as to the reason for her arrest, but the jury could have concluded that it was for the murder. Knebel had previously testified that an informant's tip led to the arrest of both Margaret and appellant. Margaret told the informant that she was paid money to buy gas and be a lookout while someone else burned a car. (RT 1087-1088.)

defendant was an accomplice. (*People v. Box* (2000) 23 Cal.4th 1153, 1208; *People v. Guiuan* (1998) 18 Cal.4th 558, 569; *People v. Gordon* (1973) 10 Cal.3d 460, 466.) The court must provide the jury with the correct definition of an accomplice (*People v. Bevins* (1960) 54 Cal.2d 71, 76; CALJIC No. 3.10), instruct it that the testimony of the accomplice witness is to be viewed with distrust, (*People v. Miller* (1960) 185 Cal.App.2d 59, 82; CALJIC No. 3.18), that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated by such other evidence as shall connect the defendant with the commission of the offense, (Pen. Code, § 1111[40]; CALJIC No. 3.11) and finally, instruct the jury with CALJIC No. 3.12, regarding the sufficiency of the evidence to corroborate an accomplice. (*People v. Bevins, supra*, 54 Cal.2d at p. 76.)

An accomplice includes all persons "concerned in the commission of the offense, whether they directly commit the act constituting the offense or aid and abet in its commission." (*People v. Scofield* (1971) 17 Cal. App.3d 1018, 1026.) In order to be included within the Penal Code definition of an accomplice (see footnote 40), the witness must have "guilty knowledge and intent with regard to the commission of the crime." (*People v. Daniels* (1991) 52 Cal.3d 815, 932; *People v. Duncan* (1960) 53 Cal.2d 803, 816.)

There is good reason why these instructions must be given to the jury

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[40]Penal Code section 1111 provides, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

when an accomplice testifies against the defendant. This Court long ago recognized that since an accomplice has the greatest possible motivation to lie, the jury may not base a conviction solely on the accomplice's testimony:

> The statutory requirement of corroboration of accomplice testimony is based primarily upon experience, which has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity.

(*People v. Wallin* (1948) 32 Cal.2d 803, 808.) When a criminal defendant is convicted on the basis of testimony that has not been subjected to the proper scrutiny, because the trial court has failed to properly instruct the jury, the defendant has been denied his right to a fair trial, a fundamental liberty secured by the Fourteenth Amendment. (*Estelle v. Williams* (1976) 425 U.S. 501, 503, citing *Drope v. Missouri* (1975) 420 U.S. 162, 172.)

Although Margaret Williams testified that her only involvement took place *after* appellant and Loretta Kelly had committed the robbery/murder, there was evidence that Margaret herself was a knowing participant in these crimes and could have been prosecuted for the same offenses as appellant. The following evidence was undisputed and would have supported a jury finding that Margaret Williams was liable for robbery and murder, at least as an aider and abettor, and as such was an accomplice to these crimes:

1. Margaret admitted to a confidential police informant that she was paid to buy gasoline for burning the car. She also admitted she was paid to be a lookout while the car was burning. Based upon this tip, the police arrested Margaret on March 25, 1989, four days after the murder. (RT 1087-88.)

2. Troy Cory, a resident of the neighborhood where the car was burned, testified that he heard several loud voices and gun shots just before the explosion which burned the car, (RT 1098-1101,) establishing that two or more persons were at the

crime scene.

3. The victim had a gunshot wound in her left hand, which she received before death. (RT 1025-26.) The state's expert testified that the bullet removed from her hand could have been fired from the .22 caliber revolver found at the scene of the crime. (RT 1186-88.)

4. Margaret admitted to giving appellant and Loretta Kelly a ride home, after the robbery and murder took place. (RT 1214.)

These undisputed facts are sufficient to support a finding that Margaret was an accomplice. If Margaret bought the gasoline and acted as a lookout while the car burned, as the informant told the police, then Margaret would have been aware of the gunshots that were fired just before the car exploded and burned. Since there would have been no reason for shots to have been fired into an *empty* automobile, it is reasonable to assume that she knew the shots were being fired *at someone*. Since the victim indeed had been shot in the hand, those present at the scene would have known that someone was in the automobile at the time it was burned. These undisputed facts are sufficient to support a finding by the jury that Margaret Williams had: (1) guilty knowledge of the arson and murder that was about to take place, and (2) the intent to carry out the crimes, as demonstrated by her personal involvement in the burning of an occupied vehicle.

In addition, Margaret's detailed description of what took place that night - - the exact sequence of events, the amounts of money recovered from the victim's ATM and from her neighbor, even the actual words spoken by the victim - - tend to support the inference that Margaret had *first hand* knowledge of these events. At trial, Margaret testified that appellant *told her* that he had "paid somebody a hundred dollar bill to go get $2 worth of gas." (RT 1221.) While it is *possible* that appellant shared this degree of

detail with her, at 2:00 a.m., allegedly with a burned hand and most likely anxious to get home, it is *more* likely that Margaret knew exactly how much gas was purchased, because *she* was the one who had purchased it.

Moreover, Margaret admitted that she assisted the alleged perpetrators by giving them rides home afterwards. Given the other evidence, it is just as likely that Margaret was involved with the perpetrators well before that point, including at the time the murder took place.[41]

Where, as here, the facts are in dispute only as to the *degree* of this witness's involvement in the events of March 20 and 21, 1989, the accomplice status of the witness is a question of fact for the jury (*People v. Gordon, supra,* 10 Cal.3d at 467), unless the evidence permits only a single inference. (*People v. Sully* (1991) 53 Cal.3d 1195, 1227, citing *People v. Garrison* (1989) 47 Cal.3d 746, 772 and *People v. Rodriguez* (1986) 42 Cal.3d 730, 758-759.) As discussed above, the undisputed facts in this case raise a strong inference that Margaret was an accomplice. Had the jury been appropriately instructed, it would have likely found Margaret to be an accomplice. The trial court had a *sua sponte* duty to fully instruct the jury as to the definition of an accomplice, as well as the appropriate use of accomplice testimony. Its failure to do so was error (*People v. Gordon, supra,* 10 Cal.3d at 469; *People v. Bevins* (1960) 54 Cal.2d 71, 76), lightening the prosecutor's burden of proof, and rendering the trial fundamentally unfair and unreliable, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

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[41]Since Margaret Williams was the first one to be arrested as a suspect in this case, it is apparent that the law enforcement investigators had reason to believe she was involved in the crime. Interest in prosecuting her only subsided *after* she had implicated appellant.

C. The Trial Court's Error Was Prejudicial.

Appellant has established in Argument I that the statements extracted from him while he was in police custody were taken in violation of his Fifth and Fourteenth Amendment rights and should not have been admitted at his trial. Without appellant's statements, there was almost no evidence connecting him to the victim, other than the biased testimony of the woman who was first arrested, and then granted immunity, for this crime: Margaret Williams. Not only was her version of the events the product of police coercion, but it was also the self-serving testimony of someone who had every reason to shift the blame to someone else. Because the jury was allowed to hear appellant's in-custody statements to the police, and was never given accomplice instructions with respect to Margaret Williams' testimony, appellant's conviction was nearly inevitable.

Assuming appellant's own statements had not been stricken, as they should have been, but the jury had been properly instructed about the nature of the accomplice testimony, the jury would have discounted Margaret Williams' testimony. In light of the other evidence, the failure to so instruct was not harmless beyond a reasonable doubt. The jury was instructed to view appellant's confession with caution. (CT Supp. I 32.) There was no physical evidence or eyewitness testimony establishing that appellant committed the robbery and murder in this case. In the prosecutor's closing argument, she told the jury that appellant was connected to these crimes because of four pieces of physical evidence: (1) the evidence of an automobile collision (RT 1298); (2) the burns on appellant (RT 1298); (3) the ammunition (RT 1299); and (4) the victim's jewelry (RT 1300).

However, since this evidence was wholly insufficient, the trial court's failure to give the accomplice instructions was prejudicial error.

1. The automobile paint transfer evidence.

The State's expert on paint comparisons, James Bailey, testified that he was asked to compare "a paint transfer from a Volvo to a control sample of a red Vega." (RT 1180.) He was given "a blue piece of plastic" from a Volvo, which had a "red transfer or scraping" on it. (RT 1181.) He was asked to compare the red transfer with a "control sample of red paint taken from the Vega." (*Id.*) From his examination and comparison he concluded that "these paints were *similar* and *could have come from the same source*, that is, the red scraping on the blue plastic *could have come* from the red Vega." (*Id.*, emphasis added.) This evidence failed to establish any connection between appellant and the victim with respect to the crimes for which appellant was convicted.

First of all, there was no evidence whatsoever that the samples which Bailey examined came from either the victim's automobile or appellant's automobile. His testimony was only that he examined a blue piece of plastic from *a Volvo* and red paint from *a Vega*. His testimony is was thus inadequate and irrelevant on its face.

However, even assuming the prosecution had presented the necessary evidence linking the paint samples to the cars of the victim and appellant, which it did not, Bailey's testimony still fell far short of establishing that appellant and the victim had been involved in a collision. Bailey's testimony only established that the blue plastic he examined had red paint on it which was *similar* to the paint from the red Vega. This evidence completely failed to support a finding that the victim's automobile had collided with appellant's automobile. Even if it had been established that the automobile parts Bailey examined were those of appellant and the victim, Bailey's testimony was, at best, weak and inconclusive. But again,

since there was no evidence linking the paint transfers to the victim and the appellant, Bailey's testimony was totally useless.

2. Evidence of burns on appellant's hand and foot.

Detective John Knebel testified that he observed a pink spot on appellant's finger and another pink spot on appellant's ankle, which Knebel believed were burns. Although two doctors, including a burn expert, examined appellant, for the purpose of determining whether these spots were, in fact, burns (RT 1124-1125), the State presented no expert testimony to support Knebel's belief. Knebel testified that the first doctor who examined appellant, who was *not* a burn expert, said appellant would have to be seen by a burn expert. (RT 1124-5.) The burn expert, Dr. Jackson, who also examined appellant, was never called to testify.

Although the State presented a burn expert, Dr. Davies, to testify about the circumstances of the victim's death (RT 1241-1267), he was never asked about the marks on appellant which Knebel believed were burns. Thus, despite the prosecutor's claim, the evidence that the pink spots seen by Knebel were actually burns, was never presented.

3. Ballistics evidence.

Sheriff's Deputy Edward Robinson, the State's expert on weapons and ammunition, testified that the bullet recovered from the victim's hand was so mutilated and distorted that there were "no general characteristics or individual characteristics left whatsoever." (RT 1186.) He was only able to say that the "base size and shape was consistent with a .22 caliber copperplated or washed bullet." (*Id.*) While that bullet "could have been fired" from the revolver found at the scene of the car burning (RT 1186), Robinson confirmed that it could not be determined whether it had, in fact, been fired from that gun. (RT 1187.) Moreover, there was no evidence that

the gun found at the scene belonged to appellant, or that it had ever even been handled by appellant. The State's fingerprint expert testified that she found no prints on the gun, or any of the other items found at the scene of the crime. (RT 1148.)

Although the police recovered a bullet from appellant's apartment that was of the type which could be fired from the kind of revolver found at the crime scene, there was no evidence that the bullet was unique;[42] nor did any other evidence support a conclusion that appellant had shot the victim.

4. The victim's jewelry.

Margaret William testified about some gold jewelry that she had seen on the night of the murder. Her description included a thick gold bracelet, two rings (one with a lot of diamonds on it and another with no diamonds on it), and a thin, gold, rope necklace. (RT 1215.) The victim's husband, Mr. Lacey, identified a photograph of the victim in which she was wearing some of her jewelry, and Mr. Lacey also described his wife's jewelry. But Mr. Lacey's description of his wife's jewelry did not actually fit the description provided by Margaret Williams. Mr. Lacey mentioned a thick bracelet *with diamond studs*, a ring with a *heart* on it, and a white gold wedding ring *with a diamond stud.* (RT 1045.) Comparing their respective descriptions of the jewelry, it certainly cannot be said that the descriptions matched, except in the most general sense. There was insufficient evidence to even establish that the jewelry Margaret observed belonged to the victim.

However, assuming for purposes of argument that Margaret Williams and Mr. Lacey were describing the same jewelry, Margaret's

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[42]Presumably, many other people have that same type of ammunition.

ability to describe the victim's jewelry would not establish that appellant was the one who robbed the victim. Margaret's familiarity with the jewelry could well have been the result of her own participation in the robbery.

Moreover, had the jury been properly instructed with CALJIC No. 3.12[43], it would have known that it could not use Margaret's testimony, describing the jewelry, to corroborate her other testimony that appellant was the one who brought the jewelry into Margaret's house. Her ability to describe the jewelry was not probative of *appellant's* involvement, and was legally insufficient to corroborate the rest of her testimony.

5. Eye-Witness Evidence.

The only other evidence that might have connected appellant to the crimes was the testimony of Mrs. Runnels, the neighbor who left her home to bring money to the victim, and that of Jay Zima, the man who was in line at the ATM around the time that the victim withdrew money. However, neither of these witnesses were able to identify appellant. Mrs. Runnels could not even say whether the person who was driving the victim's automobile was a man or a woman, only that the person had long, shoulder-length, black hair. (RT 1080.) Mr. Zima simply testified that while he was waiting in line at the ATM, he vaguely recalled that a man and woman were in front of him. (RT 1230.) Neither witness could connect appellant to the crimes.

It is apparent from a review of all of the evidence that without appellant's own incriminating statements, taken in violation of his

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[43]CALJIC No. 3.12 provides, in relevant part, "In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime."

constitutional rights, the only evidence left to convict appellant was the testimony of Margaret Williams. Had the jury been properly instructed, the jury could have concluded that Margaret was an accomplice to these crimes. The trial court, therefore, had a duty to give all of the necessary accomplice instructions, CALJIC No. 3.10, defining an accomplice, CALJIC No. 3.18, instructing the jury to view an accomplice's testimony with distrust, and CALJIC Nos. 3.11 and 3.12, forbidding a conviction based on the testimony of an accomplice, unless the testimony has been *independently* corroborated. Because Margaret Williams' testimony was insufficient to convict appellant without independent corroboration, the trial court's failure to give accomplice instructions was prejudicial.

Since the jury was never given any accomplice instructions, it was permitted to view Margaret's testimony as though she were an independent, disinterested witnesses - - a citizen merely coming forward to see that justice was done - - rather than someone whose story should be distrusted. The trial court's failure to provide these critical accomplice instructions had the indisputable effect of lightening the state's burden of proof, and in that respect depriving appellant of his Fourteenth Amendment right to due process and a fair trial, as well as the right to confront and cross-examine witnesses, equal protection, and the right to a fair and reliable guilt and penalty determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment. Appellant's conviction and death sentence must be reversed.

* * * * *

V.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY WITH CALJIC No. 2.11.5. INSOFAR AS THE JURY WOULD HAVE INTERPRETED THIS INSTRUCTION TO APPLY TO MARGARET WILLIAMS, IT WAS HIGHLY PREJUDICIAL AND DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

A. Facts

As fully set forth in the two preceding arguments, key prosecution witness, Margaret Williams, was the first person arrested for the murder in this case; she could have been charged as an accomplice, but was granted immunity in exchange for her testimony implicating appellant. There were no accomplice instructions given to the jury with respect to her testimony. However, at the close of the guilt phase trial, at the prosecution's request, the trial court *did* instruct the jury with CALJIC No. 2.11.5, which provides as follows:

> There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] There may be many reasons why such person is not here on trial. Therefore, *do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted.* Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.

(RT 1352, emphasis added; CT Supp.I 26, emphasis added.)

The instruction contained no limiting or explanatory language, but was merely the pattern instruction. The trial court made no distinction between Margaret Williams, the key witness for the State, and Loretta Kelly, another possible participant in the robbery and murder, who did not testify but who apparently, like Margaret Williams, also avoided

prosecution.[44]

B. Giving CALJIC No. 2.11.5 Was Error

The use note for CALJIC No. 2.11.5 provides that: "This instruction is *not to be used if the other person is a witness* for either the prosecution or the defense (emphasis added)." Although this use note was initially drafted without case authority, this Court has long since endorsed it. In *People v. Marks* (1988) 45 Cal.3d 1335, 1347, the trial court was ordered, upon retrial, to follow this admonition if any of the witnesses were, or may have been, involved in the crimes charged against the defendant. Since *Marks, supra,* this Court has routinely found error when a trial court instructs the jury with CALJIC No. 2.11.5, if the non-prosecuted participant is also a witness, "*because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility.*" (*People v. Williams* (1997) 16 Cal.4th 153, 226, emphasis added; *People v. Fauber* (1992) 2 Cal.4th 792, 863; *People v. Hardy* (1992) 2 Cal.4th 86, 189-190; *People v. Carrera* (1989) 49 Cal.3d 291, 312, fn. 9.) See also *People v. Rankin* (1992) 9 Cal.App.4th 430, 437; *People v. Hall* (1989) 208 Cal.App.3d 34, 47.

The reasoning behind this rule is quite apparent. When someone who may have been a participant in the crimes is also a witness, CALJIC No. 2.11.5 bars jurors from considering whether that witness may have had a motive to lie or falsely accuse the defendant. Obviously, the jurors *should not be barred* from such considerations. To the contrary, it is absolutely *necessary* to consider such factors when assessing credibility and possible

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[44]Loretta Kelly was not a witness in the case, but was implicated as a perpetrator by Margaret Williams.

bias.[45] As this Court noted in *People v. Sheldon* (1989) 48 Cal.3d 935, 946, "it is entirely proper for the jury to consider whether cooperating accomplices avoided prosecution in return for testifying against defendant."

In the present case, Margaret Williams certainly had some involvement in the crimes. The degree to which she was involved was a question for the jury to determine. She was also the lead witness for the prosecution. The jury was *required* to assess her credibility. Believing her description of the events of the early morning hours of March 20, 1989, was essential to determining that appellant was guilty of the robbery and murder of Joanne Lacey. Thus, the jury *should have taken into consideration* the following facts:

1. Margaret Williams was overheard admitting to her active involvement in the burning of the victim's automobile;
2. Margaret Williams was the first person arrested for the crime because of her admissions;
3. Margaret Williams was threatened with prosecution for first degree murder before telling the police that appellant was the perpetrator;
4. Margaret Williams admitted to giving appellant and Loretta Kelly rides home on the night of the murder;

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[45]CALJIC No. 2.20, Credibility of a Witness, which was given to the jury here (see CT Supp.I 28-29), instructs the jury that it may consider the existence of a "bias, interest or other motive" in assessing a witness's believability. Shortly after appellant's trial, the case of *People v. Echevarria* (1992) 11 Cal.App.4th 444, 450, was decided. It held that when the prosecution relies on the testimony of an immunized witness, the defense may request that the instruction include the following language, e.g., "whether the witness is testifying under a grant of immunity." The jury should have been so instructed, but was not. To the contrary, it was told that it *must not* give any consideration as to why a witness may not have been prosecuted.

5. Margaret Williams may well have been an accomplice to murder, and if she was, her testimony should have been viewed with distrust and had to be corroborated in order to convict appellant;

6. Margaret Williams was granted immunity from prosecution in exchange for her testimony against appellant.

The jury *should have considered all of these facts*. Instead, they were told the opposite: that they should give *no consideration* to the fact that Margaret was not being prosecuted for her involvement.

CALJIC No. 2.11.5 takes on the nature of judicial vouching, if it is given in the context of a potential accomplice who testifies. Where, as in this case, the trial court also fails to give the appropriate accomplice instructions, the effect of giving CALJIC No. 2.11.5 is patently prejudicial.

C. Giving CALJIC No. 2.11.5 Was Prejudicial.

The accomplice instructions make it clear that an accomplice who testifies has a motive for falsifying her version of the events and that her testimony should be viewed with distrust. Moreover, the instructions inform the jury that a defendant cannot be convicted on the basis of uncorroborated accomplice testimony, for the same reason. Particularly since accomplice instructions were *not* given in this case, the jury was misled by CALJIC No. 2.11.5 to believe that they could *not* consider Margaret's lack of prosecution in assessing her testimony. Given this misperception, which was not only endorsed but, in effect, ordered by the trial court, appellant's conviction was all but guaranteed.

This Court has frequently recognized that when CALJIC No. 2.11.5 is erroneously given, as it was in appellant's case, the error is potentially

prejudicial, unless accomplice instructions are given. (*People v. Hardy* (1992) 2 Cal.4th 86, 190 [jury was told to view the accomplice testimony with distrust and that such testimony had to be corroborated, so potential for misunderstanding was minimal]; *People v. Garrison* (1989) 47 Cal.3d 746, 779-780 [jury received accomplice and credibility instructions, so viewing the instructions as a whole, jury would not have been precluded from considering the witness's plea bargain]; *People v. Sheldon* (1989) 48 Cal.3d 935, 946-948 [not likely that error in giving CALJIC No. 2.115 was prejudicial, where jury was given all of the standard accomplice instructions]; *People v. Malone* (1988) 47 Cal.3d 1, 51 [no prejudice where jury was given full accomplice and credibility instructions and both the prosecutor and defense attorney acknowledged witness's possible motive to lie].)

Unlike the situations presented in the cases cited above, there was nothing which would have allowed reasonable jurors to understand that they could consider the fact that Margaret Williams was a likely accomplice who potentially faced prosecution herself, in judging the credibility of her testimony. Thus, the fact that they were told that they could not consider or discuss why she was not being prosecuted, effectively precluded the jury from looking at her lack of prosecution and immunity agreement as a motive to lie.

The fact that the jury was given a general instruction on the credibility of witnesses, CALJIC No. 2.20, did not cure the harm in this case, since the jury was specifically instructed that the critical basis for judging Margaret Williams' testimony, the grant of immunity, was not to be considered. Since appellant's conviction hinged upon the jury believing the testimony of Margaret Williams, the trial court's error, in instructing the

jury with CALJIC No. 2.11.5 was clearly prejudicial to appellant. This instructional error infected the trial with unfairness, lightened the prosecution's burden of proof, and violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, fundamental fairness, equal protection, confrontation and cross-examination, a fair and reliable guilt determination and a reliable, individualized and non-arbitrary sentencing determination. Appellant's conviction and death sentence must be reversed.

* * * * *

VI.

ERRONEOUS BURDEN OF PROOF INSTRUCTIONS REGARDING PRIOR FELONY CONVICTIONS DEPRIVED APPELLANT OF A FAIR TRIAL AND RELIABLE PENALTY DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Facts

At trial counsel's request, the issue of appellant's prior serious felony conviction and his prior prison term commitment were bifurcated from the guilt phase of the trial. (RT 474.) Following the guilt phase verdict, but *outside of the jury's presence*, appellant admitted that he suffered a prior serious felony conviction [within the meaning of PC 667(a)] for a 1983 rape, that resulted in a state prison commitment, within the meaning of PC 667.5(b). (RT 1394.) He waived his right to a hearing on those issues (RT 1394), and his trial counsel stipulated to the factual bases for the admissions. (RT 1395.) The prosecutor marked as People's Exhibit 74, documents purporting to establish the conviction and prison term in connection with the 1983 rape case, case number A 564 356. (RT 1393.) *Still outside of the jury's presence*, for purposes of establishing the prior rape conviction and the resulting prior prison term commitment, Exhibit 74 was admitted into evidence. (RT 1395.) Immediately thereafter, the jury was returned to the courtroom, and the penalty phase of the trial began. (RT 1395.)

After the close of the penalty phase testimony, the prosecutor again brought People's Exhibit 74, the group of documents relating to the 1983 rape conviction, to the court's attention (RT 1448-1449), and for the second time, but this time *in the jury's presence*, asked that Exhibit 74 be admitted into evidence. For the second time, the court admitted it. (RT 1449.)

Immediately thereafter, the prosecutor referred to another case, specifically, superior court case number A 560 982. The prosecutor stated, that another exhibit, People's Exhibit 75, was

> a certified copy of the court document in that case, a copy of the information and a certified copy of documents from the California Youth Authority. These documents indicate that the defendant, David Earl Williams, was convicted of the crime of attempted residential burglary, a felony, in April of 1981 and was sentenced to the California Youth Authority.

(RT 1449.) The prosecutor also noted that "the certification from the California Youth Authority indicates that the records have been destroyed as they're only kept for a period of time." (RT 1449.)

People's Exhibit 75, which the court admitted into evidence, was supposed to have established proof of the alleged 1981 attempted burglary conviction. (RT 1450.) In fact, Exhibit 75 consists of three pages: The first page appears to be a docket sheet showing several appearances in the year 1981; at the top, the name of David Earl Williams appears. The second page is an *unsigned* Information, *accusing* David Earl Williams of attempted burglary on or about November 30, 1980. The third page is a letter from the Department of the Youth Authority, dated July 9, 1992, responding to the prosecutor's request for "information to establish a prior conviction." The letter explains that the subject had been discharged from the Youth Authority on July 14, 1983, and since records were not retained on "discharged wards" the writer was not able to comply with the prosecutor's request for documents in support of an alleged conviction.

People's Exhibit 75 thus establishes that the prosecutor was *unable* to provide the necessary proof that appellant had been convicted of an attempted burglary in 1981. Nevertheless, in her closing argument, the

prosecutor cited this alleged conviction, as well as the 1983 rape conviction, to argue that appellant "had earned the ultimate sanction of the society, and that is death." (RT 1551-1552.)

The jury was *not* given CALJIC No. 8.86, which requires proof beyond a reasonable doubt. Instead, the court instructed the jury as follows:

> Within the meaning of the preceding instruction,[46] prior felony convictions for which the defendant purportedly has been convicted must be proved *by a preponderance of the evidence*. You must not consider such evidence for any purpose unless you are satisfied that the defendant was convicted of the crimes purported in the documents of conviction.
>
> The prosecution has the burden of proving these facts by a *preponderance of the evidence*.
>
> Evidence has been introduced for the purpose of showing that the defendant has been previously convicted of three (3) felony crimes:
>
> Attempted Residential Burglary in violation of Penal Code Section 664/459;
>
> Residential burglary in violation of Penal Code Section 459 and Forcible Rape in violation of Penal Code section 261.2.
>
> A juror may consider any evidence of a prior felony conviction as an aggravating circumstance if the juror is convinced by the *preponderance of the evidence* that said conviction has been proven.
>
> It is not necessary for all jurors to agree. If any juror is convinced by the *preponderance of the evidence* that conviction occurred, that juror may consider that conviction as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

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[46]In this case, the preceding instruction was CALJIC No. 8.85, which informs the jury that they may take into consideration, in determining the proper penalty, "the presence or absence of any prior felony conviction. . . ."

(CT 2015-2016; RT 1578-1579, emphasis added.)

The above instruction, in its written form (CT 2015), was designated by the prosecutor as CALJIC No. 2.50.1, and entitled "Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence." However, a comparison of the standard instruction, CALJIC No. 2.50.1,[47] with the instruction that was actually given to the jury, demonstrates that the given instruction, prepared by the prosecution, was actually a *combination* of two standard instructions, CALJIC 2.50.1 and CALJIC No. 8.86. CALJIC No. 8.86 is a standard penalty instruction for capital cases entitled, "Penalty Trial - Conviction of Other Crimes - Proof Beyond a Reasonable Doubt."[48]

The use notes for CALJIC No. 8.86 state that "this instruction must be given *sua sponte* in all cases where the People claim prior criminal conviction and especially where CALJIC No. 8.85, subparagraph (c) is given." In this case, CALJIC No. 8.85, in its entirety, including subparagraph (c), was read to the jury. (CT 2012-2014; RT 1576-1578.)

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[47]CALJIC No. 2.50.1, "Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence," provides: "Within the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed crimes other than those for which he is on trial. ¶ You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the others crimes."

[48]CALJIC No. 8.86 provides: "Evidence has been introduced for the purpose of showing that the defendant has been convicted of the crimes of [__] and [__] prior to the offense of murder in the first degree of which he has been found guilty in this case.¶ Before you may consider any of the alleged crimes as an aggravating circumstance in this case, you must first be satisfied *beyond a reasonable doubt* that the defendant was in fact convicted of the prior crimes. You may not consider any evidence of any other crime as an aggravating circumstance. (Emphasis added.)

B. Because the Jury Was Instructed With the Wrong Standard of Proof, The Jury Could Not Have Found, Beyond a Reasonable Doubt, That Appellant Suffered Two Prior Felony Convictions. Appellant Was Sentenced to Death in Violation of the Fourteenth Amendment.

With respect to both alleged prior felony convictions, the jury could not have found, beyond a reasonable doubt, that appellant had suffered the conviction. Not only was the evidence itself wholly insufficient, but since the instruction upon which the jury relied did not require it to find, beyond a reasonable doubt, that appellant had suffered these convictions, there determination was made in violation of appellant's constitutional rights. As discussed below, the evidence of these two prior convictions was itself inadequate.

1. The 1983 prior rape conviction.

Although there was evidence in the record that appellant and his counsel stipulated to the existence of the 1983 prior rape conviction, that evidence was offered *outside* of the jury's presence. (RT 1394-1395.) Consequently, from the jury's standpoint, the question of whether appellant had suffered a 1983 prior felony conviction was a matter which still had to be proven beyond a reasonable doubt. Only hearsay evidence was offered to prove this conviction. The first piece of evidence, People's Exhibit 74, was a packet of papers which included copies of a court docket, an abstract of judgment, copies of fingerprints, and a superior court minute order. The second type of evidence which the prosecutor offered was the hearsay testimony of appellant's co-defendant in the rape case, Shelby Fulcher, who said that appellant had pled guilty to the rape charge and was sentenced to ten years in prison. (RT 1429-1430.) Although the rape victim testified as to the circumstances of that crime, her testimony did not establish a rape

conviction under PC section 190.3 (c).

2. The 1981 prior attempted burglary conviction.

The prosecutor presented even less evidence to support the alleged 1981 attempted burglary conviction. The single piece of evidence, People's Exhibit 75, consisted of three unrelated pages, only one of which even *referenced* a conviction. This third page was a letter from the Department of Youth Authority. It alluded to a case in which *a* David Williams had been *discharged as a ward* from the Youth Authority. There was no evidence presented that the David Williams referenced in the letter was appellant. More importantly, the letter itself confirmed that any paperwork which might otherwise have shown a prior conviction for David Williams, was no longer available.[49] Finally, insofar as the letter referred to a discharged "ward," it also raised the possibility that, if there had been such a conviction, it may have involved a juvenile matter. It is well settled that

> juvenile court adjudications under Welfare and Institutions Code section 602 are not criminal convictions, and thus are not admissible under section 190.3, factor (c), as prior felony convictions.

(*People v. Burton* (1989) 48 Cal.3d 843, 862.) For all of these reasons, People's Exhibit 75 was clearly insufficient to establish that appellant had been convicted of attempted burglary in 1981, for purposes of establishing a prior criminal conviction under Penal Code section 190.3(c).

The evidence was thus far from conclusive that appellant had suffered two prior felony convictions. Consequently, the fact that the jury

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[49]The letter stated, in relevant part, "Your request. . . for information to establish a prior conviction. . . has been received. . . . [W]e are unable to supply you with the regular material, as . . . we do not retain case files on discharged wards beyond the period of seven years." (People's Exhibit 75, page 3.)

received the wrong instruction regarding the prosecutor's burden in proving these prior convictions, was strongly prejudicial.

Penal Code section 190.3 sets forth the only three permissible statutory aggravating factors which may be presented by the prosecution in a capital case: the circumstances of the crime in the present proceeding (known as "factor (a)"); the presence or absence of criminal activity involving force or violence or the threat thereof ("factor (b)"); and the presence or absence of any prior felony conviction ("factor (c)"). This Court has held that prior felony convictions cannot "be considered in aggravation under factor (c) absent *proof beyond a reasonable doubt* that the defendant was in fact convicted of the prior crime. (CALJIC No. 8.86.)." (*People v. Millwee* (1998) 18 Cal.4th 96, 161, emphasis added.)

Thus, under California law, appellant had a statutory right to have the jury determine the "presence or absence of any prior felony conviction" suffered by appellant, *and* to an instruction that before those alleged convictions could be considered, they had to be proven *beyond a reasonable doubt.* Accordingly, appellant had "a substantial and legitimate expectation that he would be deprived" of his life "only to the extent determined by the jury" in accordance with the instructions required by the State of California; appellant's expectation "is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

In this case, there is no question that appellant was entitled to an accurate instruction on the proper burden of proof for proving these statutory aggravators. The use notes state that the instruction must be given *sua sponte.* The trial court failed to see that this was done. The result was that the State arbitrarily deprived appellant of his legitimate expectation that

his life would not be taken except in accordance with the processes required under state law. Appellant's death sentence cannot stand, under these circumstances.

C. The Trial Court's Failure to Give the Correct Instruction Regarding the Prosecutor's Burden of Proof Deprived Appellant of His Eighth Amendment Right To a Reliable Penalty Determination.

In *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, the Supreme Court held that inherent in the Eighth Amendment's prohibition on cruel and unusual punishment is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." This Court has very recently affirmed this principle. Quoting *People v. Clark* (1992) 3 Cal.4th 41, 109, this Court stated:

> "[T]he required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, *the death verdict has been returned under proper instructions and procedures*, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements."

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1044, emphasis added.)

This Court thus recognizes that proper instructions in the penalty phase are one of the essential elements in assuring the reliability of a death judgment. When those instructions fall short of what is required, particularly when, as here, the instructions permit the jury to make findings based upon a lower standard of proof, the death judgment cannot be said to have conformed to the "rigorous standards" which the Eighth Amendment

and this Court so clearly require. Under the Fifth, Sixth and Eighth and Fourteenth Amendments, appellant is entitled to a new penalty trial in which the jury has been instructed with the correct burden of proof.

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VII.

THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT BY TELLING THE JURORS THAT THE BIBLE REQUIRED THEM TO IMPOSE THE DEATH PENALTY.

A. Facts

The prosecutor, in arguing to the jury that the death penalty was the *only* appropriate punishment, made the following remarks:

> And don't think that you should have any religious scruples to not impose the death penalty. *The Bible unambiguously commands that murderers be put to death.* In Genesis it says: "Whomever sheds the blood of man *shall his blood be shed*, for in his image did God make man." And also in Genesis it clearly states: Man, not God, is who is going to impose this penalty. When it says by man, it means, the murder[er]'s blood be shed. *And in Exodus it says: "He who fatally strikes the man shall be put to death.*" And I'm sure that refers to women as well. It goes on to say: "And you shall not take reparations for the soul of the murderer who deserves to die but *he shall be put to death."*
>
> So ladies and gentlemen, even the Bible for those of you who may have some religious scruples, does not say that you should not use your own moral beliefs in making [the] determination here.

(RT 1566, emphasis added.)

B. Under California Law, the Prosecutor's Remarks Constituted Patent, Prejudicial Misconduct

The California Supreme Court has repeatedly held that it is "patent misconduct" (*People v. Hill* (1998) 17 Cal.4th 800, 836) for the prosecutor to ask the jury to consider biblical teachings when deliberating about the appropriateness of the death penalty. (*People v. Ervin* (2000) 22 Cal.4th 48, 100, *cert den.*, 531 U.S. 842 (2000); *People v. Welch* (1999) 20 Cal.4th 701,

761-762; *People v. Roybal* (1998) 19 Cal.4th 481, 521; *People v. Hill, supra*, 17 Cal.4th at pp. 836-837; *People v. Bradford* (1997) 14 Cal.4th 1005, 1063; *People v. Freeman* (1994) 8 Cal.4th 450, 515; *People v. Wash* (1993) 6 Cal.4th 215, 260-261; *People v. Sandoval* (1992) 4 Cal.4th 155, 191-194.) As this Court has explained many times, such references tend "to diminish the jury's personal sense of responsibility for the verdict," (*People v. Hill, supra*, 17 Cal.4th at p. 837) and potentially cause the jury to believe that a "higher law" should be applied rather than the court's instructions. (*People v. Welch, supra*, 20 Cal.4th at p. 761.)

As in *People v. Welch, supra,* the prosecutor in this case fully admitted her purpose: to demonstrate to those jurors who may have had "any religious scruples" that the Bible not only permitted capital punishment, but indeed, *commanded* it. (RT 1566.) And, as was true in *Welch*, the prosecutor here "was not responding to a defense argument invoking religious authority," (*People v. Welch, supra*, 20 Cal.4th at p. 761), which might have otherwise helped to explain why she took the argument in that direction.[50]

The prosecutor wanted to make certain that jurors would not be affected by scruples or conscience in perhaps deciding to be merciful to appellant. The three Bible passages she read from indicated that it was *mandatory* to demand a life for a life.

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[50]In *People v. Sandoval* (1992) 4 Cal. 4th 155, 193, this Court explained: "There are situations in which the prosecutor has been allowed to make comments in rebuttal that would otherwise be improper, when such comments are fairly responsive to the argument of defense counsel." (See *People v. McDaniel* (1976) 16 Cal.3d 156, 177 and *People v. Hill* (1967) 66 Cal.2d 536, 560; see also *United States v. Robinson* (1988) 485 U.S. 25, 31-34.)

C. The Prosecutor's Misconduct Violated Appellant's State and Federal Constitutional Rights

1. The Prosecutor's Argument Violated the Eighth Amendment

In order to withstand constitutional scrutiny, a state statute authorizing the imposition of the death penalty must "tailor *and apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428, emphasis added.) This language indicates that a state must not only *enact* a statute which sufficiently narrows the class of death eligible defendants, but it must also *enforce and apply* the law in such a way that there is a "'a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many in which it is not.'" (*Godfrey, supra,* 446 U.S. at p. 427, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn of White, J.)) Applying these principles, the Ninth Circuit has recently held that "invocation of higher law or extra-judicial authority" in urging the jury in a capital case to vote for death violates the Eighth Amendment. (*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 776, *cert den.*, (2001) 122 S.Ct. 322.)

California has attempted to comply with the Supreme Court's "narrowing" requirement by specifying the circumstances under which the State may seek the death penalty (Pen. Code, § 190.2), as well as the factors in aggravation and mitigation which may be considered by the jury. (Pen. Code, § 190.3.)[51] In applying these statutes, this Court recognizes that

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[51]This Court has held that although, under PC section 190.2 (k), "a defendant has an open-ended opportunity to present mitigating evidence for the jury's consideration," the prosecution may only present aggravating evidence that is specifically enumerated in PC section 190.3. (*People v. Howard* (1988) 44

sympathy and mercy for the defendant are appropriate and necessary considerations for the jury. See, e.g., *People v. Lanphear* (1984) 36 Cal.3d 163, 166, where, in reversing the penalty verdict, this Court explained that

> both California precedent and controlling decisions of the United States Supreme Court not only permit, *but mandate freedom on the part of the jury to act on the basis of sympathy or compassion* when that sympathy is a reaction to evidence regarding the defendant's character or background. That evidence, as distinguished from mitigating circumstances related to the offense itself, may not reduce culpability, *but it must nonetheless be considered by the jury.* (Emphasis added.)

While mercy *must* be considered by the jury under California law, certain portions of biblical law, including those portions read by the prosecutor, specifically reject any individualized distinctions with respect to murderers. For this reason, it is generally recognized that religion may not play a role in the sentencing process. (*Jones v. Kemp* (N.D. Ga. 1989) 706 F. Supp. 1534, 1559; *United States v. Giry* (1st Cir. 1987) 818 F.2d 120, cert. denied, 484 U.S. 855 (1987).

> The use by deliberating jurors of an extrajudicial code (not already embodied in their own characters) cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction.

(*Jones, supra,* 706 F.Supp. at p. 1559.)

In *Jones, supra,* a Bible was present in the jury room during deliberations, with the approval of the trial court. There was no evidence that any of the jurors had even opened the Bible. Nevertheless, the court held that it was "constitutional error for the court to permit the Christian

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Cal.3d 375, 438; *People v. Boyd* (1985) 38 Cal.3d 762, 773.

Bible to go into the jury room . . . ." (*Id.* at p. 1560; see also *Tennessee v. Harrington* (Tenn. 1981) 627 S.W.2d 345, 350, cert. denied, 457 U.S. 1110, in which the Tennessee Supreme Court held that a jury foreman's reading of bible passages to the jury during penalty phase deliberations was error that required new sentencing.)

In the present case, the Bible was not simply taken into the jury room where it may or may not have been used; nor was it read merely by another *juror.* Rather, the Bible was read to the jury by the *State's own prosecutor,* cloaked with all of the authority of her position. As the Supreme Court has held, the prosecutor is

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

(*Berger v. United States* (1935) 295 U.S. 78, 88, overruled on other grounds, *Stirone v. United States* (1960) 361 U.S. 212.)

The prosecutor here deliberately abused her position of authority. Her argument was not based on the facts or the law and did not attempt in any way to distinguish appellant from any other murderer. The biblical quotations discredited California law by mandating death for all murderers. The argument was "a blatant appeal to the jury to sentence defendant to death based on considerations that had nothing to do with the 'individualized determination' the jury was constitutionally required to make." (*People v. Wash* (1993) 6 Cal.4th 215, 284 (conc. and diss. opn. of Kennard, J.,) quoting *Zant v. Stephens* (1983) 462 U.S. 862, 879. The jury had every reason to believe that biblical law was proper for them to consider in determining the appropriate punishment. By urging the jury to

focus on the dictates of the Bible, rather than the character of appellant and the circumstances of the crime, the prosecutor deprived appellant of his Eighth Amendment right to a reliable, non-arbitrary and individualized sentencing determination. Based upon the reasoning of *Sandoval v. Calderon*, *supra*, appellant's death sentence must be reversed.

2. The Prosecutor's Misconduct Deprived Appellant of a Fair Penalty Trial and Constituted an Establishment of Religion

Citing the Bible as reason for a jury in a capital case to impose death implicates not only the Eighth Amendment, but also the Establishment Clause of the First Amendment. When the State invokes biblical teachings to persuade a jury, there is, at the very least, the appearance of state endorsement of those teachings. Cf. *Lynch v. Donnelly* (1984) 465 U.S. 668, 687-88 (O'Connor, J., conc.). Similar Establishment Clause concerns are present in the Supreme Court's decisions finding public school prayer unconstitutional. See *Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290; *Lee v. Weisman* (1992), 505 U.S. 577, 593-97.

A criminal defendant, on trial for his life, has a constitutional right to a trial in which the jurors are guided only by the law in making the penalty determination. In this case, that did not take place. The prosecutor's reliance upon divine law, as set forth in scripture, encouraged the jurors to base their decision on factors that were "totally irrelevant to the sentencing process." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585.) The prosecutor's various references to the biblical commandment to put murderer's to death were neither isolated nor brief. The message was clear and unmistakable: death was the *only* appropriate punishment for murder. The penalty trial was poisoned by the prosecutor's remarks, depriving

appellant of his due process rights under the Fifth and Fourteenth Amendments and its state counterparts in the California Constitution. In addition, the State's reliance upon religious law, rather than civil law, constitutes an establishment of religion in violation of the First Amendment and its state counterparts in the California Constitution.

D. The Prosecutor's Argument Was Inflammatory and Highly Prejudicial to the Penalty Phase Determination. The Sentence of Death Should Be Reversed

Although this Court has repeatedly condemned the prosecutor's use of Scripture and religion to persuade jurors to vote for the death penalty (see cases cited *supra*, in part B), it has many times decided that the error was harmless, either because *both* the prosecutor and the defense referred to religion in their arguments (*People v. Ervin, supra,* 22 Cal.4th 48 [defense also relied on the Bible in argument]; *People v. Bradford, supra*, 14 Cal.4th at p. 1063 [comments were simply a *response* to the defense counsel's religious references]; (*People v. Freeman, supra*, 8 Cal.4th at p. 516 [defense countered with biblical argument of his own]; *People v. Wash, supra,* 6 Cal.4th at pp. 259-260 [defense relied at length on Bible in urging jury not to impose death]); or because the reference to the Bible was very brief and not presented as a "higher law" that the jury was bound to follow. (*People v. Arias* (1996) 13 Cal.4th 92, 180 [prosecutor noted that Bible supports either view and that jury should follow California law]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1242 [prosecutor's reference to the Bible urged jury to use secular standards, not religious law]; *People v. Roybal, supra,* 19 Cal.4th at p. 521 ["brief allusion" to biblical law could not have diminished jury's sense of responsibility]; *People v. Wrest* (1992) 3 Cal. 4th 1088, 1107 [brief, passing reference to the Old Testament's support for

capital punishment was harmless].)

In the present case, however, it was *only the prosecutor* that improperly brought the Bible before the jury. The defense did not introduce religious references, nor did it rely on religion or the Bible to counter the prosecutor's improper remarks. Moreover, unlike the cases cited above, in which the references to the Bible were very brief or made only in passing, the prosecutor's references here were very specific, and the passages that she chose all pointed to the same conclusion: that biblical law *mandated* imposition of the death penalty. The prosecutor quoted directly from the Bible, mentioned the chapters from which she was reading (Genesis and Exodus), and emphasized the point that death was the *only* appropriate penalty in the case of murder. Under these circumstances, it cannot be said that her improper use of the Bible to emphasize religious law, rather than California law, was harmless error.

It is hard to imagine a more prejudicial penalty phase argument, than telling the jury that God's law mandated death. The prosecutor's comments "seriously affected 'substantial rights'" enjoyed by appellant and must be held to have had an "unfair prejudicial impact on the jury's deliberations." (*United States v. Young* (1985) 470 U.S. 1, 16, fn. 14.) Under the circumstances, simply finding that the prosecutor has engaged in serious, blatant misconduct, but refusing to find this misconduct prejudicial, can only encourage future abuse by the State. Such abuse, particularly when a life hangs in the balance, must not be tolerated. Reversal, rather than lip service, is required.

As Justice Blackmun noted in *Darden v. Wainwright* (1986) 477 U.S. 168, 205, there is little point in *condemning* prosecutorial misconduct, but then *affirming* the decision which results:

> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, "Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial." Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court--recalling the bitter tear shed by the Walrus as he ate the oysters--breeds a deplorably cynical attitude towards the judiciary (footnote omitted).

(*Id.*, quoting *United States v. Antonelli Fireworks Co.* (2d Cir. 1946) 155 F.2d 631, 661, cert. denied, 329 U.S. 742 (1946).

The Pennsylvania Supreme Court, in apparent recognition of the futility of condemning misconduct, but upholding the resulting decision, now holds that the prosecutor's reliance upon religious authority to urge a sentence of death, is per se reversible error. (See *Commonwealth v. Chambers* (Pa. 1991) 599 A.2d 630.) While this Court may decide that such a rule is unnecessary, where, as here, the prosecutor invites and encourages the jury to apply a particular religious law, taken directly from Christian Scripture, the error should be found prejudicial and the death sentence should be reversed.

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E. Defense Counsels' Failure to Object to the Prosecutor's Misconduct Should Not Bar Review by This Court

Trial counsel's failure to object does not waive the issue because an admonition to disregard the prosecutor's argument would not have cured the error. An admonition to disregard the prosecutor's comments "could not erase them from the jurors' minds or explain why they should not be considered without further magnifying their impact." (*People v. Love* (1981) 56 Cal.2d 720, 733; see also *People v. Hill* (1998) 17 Cal.4th 800, 821.)

The misconduct that the prosecutor committed here was such as no admonition could cure, as the prosecutor should well have recognized. One of the challenges in selecting a jury to decide a capital case is the fact that the requirements of law often diverge from the personal philosophical and religious views of potential jurors. Thus, a venire person who believes that the death penalty is immoral or a violation of divine law, and who is perceived by the judge as unable to overcome their personal views, may not serve on a jury.

Consider then the situation of a juror who believes in the literal truth of the words of the Bible. Only that person knows in their heart whether they can truly put aside his or her notion of divine law and instead follow what they would probably consider a lower level of law, that devised by humans. Even assuming that they are doing their best to follow the law, what is the effect of having the prosecutor quote from the purported biblical injunctions to impose death on a murderer without mercy? What is the likelihood that after hearing such an invocation to divine authority the juror will then put that out of his or her mind when a judge tells them to consider something else? Appellant submits that the likelihood is small indeed.

Then consider the prosecutor in this case, who read several biblical passages that specifically commanded that death was the only appropriate penalty for murder, but who then told the jury that she was only reading the passages in case they had "any religious scruples." There is no difference in principle between looking to the Bible as providing the reason to impose a death sentence and using it to assuage misgivings about taking the defendant's life. In either event, the authority of the Bible has been placed on the weighing scales, and for at least some jurors, the Bible will carry more weight than any of the mitigating evidence they have heard.

Secondly, the prosecutor had to have realized that once she read from the Bible, jurors who accepted the words of the Bible as literal truth would be influenced irrespective of her claim that the passages were only read to assure the jury that they could use their "own moral beliefs in making [the] determination here." No admonition by the trial judge could have undone the harm caused by the prosecutor's argument any more than the prosecutor's own admonition, to use their "own moral beliefs," did.[52]

F. Review by This Court Is Necessary Under the Doctrine of Plain Error

Despite the failure of the defense to object, as Justice Mosk pointed out in his separate opinion in *People v. Wash, supra,* 6 Cal. 4th at pp. 276-277, this Court retains the power to review the prosecutor's actions and determine if the error was prejudicial. Under the doctrine of "plain error" almost all jurisdictions, state and federal, recognize the power of the reviewing court to reverse a decision even though the error may not have

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[52]To the extent that trial counsel's failure to object waives the issue, counsel rendered ineffective assistance of counsel, a claim that will be raised in the petition for habeas corpus. In the interest of judicial economy, this Court may more appropriately resolve this issue in the habeas proceeding.

been raised and preserved at the trial level. (3 *LaFave & Israel, Criminal Procedure* (1984) Scope of Appellate Review, sec. 26.5(d), p. 255.) A trial court commits plain error when (1) there is error, (2) that is plain, and (3) the error affects substantial rights, that is, if the error was one that seriously affected the fairness or integrity of judicial proceedings. (*United States v. Fuchs* (9th Cir. 2000) 218 F.3d 957, 961-962, citing *Johnson v. United States* (1997) 520 U.S. 461, 467.)

This Court has already held that prosecutorial reliance upon the Bible during penalty argument in a capital case constitutes serious misconduct. That this misconduct affected substantial rights of appellant can hardly be questioned. As Justice Mosk explained in *Wash, supra*, 6 Cal.4th at p. 277-78, the prosecutor's remarks bore directly on the only issue before the jury in the penalty phase: whether to vote for life or death. "Just as obviously, his remarks must have carried special force, 'incorporating as [they] did what many consider an authoritative source - if not Authority Itself.'" (*Id.*, quoting *People v. Sandoval* (1992) 4 Cal.4th 155, 205 (conc. & diss. opn. of Mosk, J.))

The prosecutor's repeated references to biblical law most certainly affected the fairness of the penalty proceedings and the jury's verdict. Reversal of the penalty and a new penalty trial is required to protect the defendant's right to a fair trial as well as the integrity of the proceedings.

G. Conclusion

Appellant is well aware of this Court's pattern of condemning a prosecutor's reliance on religious law in urging the jury to vote for death, yet often finding the misconduct harmless or "not cognizable on appeal" (*People v. Riel* (2000) 22 Cal.4th 1153, 1212) if defense counsel fails to object. Finding the error harmless, in this case, however, would not be

appropriate.

Appellant's life was at stake. The State abused its position by urging the jury to take appellant's life partly, if not primarily, because the laws of God required it. There is no way of knowing how this false and inflammatory argument was received by each of the jurors. Depending on their religious convictions, it may well have been *the most important part* of their difficult, delicate, once-in-a-lifetime, moral decision. Appellant had a right to a penalty determination by a jury that was not told to consider "the laws of God." He had a constitutional right to an individualized determination, based only on the statutory factors, as to which penalty was most appropriate in his case: life or death. It is more likely than not that he did not receive his due.

The trial court, charged with knowing the law, had an obligation to see to it that appellant was fairly tried and sentenced and that the law of the State, not religious law, was applied. Instead, the trial court allowed the state to deliberately proceed with an argument that went outside of the law, in order to win a death sentence. The jury thus had every reason to believe that the Bible was a proper subject for consideration and may very well have voted for death because of the biblical passages that were read. Appellant should not be forced into a position where he must pay with his life because of the unfortunate combination of purposeful State misconduct, neglect on the part of the trial court and the Hobson's choice which the State created for his defense counsel. Reversal of the penalty verdict is required.

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VIII.

THE TRIAL COURT GAVE INACCURATE AND PREJUDICIAL INSTRUCTIONS TO THE JURY IN RESPONSE TO ITS INQUIRY ABOUT THE GOVERNOR'S COMMUTATION POWERS.

A. Facts

In urging the jury to impose a sentence of death, the prosecutor devoted a considerable portion of her penalty argument to reviewing appellant's criminal history and the failure of the state prison system to reform him. The prosecutor argued that appellant exhibited an escalating pattern of violent behavior, which suggested that death was the only appropriate penalty. She explained that each time appellant was released from custody, he went on to commit more serious crimes. (RT 1551-1553.) A sentence of life without parole, she argued, would be inadequate because appellant would "probably be thinking . . . 'Why don't they let me out so I can go out there and do it again.' " (RT 1563.) The issue of appellant's future dangerousness was thus squarely before the jury as it began deliberating as to whether to impose life or death. (See *Kelly v. South Carolina* (Jan. 9, 2002) __ U.S. __, 122 S.Ct. 726.)

After approximately one hour of penalty phase deliberations, the jury sent the following note to the trial judge:

> When the defendant is given the death sentence, can the governor or anyone else overturn and/or overrule the decision, thus giving the defendant the opportunity for parole?
>
> When the defendant is given life without the chance of parole, can the governor or anyone else overturn and/or overrule the decision, thus giving the defendant an opportunity for parole?

(CT 1989; RT 1588-1589.)

In response to this inquiry the trial court stated that, after conferring with counsel and "by agreement of counsel" it would instruct the jury per the requirements of *People v. Ramos* (1984) 37 Cal.3d 136, 159 and *People v. Whitt* (1990) 51 Cal.3d 620, 656. (RT 1589.) Defense counsel requested that the court further instruct the jury that "life without the possibility of parole means exactly that," but the court denied the request, stating that "[t]he court and counsel have both given that instruction during the course of the trial and case law. [sic] The Court knows it would be improper at this time to give the instruction." (RT 1590.) Instead, the following instruction was read to the jury:

> The governor's commutation powers applies [sic] to both sentences, to wit, one death or two life without the possibility of parole. [It would] Be a violation of your duty as a juror to consider the possibility of such commutation in determining the appropriate sentence.

(RT 1591.) Given the facts of this case, however, this instruction misstated the law, as applied to appellant.

Appellant had three felony convictions. In addition to the murder conviction in the present case, the prosecution presented evidence of appellant's two prior felony convictions: a 1981 attempted burglary conviction (PX 75; RT 1449; RT 1450) and a 1983 burglary and rape conviction (PX 74; RT 1395; RT 1450.) Given these three convictions, the governor alone *could not have commuted* appellant's sentence. The governor would have had to consult with the Board of Prison Terms and obtain the prior approval of four justices of this Court. (Cal.Const. Art. 5 § 8; Penal Code §§ 4802, 4850-52, 4852.16.) However, the trial court did not give this information to the jury. The trial court's response denied

appellant fundamental fairness and rendered appellant's sentence unconstitutional in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, by providing the jury with incomplete and misleading information, which prevented it from undertaking the kind of individualized sentencing determination required in capital cases.

B. The Trial Court Gave an Inaccurate and Constitutionally Infirm Instruction to the Jury. Appellant's Death Sentence Must Be Reversed.

It is well settled that because of the "qualitative difference" between death and a sentence of imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Thus, in a capital case, the Eighth and Fourteenth Amendments require that a sentencing scheme allow the jury to consider *all relevant mitigating evidence* that would serve "as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

In this case, the legal obstacles that would have made appellant's parole eligibility less likely were certainly relevant factors that may well have served "as a basis for a sentence less than death." (*Id.*) By keeping this potentially mitigating information from the jury, it was effectively prevented from considering "constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 390.)

Moreover, when the prosecution relies on a prediction of future dangerousness in requesting the death penalty, "fundamental notions of due process" require that the jury be permitted to hear all evidence relevant to rebut the state's claim. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 164; *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, n.1; *Gardner v.*

Florida (1977) 430 U.S. 349, 362.) This is particularly so, when the jury has expressed its confusion. "When a jury makes explicit its difficulties a trial judge should clear them away with *concrete accuracy.*" (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-613, emphasis added.) Thus, when the jury asks the trial court to provide it with the relevant law that applies to the defendant's opportunity for parole or other commutation of a potential sentence, due process requires that *complete and accurate* information, relevant to the jury's determination of future dangerousness, be provided.

In analyzing the validity of a penalty instruction which deals with sentencing alternatives, this Court has held, "A court may not give an instruction that is incorrect." (*People v. Roybal* (1999) 19 Cal.4th 481, 524, *quoting People v. Ashmus* (1991) 54 Cal.3d 932, 994.) Similarly, relying on the reasoning of *California v. Ramos* (1983) 463 U.S. 992, the Ninth Circuit has held that "if an instruction is inaccurate or misleading it will not be upheld." (*Hamilton v. Vazquez* (9th Cir. 1994) 17 F.3d 1149, 1160.) See also *Gallego v. McDaniel* (9th Cir. 1997) 124 F.3d 1065, 1075 ["One of the key factors emphasized by the Court in *Ramos* was that of accuracy."]. In this case, after the jury asked about the governor's power to "overrule" its sentence, the trial court gave an instruction that was incomplete, inaccurate, and misleading. By failing to inform the jury that the sentence of a twice-convicted felon, such as appellant, could only be commuted by the governor if four justices of the California Supreme Court approved, the jurors were given substantially incomplete information which was critical to their inquiry.

It was obvious that the jury was concerned about the practical effect of their verdict: Could or would appellant ever be released from

prison? Since their decision as to whether appellant should live or die might very well have turned upon their correct understanding of the applicable law, including the governor's commutation powers in the case of a twice-convicted felon, it was essential that the jury be given absolutely complete and accurate information.

The answer given to the jury was neither complete nor accurate and could have only caused the jury to believe that (1) the life/death decision was ultimately with the governor, not the jury and/or (2) the process for commutation of a sentence was much simpler, and therefore more likely to happen, than it really was. If the jury believed that its decision could easily be reduced by the governor, it may have been more inclined to impose a harsher sentence than if it believed that its decision would stick.

In either case, (1) or (2), the impression left with the jury could have only been prejudicial to appellant. Had the jury been told the full truth about the commutation process in a case such as appellant's, it is more likely that they would have opted for a life without possibility of parole sentence, rather than death.

A similar situation arose in the case of *Coleman v. Calderon* (9th Cir. 1998) 150 F.3d 1105, rev'd on other grounds and remanded (1998) 525 U.S. 141, aff'd (9th Cir. 2000) 210 F.3d 1047. In *Coleman* the jury was instructed that the governor had the power "to grant a reprieve, pardon or commutation of a sentence following conviction of the crime."

The jury was further instructed that a life without parole sentence could be commuted to life *with* the possibility of parole, but that they were not to speculate about whether the governor would exercise that power. (*Coleman, supra,* 150 F.3d at pp. 1117-18.) As was true in appellant's case, Coleman had more than two prior felony convictions. (*Id.,* at p.

1118.) In considering whether the instruction was merely "incomplete" as the State argued, or inaccurate as applied to Coleman, the Ninth Circuit held that *the instruction was inaccurate.* Noting its previous decision in *McLain v. Calderon* (9th Cir. 1998) 134 F.3d 1383, 1388, the court said that "a commutation instruction is prejudicially inaccurate when it creates the false impression that the Governor, acting alone, can commute a life sentence." (*Coleman, supra*, 150 F.3d at 1119.) When the record demonstrates both (1) an interest in this subject matter by the jury and (2) a tactic by the prosecutor to emphasize the future dangerousness of the defendant, it is reasonable to assume that this inaccurate instruction *did* make a difference to the jury.

In appellant's case, the prosecutor devoted a considerable portion of her closing argument to reviewing appellant's criminal history and the failure of the state prison system to reform him. The prosecutor argued that appellant exhibited an escalating pattern of violent behavior, which suggested that death was the only appropriate penalty. She explained that each time appellant was released from custody, he went on to commit more serious crimes. (RT 1551- 1553.) A sentence of life without parole, she argued, would be inadequate because appellant would "probably be thinking . . . 'Why don't they let me out so I can go out there and do it again.' " (RT 1563.) The prosecutor thus placed appellant's claimed future dangerousness squarely before the jury as grounds for imposing the death penalty.

The prosecutor's message was certainly not lost on this jury. After a little more than an hour of deliberations, the jury asked about appellant's parole possibilities. Since the ease or difficulty with which appellant could be paroled was unquestionably of paramount concern to the jury in making

the life or death decision, it was entitled to complete and accurate information about the law as it applied to appellant. More importantly, appellant had a constitutional right, under the Eighth and Fourteenth Amendments to the U.S. Constitution and under the Article I, sections 7 and 17 of the California Constitution, to have his penalty phase jury fully apprised of the law with respect to any opportunities for, or likelihood of, parole.

California does not recognize "future dangerousness" as a statutory aggravating factor. (*People v. Boyd* (1985) 38 Cal. 3d 762, 775-776.)[53] Nevertheless, even in states such as South Carolina, where future dangerousness *is* a statutory aggravator, due process requires that when future dangerousness is raised by the state, the defendant is entitled to present *accurate and complete* information to rebut it. As the United States Supreme Court held in *Simmons v. South Carolina* (1994) 512 U.S. 154, 165, n. 5:

> The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff. *But the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility.* The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law. (Emphasis added.)

A criminal defendant should have no *less* rights here in California, where future dangerousness is not even a recognized aggravator.

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[53]This Court has, however, permitted the prosecutor to make the argument when properly admitted aggravating evidence supports such an inference. *(People v. Miranda* (1987) 44 Cal.3d 57, 111.)

Simmons is instructive for the proposition that when the prosecutor raises the prospect of the defendant's future dangerousness, the jury should not be left with a *false impression* regarding prospects for parole. In appellant's case, the prosecutor argued that a life prison term for appellant would not be sufficient punishment because he would simply use the time to figure out how to get out and "do it again." The prosecutor arguably exceeded her boundaries in making this argument. But since the prosecutor opened the door, the trial court, at the very least, had an obligation to give complete and accurate information to the jury about the law governing appellant's parole possibilities. Justice O'Connor, in *Simmons, supra,* recognized the importance of accurate instructions in that context:

> When the State seeks to show the defendant's future dangerousness . . .the defendant should be allowed to bring his parole ineligibility to the jury's attention--by way of argument by defense counsel *or an instruction from the court*--as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that *due process requires* that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole *and the prosecution argues that the defendant will pose a threat to society in the future.*

(Simmons, supra, 512 U.S. 154, 177 (conc. opn. of O'Connor, J.), emphasis added.)

Appellant is aware of this Court's contrary view in *People v. Whitt* (1990) 51 Cal.3d 620, and more recently in *People v. Hart* (1999) 20 Cal.4th 546. In both cases, this Court held that even when the defendant was a twice-convicted felon, it was sufficient to simply inform the jury that

the governor could commute either sentence. In *Whitt*, this Court found it "insignificant" that the trial court had failed to describe the additional limitations on the governor's power in the commutation process, and that those limitations were mere "details," that "bore no relevance to the jury's task." (*Whitt, supra,* 51 Cal.3d at pp. 656- 657.) Nevertheless, in *Hart, supra*, this Court *conceded* that the instruction at issue was *inaccurate*:

> [T]he trial court's comments *would have been more complete and fully accurate* had they noted that, in the case of a "twice-convicted" felon such as defendant, *the Governor may not grant clemency without the favorable recommendation of four or more justices of this court, . . .*

(*Id.* at p. 656, emphasis added.) This concession makes appellant's point.

An instruction is either accurate or it is not. One that is not "fully accurate," is less than accurate, and by definition, inaccurate. It is hard to imagine a context where it is any more critical to have complete and "fully accurate" instructions than in the penalty phase of a capital case. When a criminal defendant has his life on the line, and the jury asks the trial judge to explain that defendant's parole possibilities, fundamental fairness demands "fully accurate," as opposed to somewhat, partially, or less than accurate, jury instructions regarding those same parole possibilities.

Indeed, the U.S. Supreme Court's decision in *California v. Ramos* (1994) 463 U.S. 992, was premised upon the notion that a jury instruction which describes sentencing alternatives in a capital case must at the very least be *accurate*. Justice O'Connor's opinion refers to the "accuracy" of the Briggs Instruction at least six times.[54] Accord *Caldwell v. Mississippi*

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[54] "The Briggs Instruction gives the jury *accurate* information. . . ." (*Ramos, supra,* 463 U.S. at p. 1004); The instruction is not misleading. "On the contrary, the instruction gives the jury *accurate* information. . . ." (*Id.* at n. 19); "respondent

(1985) 472 U.S. 320, 342 [during the penalty phase of a capital case, jurors may be instructed on post-sentencing review by appellate courts, so long as the information provided the jurors is accurate] (O'Connor, J., concurring in part and concurring in judgment).

Arguably, this Court applies an even stricter standard than the U.S. Supreme Court when scrutinizing penalty instructions.[55] On remand, this Court struck the Briggs Instruction as violative of the due process clause of the California Constitution, "both because it is *misleading* and because it invites the jury to consider speculative and impermissible factors in reaching it's decision." (*People v. Ramos* (1984) 37 Cal.3d 136, 159, emphasis added.) Despite the U.S. Supreme Court's conclusion that the Briggs Instruction was *accurate*, this Court still found it to be *misleading* and struck it on that basis. Since the instruction given in this case has already been determined to be not "fully accurate" by this Court, and since the information that was omitted from the instruction goes to the heart of the jury's question, there simply can be no doubt that the instruction, as

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cannot argue that the Constitution prohibits the State from *accurately* characterizing its sentencing choices." (463 U.S. at p.1004); the instruction "was merely an *accurate* statement of a potential sentencing alternative." (*Id.*, at p. 1009); the instruction "supplies the jury with *accurate* information for its deliberation in selecting an appropriate sentence." (*Id.*); "This information if relevant and factually *accurate* and was properly before the jury." (*Id.*, at p. 1012.)

[55]In *Simmons, supra,* the Supreme Court reaffirmed the proposition articulated in *Ramos*, that the Court "will generally defer to a State's determination as to what a jury should and should not be told about sentencing." (*Simmons, supra,* 512 U.S. at p. 168.) However, when the state argues for the death penalty, in part on the premise that the defendant will be dangerous in the future, "due process plainly requires" that "*truthful information of parole ineligibility*" be allowed to be brought to the jury's attention, either by way of argument *"or an instruction from the court."* (*Id.*, at p. 168-169, emphasis added.)

applied to appellant was both materially inaccurate and misleading. Under *People v. Ramos, supra,* and well-established federal precedent, appellant's sentence of death must be reversed.

C. The Instruction Gave the False Impression That the Jury's Decision Could Unilaterally be Commuted by the Governor, in Violation of the Eighth Amendment.

In *People v. Morse* (1964) 60 Cal.2d 631, this Court held, on the basis of its supervisory powers, that jurors should not be instructed that a death sentence could be commuted because it reduced the jury's sense of responsibility in imposing a capital sentence. Twenty years later, in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329, the U.S. Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*Caldwell, supra*, 472 U.S. at p. 329, quoting *California v. Ramos*, *supra* 463 U.S. at pp. 998-999.)

In the present case, because the jurors expressed their concern about appellant's parole possibilities and specifically asked the trial court for information regarding those possibilities, it was not feasible to simply tell the jury *not* to concern itself with that question. It was apparent that the jury *had already decided* that, because appellant's future dangerousness had been argued by the prosecutor, the likelihood of him being paroled was something that should and would be of concern to them. The jury was thus already aware that parole *was* a possibility, and simply wanted to know *how much of a possibility, in appellant's case.*

Under these circumstances, it was especially important for the jury to know the full truth about these possibilities. By giving the jury the false impression that a governor could unilaterally modify either sentence, it made it more likely that the jury would feel *less responsibility* for making the sentencing decision. Thus, by giving incomplete information, the trial court made it *more* likely that the jury would not perform its duties as required, in violation of the holdings of both *Morse, supra* and *Caldwell, supra.*

Thus, not only did the trial court violate appellant's Due Process rights by failing to give the jury complete and fully accurate instructions regarding sentencing alternatives, but the shortcomings of the court's instruction made it more likely that the jury would not take responsibility for its sentencing decision, in violation of the Eight Amendment of the U.S. Constitution and Article I, section 17 of the California Constitution.

D. The Error Was Prejudicial

It is clear from the questions which were forwarded to the trial judge that the jury was very concerned about appellant's future dangerousness, and the likelihood of him being released from prison. This issue, without question, played a part in the jury's penalty determination. As *Coleman* recognized, an inaccurate instruction relating to this issue allows the jury to resolve it on the basis of a false premise. Under these circumstances, it cannot be said that the trial court's error was harmless. Appellant's sentence of death must be reversed.

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IX.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED IN THIS CASE, VIOLATES THE U. S. CONSTITUTION. APPELLANT'S DEATH SENTENCE MUST BE SET ASIDE.

A. Introduction

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant, presents these arguments here in an abbreviated fashion, sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for reconsideration by this Court. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have actually *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime -- even circumstances squarely opposed to each other -- to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on PC §190.2,

the "special circumstances" section of the statute -- but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that a random element in selecting who the state will kill is impermissibly dominant throughout the process of applying the penalty of death.

B. PC § 190.2 Is Impermissibly Broad. Its Failure to Narrow the Class of Death-Eligible First Degree Murderers Is Unconstitutional.

Section 190.2 violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; its application to appellant's case invalidates his death judgment because it is so all-inclusive that it does not meaningfully narrow the pool of murderers to those most deserving of consideration for the death penalty. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238, (conc. opn. of White, J.); accord, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, (plur. opn.).)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens (1983) 462 U.S. 862, 878.

Appellant was tried and convicted under the 1978 California Death Penalty Law. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[56] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated:

> And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*

(See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7," emphasis added.)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function: the circumscription of the class of persons eligible for the death penalty. By establishing twenty-six categories of special circumstance murder, the statute comes very close to achieving its goal of making every murderer

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[56]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow, and is now thirty-two.

eligible for death.[57] Section 190.2 does not genuinely narrow the class of persons eligible for the death penalty.

A recent law review article provides compelling confirmation of the 1978 statute's invalidity. The article, Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman*? (1997) 72 NYU L.Rev. 1283, presents empirical evidence demonstrating in two respects the statute's failure to perform the constitutionally mandated narrowing function. First, the data demonstrates as an empirical matter that 84% of convicted first degree murderers are statutorily death-eligible under the 1978 statute. (*Id.*, at p. 1332.) Second, the data shows that only 11.4% of the statutorily death-eligible class of first degree murderers are in fact being sentenced to death. (*Ibid.*)

A statutory scheme under which 84% of first degree murderers are death-eligible does not "genuinely narrow" the class. (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319, *cert. den.* (1995) 513 U.S. 1120). Further, since only 11.4% of those statutorily death-eligible are sentenced to death, California's death penalty scheme permits an even greater risk of arbitrariness than the schemes considered in *Furman v. Georgia, supra,* 408 U.S. 238,[58] and, like those schemes, is unconstitutional. Under the 1978

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[57]The problem has been exacerbated by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Morales* (1989) 48 Cal.3d 527, 557-58, 575.)

[58]At the time of the decision in *Furman*, the evidence before the high court established, and the justices understood, that approximately 15-20% of those convicted of capital murder were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (402 U.S. at p. 386 n. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . ." (402 U.S. at p. 309, n. 10.) Thus, while Justices Stewart

statute, as in pre-*Furman* Georgia, being sentenced to die is akin to being struck by lightning.

C. PC § 190.3(a) Is Impermissibly Vague and, as Applied, Violates the U.S. Constitution by Failing to Provide Any Basis for Differentiating Those Who Are Deserving of Death From Those Who Are Not.

Just as PC § 190.2 fails to adequately narrow the class of those who may be considered for death, PC § 190.3(a) likewise fails to provide any narrowing principles that might be applied by the jury in determining the appropriate penalty. Section 190.3(a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that virtually every feature of any murder, even features exactly at odds with those of other murders, have been found to be "aggravating" within the statute's meaning.

Factor (a), listed in § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor

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and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than 15-20% of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment. See also, *The California Death Penalty Scheme*, *supra*, 72 NYU L.Rev. at 1288-1290.

because defendant had a "hatred of religion,"[59] or because three weeks after the crime defendant sought to conceal evidence,[60] or threatened witnesses after his arrest,[61] or disposed of the victim's body in a manner that precluded its recovery.[62]

The purpose of § 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate the federal guarantee of due process of law.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. because the defendant struck many blows and inflicted multiple wounds,[63] or because the defendant killed with a single execution-

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[59] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-82, *cert. den.*, 112 S. Ct. 3040 (1992).

[60] *People v. Walker* (1988) 47 Cal.3d 605, 639 n.10, *cert. den.*, 494 U.S. 1038 (1990).

[61] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[62] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110 n.35, *cert. den.* 496 U.S. 931 (1990).

[63] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*,

style wound;[64]

b. because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[65] or because the defendant killed the victim without any motive at all;[66]

c. because the defendant killed the victim in cold blood[67] or because the defendant killed the victim during a savage frenzy;[68]

d. because the defendant engaged in a cover-up to conceal his crime,[69] or because the defendant did not engage in a cover-up and so must

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No. S004569, RT 160-61 (same).

[64] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[65] See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1224 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[66] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[67] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[68] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[69] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

have been proud of it;[70]

e. because the defendant made the victim endure the terror of anticipating a violent death[71] or because the defendant killed instantly without any warning;[72]

f. because the victim had children,[73] or because the victim had not yet had a chance to have children;[74]

g. because the victim struggled prior to death,[75] or because the victim did not struggle;[76]

h. because the defendant had a prior relationship with the victim,[77] or because the victim was a complete stranger to the defendant.[78]

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[70] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[71] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[72] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[73] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[74] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[75] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[76] See, e.g., *People v.* Riel (2000) 22 Cal.4th 1153, 1224 (victim offered no resistance); *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[77] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide.

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[79]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because

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Cal.3d at 717, 802 P.2d at 316 (same).

[78] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[79] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[80]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[81]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[82]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[83]

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[80] See, e.g., People v. Clair, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[81] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[82] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[83] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); People v. Ashmus, No. S004723, RT

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts -- or facts that are inevitable variations of every homicide -- into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, § 190.3 (a)'s broad "circumstances of the crime" aggravating factor permits indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.)

D. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing, and Therefore Violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

As shown above, California's death penalty statute does nothing to effectively narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Every person, like appellant, convicted of felony-murder is automatically eligible for death, and freighted with the requisite aggravating circumstance to be selected for death. Section 190.3(a) allows the prosecutor to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. As discussed in further detail below, juries do not have to make written findings or achieve unanimity as to aggravating circumstances; they do not have to believe beyond a reasonable doubt either that aggravating circumstances are proved, or that they outweigh the mitigating circumstances and that death is the appropriate penalty. Not only is inter-case proportionality review not required; trial courts routinely refuse to allow defendants to present evidence or arguments comparing crimes and this Court has consistently upheld those decisions. (*People v. Hughes* (2002) __Cal.4th___, 2002 WL 100453; *People v. Riel* (2000) 22 Cal.4th 1153, 1223; *People v. Roybal* (1998) 19 Cal.4th 481, 528-529.)

1. The Failure to Require Unanimous Written Findings, Beyond a Reasonable Doubt.

Appellant's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require proof beyond a reasonable doubt that (1) aggravating circumstances outweigh mitigating circumstances; or (2) that death is the appropriate sentence. Nor does the statute require the jury to be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358.) Moreover, the California statute requires neither written findings nor jury unanimity with respect to the aggravating factors that have been proven. A review of other jurisdictions reveals that California's statute falls outside the norm with respect to these standards.

Of the post-*Furman* state capital sentencing systems, twenty-five

require some form of written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied upon to impose death.[84] Of the twenty-two states that, like California, vest the responsibility for death penalty sentencing on the jury, fourteen require jury unanimity on the aggravators.[85]

Regarding the burden of proof, twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related

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[84] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

[85] See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

provisions.[86] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding that death is the appropriate punishment beyond a reasonable doubt.[87] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) California does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to

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[86] (See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).)

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[87] See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (N.C. 1979) 257 S.E.2d 569, 577.

proof of prior criminality relied upon as an aggravating circumstance -- and even in that context, the required finding need not be unanimous. Of course in appellant's case, even with respect to the prior felony convictions, the jury was not given the proof beyond a reasonable doubt instruction. As discussed in Argument VII, *supra,* appellant's jury was erroneously instructed that the preponderance of the evidence standard was sufficient.

The deficiencies in California's death penalty statute undermined appellant's right to a fair and a reliable penalty determination. Appellant's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from such factors relied on by the other jurors, i.e., there may have been no actual agreement on why appellant should be condemned. Without written findings, there is no way to determine whether or not the jury reached agreement.

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449.) In *non-capital* cases, the sentencer is required to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170(c).) In addition, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, *unanimous* verdict on the truth of such allegations. (Penal Code, §§ 1158, 1158(a), 1163.)

The failure to require that capital juries in the penalty phase unanimously, or even by a majority, find prior criminal activity to be true, stands in stark contrast to the rules applied to non-capital cases. The failure to require such separate, unanimous findings in capital cases violates the

principle that capital defendants are entitled to *more* rigorous procedural protections than non-capital defendants (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994; *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Conner, J.); *Lockett v. Ohio* (1978) 438 U.S. 586), in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. In fact, the current scheme adopts precisely the opposite approach: appellant, as a capital defendant, was singled out for *less* procedural protection than other individuals not charged with a capital offense, in violation of the Equal Protection Clause of the Fourteenth Amendment. See generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.

Indeed, explicit findings in the penalty phase of a capital case are especially critical because of two factors: 1) the magnitude of what is at stake (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305); and 2) the possibility of error. In *Mills v. Maryland* (1988) 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (*Id.*, at p. 383, fn. 15.) Absent a requirement of unanimous jury agreement as to the existence of any factors, and written findings thereon, the propriety of the judgment herein cannot be reviewed in a constitutional manner. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.)

Although this Court has held that unanimous agreement on the circumstances in aggravation is not required in a capital case, (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147), that holding is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement

of enhanced reliability in capital cases, and the Fourteenth Amendment requirement of due process and equal protection and California's constitutional counterparts. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra,* 428 U.S. 280.)

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo, supra*, particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640, should be reconsidered, in light of the recent decisions of the United States Supreme Court, including *Apprendi v. New Jersey* (2000) 530 U.S. 466, and the grant of *certiorari* in the case of *Ring v. Arizona* (cert. granted January 11, 2002) 151 L.Ed.2d 738.)

In *Bacigalupo*, this Court relied on *Hildwin* for the proposition that "the Sixth Amendment does not require the jury to reach unanimous agreement on the sentencing factors underlying its choice of penalty." (*People v. Bacigalupo, supra*, 1 Cal.4th at p. 147.) In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Hildwin v. Florida, supra*, 490 U.S. at pp. 640-641.) First of all, this is not the same as holding that unanimity is not required; more importantly, the *Hildwin* holding may no longer be valid since *Apprendi, supra.*

In *Apprendi* the Court struck down a New Jersey statute that permitted the judge, rather than the jury, to decide whether a crime had been motivated by racial bias, where such a finding would have increased the defendant's sentence by 10 years. The Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the

prescribed statutory maximum, other than the fact of a prior conviction, must be proven by a unanimous jury beyond a reasonable doubt.

As Justice O'Connor pointed out in her dissent, the *Apprendi* ruling calls into question the validity of the Court's rulings in both *Walton v. Arizona* (1990) 497 U.S. 639 and *Hildwin v. Florida, supra,* cases in which the validity of the death penalty statutes in Arizona and Florida were challenged. Both statutes direct the judge to determine the existence or non-existence of statutory aggravating and mitigating factors. Then, depending on those findings, the judge is authorized to impose the death penalty. *Walton* quoted *Hildwin* for the proposition that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Walton, supra,* at p. 648, quoting *Hildwin v. Florida, supra,* 490 U.S. at p. 640-41.)

However, if the *Apprendi* Court would strike a New Jersey statute which permits a judge to find a fact which would result in a 10-year sentencing increase, then, applying the same rule, it must surely strike statutes which permit a judge to make the findings required to increase a sentence from life in prison to the death penalty. The fact that the Supreme Court has now granted *certiorari* in *Ring v. Arizona, supra,* certainly raises the possibility that these statutes may indeed be ruled unconstitutional. Such a ruling would also call into question the constitutional validity of this Court's ruling in *People v. Bacigalupo, supra.*

Applying the *Apprendi* reasoning here, appellant contends that factors which increase a penalty from life in prison to death must be found by a unanimous jury, beyond a reasonable doubt. Under California's capital sentencing scheme, the jury may not impose a death sentence unless it finds (1) that one or more aggravating factors exist and (2) the aggravating factor

or factors outweigh any mitigating factors. (Penal Code § 190.3.) The Sixth, Eighth and Fourteenth Amendments require that both the existence of any aggravating factors relied upon to impose a death sentence and the determination that such factors outweigh any mitigating factors must be found by a unanimous jury, beyond a reasonable doubt.

Even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, *and with reasonable consistency*, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112; emphasis added.) The trial court's failure to instruct on any penalty phase burden of proof deprived appellant of his rights to due process, equal protection, and freedom from cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In cases in which the aggravating and mitigating evidence is balanced, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the ultimate burden of persuasion to the state, and another assigns it to the defendant.

2. The Failure to Require Inter-case Proportionality Review.

Thirty-one of the states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state supreme court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United

States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[88]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of sentence imposed, i.e., inter-case proportionality review. (See *People v. Riel, supra,* 22 Cal.4th at p. 1223.) Although the statute also does not forbid it, this Court has "consistently declined to undertake it," (*Id., quoting People v. Mincey* (1992) 2 Cal.4th 408, 476)

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[88] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

and has repeatedly upheld trial court decisions prohibiting evidence and arguments which show that death sentences are not being charged by prosecutors, or imposed by juries, on similarly situated defendants. (See, e.g., *People v. Hughes* (2002) __ Cal.4th___, 2002 WL 100453; *People v. Roybal* (1998) 19 Cal.4th 481, 528-529.)

Furman raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) This failure also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

E. Failure to Have Provided Appellant With the Same Disparate Sentence Review Afforded to All Californians Convicted and Sentenced To Penalties Less Than Death Violated Appellant's Rights to Due Process and Equal Protection of the Laws.

The failure to provide appellant with an inter-case proportionality review additionally violates appellant's right to equal protection and due process of law as guaranteed by the Fourteenth Amendment, because such review was afforded non-condemned inmates, per Penal Code § 1170(f), which, at the time of appellant's sentence, read:

> Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in

> comparison with the sentences in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate.
>
> Within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence . . . and resentence the defendant . . . as if the defendant had not been sentenced previously . . . .

Even assuming, arguendo, that appellant has no constitutional right to inter-case review, appellant is entitled to equal treatment with other inmates convicted of crimes occurring at the same time as those of which he has been convicted, i.e., the benefit of a determination of whether his ". . . sentence is disparate in comparison with the sentences in similar cases." (*Id.*)

Failure to provide persons sentenced to death with the same proportionality review given to all other persons sentenced to California's state prisons also violated appellant's right to substantive due process, which requires that significant benefits -- here, life itself -- not be arbitrarily withheld from either individuals or classes of convicted defendants.

F. The Statutory Mitigating Factors, as Written, and as Applied Through the Jury Instructions, Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

The mitigating factors set forth in Penal Code section 190.3, subsections (d) through (k), were provided to the jury in the standard jury instruction, CALJIC No. 8.85. (CT 2012-2014; RT 1576-1578.) The statute and the related instruction, however, are substantially misleading and for various reasons impermissibly acted to restrict the jury's consideration of mitigating evidence in appellant's case.

1. Irrelevant factors should have been deleted.

Instructing the jury about mitigating factors for which there was no evidence in this case was highly prejudicial to appellant. Because the defense presented no evidence to support factors (e) and (f), inclusion of those factors in the instruction could only have prejudiced appellant. The murders in the instant case were not rendered more heinous than others because the victims did not consent to the killing [factor (e)], or by the fact that they were not "committed under circumstances which the defendant reasonably believed to be a moral justification . . . for his conduct" [factor (f)]. Yet, the instruction improperly suggested otherwise. Thus, there was a real risk that the jury would aggravate appellant's sentence based on factors that should have played no role in its determination of penalty in this case.

2. Restrictive adjectives acted as barriers to consideration of mitigation

With respect to factors (d) and (g), the court should have deleted the words "extreme" and "substantial" before submitting those factors for consideration. Factor (d) requires evidence of an "*extreme* mental or emotional disturbance" and factor (g) requires "*extreme* duress" or "*substantial* domination." The restrictive language of factors (d) and (g) acted as unconstitutional barriers to consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Stringer v. Black* (1992) 503 U.S. 222; *Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) There is an impermissible risk that the jury would either understand these factors, or their absence, to be aggravating, or would interpret the language to mean that mental or emotional disturbance, duress, and impaired capacity could not be given any mitigating weight *unless* those conditions were extreme or substantial.

Without a showing of either an "extreme" mental disturbance or "extreme" duress, including those factors in the instruction only made it more difficult for the defense to convince the jury that appellant's life should be spared.

In addition, factors (d) and (h) both impermissibly restrict the described conditions to the time of the offense, implying that unless they existed at that time, they could not be considered as mitigating evidence. This language -- i.e., at the time of the offense -- creates a substantial and impermissible risk that the jury would believe that evidence relevant to such factors could not be given mitigating weight if they did not influence the commission of the crime. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1030; U.S. Const., 8th & 14th Amends.) Inferences that do "not relate specifically to [the defendant's] culpability for the crime he committed" may nevertheless be mitigating under the Eighth Amendment. (*Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5.)

The restrictive language of factors (d), (g) and (h), acted as instructional commandments to the jury, rendering those factors unconstitutionally vague, overbroad, arbitrary, capricious, and incapable of principled application. (*Maynard v. Cartwright* (1988) 486 U.S. 356; *Godfrey v. Georgia* (1980) 446 U.S. 420.) The jury's consideration of these factors, in turn, introduced impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

3. The jury should have been instructed that factors (d) through (h), (j) and (k) could only be considered as mitigation.

Nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of

the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" -- factors (d), (e), (f), (g), (h), and (j) -- were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "arbitrary and capricious action," *Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U. S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. The constitution requires "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112 .)

X.

CALJIC 8.88 IS CONSTITUTIONALLY FLAWED

The jury was instructed with CALJIC 8.88, which was read by the trial judge as follows:

> "It is now your duty to determine which of the two penalties, death or confinement of [sic] the state prison for life without possibility of parole, should be imposed on the defendant. [¶] After hearing all of the evidence, and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the element [sic] of crime [sic] itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. [¶] In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by the [sic] considering with [sic] the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 1585-1587.)

This instruction contains numerous flaws which violated appellant's Sixth, Eighth and Fourteenth Amendment rights. Appellant acknowledges

that this Court has previously rejected these contentions but respectfully requests that this Court reconsider them.

First, the term "so substantial" is unconstitutionally vague under the Eighth and Fourteenth Amendments. (But see *People v. McPeters* (1992) 2 Cal.4th 1148, 1194.)

Second, the term "warrants" is unconstitutionally broad and permissive, and misleads the jury into believing it may impose death even when not the appropriate penalty in violation of the Eighth and Fourteenth Amendments' requirement of a reliable penalty determination. (But see *People v. Breaux* (1991) 1 Cal.4th 281, 316.)

Third, the instruction fails to specify that the prosecution has the burden of persuading the jury that it must be convinced of the penalty determination beyond a reasonable doubt in violation of the Due Process Clause of the Fourteenth Amendment. (*Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818; but see *People v. Berryman* (1993) 6 Cal.4th 1048, 1101.)

Fourth, the instruction fails to require a finding beyond a reasonable doubt that aggravating circumstances outweighed mitigating ones, and that the death penalty was appropriate in violation of the Due Process Clause of the Fourteenth Amendment. (*Ford v. Strickland, supra*, 696 F.2d at p. 818; but see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

Fifth, the instruction fails to require unanimous jury findings regarding the truth of the various aggravating circumstances, and to require a "statement of reasons" supporting a death verdict. (cf. *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. 280; but see *People v. Pride* (1992) 3 Cal.4th 195, 268-269.)

Appellant's jury was instructed that "[a] mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (RT 1586.) This definition of mitigation was insufficient to inform properly the jury of the full scope of evidence that must be considered in determining whether life imprisonment without the possibility of parole, rather than death, is the appropriate sentence. The failure of the trial court to provide the jury with an adequate understanding of this critical legal concept undermined the reliability of the ensuing death judgment in violation of the Eighth and Fourteenth Amendments.[89]

A study of capital jury instructions in California found that only 12% of the college-educated subjects were able to define mitigation in a legally correct fashion. (Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 420.) Even more disturbing, 41% of these subjects were either totally incorrect in their definition or completely unable to fashion any definition whatsoever. As for the scope of the definition, 53% attempted to define mitigation by focusing on the nature of the crime. (*Id.*, at p. 421.)

In another study, based upon interviews with actual capital jurors in California, it was found that of 30 California jurors interviewed, only thirteen showed "reasonably accurate comprehension of the concepts of aggravating and mitigating." (Craig Haney, et al., *Deciding to Take a Life:*

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[89]As this Court has repeatedly recognized, trial courts must "instruct sua sponte on those general principles of law which are closely and openly connected with the facts and are necessary for the jury's understanding of the case. (*People v. Varin* (1974) 12 Cal.3d 220, 226.)

Capital Juries. Sentencing Instructions, and the Jurisprudence of Death (1994) J. Social Issues, vol. 50, No. 2, pp. 149, 169.) Moreover, the study noted that "fully one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself, and did so in a way that amounted to a presumption in favor of death." (*Id.* at p. 162.)

A definition of mitigation limited solely to circumstances surrounding the capital crime violates the constitutional requirement that the jury be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra*, 438 U.S. at p. 604.) Any verdict of death premised on such an abridged interpretation of mitigation fails to reflect the "reasoned *moral* response to the defendant's background, character, and crime" that is required under the Eighth Amendment. (*California v. Brown* (1987) 479 U.S. 538, 545 (O' Connor, J., concurring, emphasis in original).)

This Court's assumption that "mitigating" is a commonly understood term necessitating no further definition (*People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1018; see also *People v. Holt* (1997) 15 Cal.4th 619, 702) is refuted by empirical evidence. Moreover, this same empirical evidence indicates that one of the primary misconceptions harbored by jurors concerning "mitigation" is that it relates only to the circumstances surrounding the crime. The definition provided to appellant's jury, rather than eradicating the confusion that exists as to the meaning of the term "mitigation," reinforced the commonly held belief that mitigating evidence must be directly related to the crime in order for the jury to consider it as a basis for a sentence less than death.

The failure properly to instruct appellant's jury regarding the full scope of mitigating evidence was tantamount to an explicit instruction to the jury not to consider mitigating evidence if not directly related to the crime. Such instructions are unconstitutional. (*Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399.) The failure of the trial court to give an adequate definition of mitigation irreparably and unconstitutionally tainted the jury's verdict of death, requiring reversal of appellant's sentence.

* * * * *

XI.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRE THAT THE CONVICTIONS AND DEATH SENTENCE BE REVERSED.

Even if the errors in appellant's case standing alone do not warrant reversal, it is necessary to consider their cumulative impact. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Fields v. Woodford* (9th Cir. 2002) ___ F.3d ___, 2002 WL 253821; *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381. The cumulative effect of multiple errors may still prejudice a defendant. (*Id.*)

A. Guilt Phase Errors

The prosecution's case against appellant was entirely dependent upon evidence obtained through coercive police tactics, that were employed with utter disregard for the constitutional rights of the persons being questioned. The information coerced from Margaret Williams led directly to appellant's arrest and indictment, and then later, to his conviction. Moreover, appellant's own statements, which were also obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights, became the centerpiece of the prosecution's case. The trial court's erroneous rulings on these essential portions of the state's case, ensured appellant's conviction. (Arguments I, II and III, *supra.*)

Moreover, the trial court's failure to provide the jury with any instructions on Margaret Williams' status as an accomplice; to instruct them that accomplice testimony had to be independently corroborated; and that it had to be viewed with caution, was also very prejudicial to appellant. (Argument IV, *supra.*) Rather than properly evaluating Margaret Williams' testimony as a potential accomplice, the jury was permitted to

treat her testimony as it would any other witness. The prejudice caused by this failure to give accomplice instructions was exacerbated by the trial court's inclusion of CALJIC 2.11.5 in the jury instructions. That instruction wrongfully prevented the jury from considering Margaret Williams' motives in incriminating appellant and exonerating herself. (Argument V, *supra.*) The result of these errors, together, unfairly elevated Margaret Williams' credibility, unfairly bolstered the prosecution's case and lessened the State's burden of proof.

Given the interrelationship and the severity of these trial court errors, their cumulative effect was to deny appellant a fair and reliable guilt determination. Appellant's conviction must be reversed.

B. Penalty Phase Errors

Errors in the penalty phase similarly had a cumulative impact resulting in an unfair and unreliable sentence of death. Not only was the jury given the wrong standard with respect to the state's burden of proving prior felony convictions (Argument VI, *supra*), but the prosecutor was allowed to urge the jury to vote for death on the basis of passages which he read from the Bible that said death was the only appropriate punishment for murder. (Argument VII, *supra.*) Finally, when the jury was deliberating, it expressed its concern, in writing, about appellant's ability to be paroled, or his sentence commuted, through the action of the governor. The jury should have been given complete and accurate information from the court in this regard. Instead, the court gave incomplete, inaccurate information that could only have increased the likelihood that appellant would be thereafter sentenced to die. (Argument VIII, *supra.*) This error was also devastating to appellant. However, these combination of errors adversely influenced the penalty determination, resulting in appellant's being

sentenced to death without a fair and reliable process. It certainly cannot be said that the errors had "no effect" on at least one juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) The combination of guilt and penalty phase errors rendered appellant's trial fundamentally unfair and, when considered altogether, were highly prejudicial. Appellant's death sentence must be reversed due to the cumulative effect of the many errors in the penalty phase.

CONCLUSION

For all of the foregoing reasons, appellant asks that this Court set aside his sentence of death, reverse his convictions, and remand the case for a new trial.

Dated: March 19, 2002

Respectfully submitted,

LYNNE S. COFFIN
State Public Defender

ELLEN J. EGGERS
Deputy State Public Defender

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. David Earl Williams**
Case Number: **California Supreme Court No. S020490**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 801 K Street, Suite 1100, Sacramento, California 95814.

On March 19, 2002, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Sacramento, California, with postage thereon fully prepaid.

David E. Williams
Post Office Box H-54601
San Quentin State Prison
San Quentin, CA 94974

Mr. Richard Leonard
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Downey, CA 90242-2356

Ms. Suzanne Papagoda
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880 West First St., Suite 309
Los Angeles, CA 90012

Clerk of the Superior Court
(for delivery to Judge Smith)
L.A. County Superior Court
210 W. Temple Street
Los Angeles, CA 90012-3210

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 2002, at Sacramento, California.

Kimberli Marks