IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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 REPLY BRIEF

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS, (Cont.)

PAGE(S)

TABLE OF CONTENTS, (Cont.)

PAGE(S)

TABLE OF CONTENTS, (Cont.)

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES, (Cont.)

TABLE OF AUTHORITIES, (Cont.)

TABLE OF AUTHORITIES (Cont.)

STATUTES

TABLE OF AUTHORITIES, (Cont.)

PAGE(S)

RULES

CALIFORNIA CONSTITUTION

U.S. CONSTITUTION

TABLE OF AUTHORITIES, (Cont.)

PAGE(S)

TREATISES

INTRODUCTION

In this reply brief, appellant specifically addresses certain contentions made by respondent and does not reply to arguments adequately addressed in appellant's opening brief. As to those matters not addressed here, appellant has neither conceded nor waived them. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) With respect to AOB Argument VII, regarding the prosecutor's reliance on biblical authority in urging the jury to vote for the death penalty, trial counsel's failure to object to the argument constitutes grounds for a claim of ineffective assistance of counsel. As such, that claim is, and will be, more properly raised in a petition for a writ of habeas corpus; it is hereby withdrawn from this direct appeal.

I.

APPELLANT'S STATEMENTS WERE OBTAINED IN VIOLATION OF HIS *MIRANDA* RIGHTS AND SHOULD HAVE BEEN SUPPRESSED.

Respondent has correctly cited the applicable law regarding the suppression of statements obtained from a suspect who has unequivocally and unambiguously made a demand for counsel. However, by completely mischaracterizing appellant's interactions with his interrogators, respondent has *erroneously* concluded (1) that appellant gave conflicting and/or ambiguous responses which required the police to ask "clarifying questions;" (2) that appellant failed to request counsel again, later in the interview; and (3) that appellant's later initiation of contact with the police resulted in a valid waiver of the right to counsel. As discussed below, these conclusions are erroneous and not supported by the record.

A. Appellant's Responses, Requesting Counsel, Were Neither Conflicting Nor Ambiguous.

At the start of the interview appellant was absolutely clear about two things: (1) he was willing to talk to the police and (2) yes, *yes*, ***yes***, he wanted an attorney "present during questioning." Appellant's answers to both questions posed by the police (was he willing to talk and did he want an attorney present), were clear, concise, unambiguous and in no way conflicting. Under such circumstances, the police officers had but one option, and that was to "scrupulously honor" the defendant's right to cut off questioning. In its brief, respondent has correctly cited the legal authority establishing this right. (RB 51-53.)

Nevertheless, respondent claims, without reference to any legal authority, that when appellant said, three times, that he wished to have counsel present during questioning, those "*assertions contradicted*

appellant's waiver of the right to remain silent. . . ." (RB 55.) Respondent is wrong. A suspect's request for counsel in no way undermines or *contradicts* a waiver of the right to remain silent. They are separate rights; and a suspect may well be willing to speak with the police but still desire his attorney to be present during the process.

Respondent also claims that appellant's three requests for counsel "were *ambiguous, given appellant's question, 'You talking about now.'*" (RB 55, emphasis added.) As will be discussed below, respondent's distorted analysis is without factual or legal support. The transcript of the interrogation, after appellant waived his right to *silence*, speaks for itself:

[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]: Un huh.

[Knebel]: Are you sure?

[Appellant]: Yes.

[Salgado]: You don't want to talk to us right now?

[Appellant]: Yeah, I'll talk to you right now.

(Supp. 2 CT 74, emphasis added.)

In arguing that appellant created confusion, respondent focuses on appellant's question to Knebel, "You talking about now?" Respondent claims that this question *created some sort of confusion or ambiguity for the interrogating officer*, for which appellant should now pay the price. (See RB 55.) The unfairness of such an argument is obvious.

Appellant's intervening question, rather than *causing* confusion, sought clarification and gave Officer Knebel the perfect opportunity to *legitimately* respond with the correct information *prior to appellant asserting his right to counsel.* Had Officer Knebel simply answered the question by telling appellant *when* an attorney would be provided, the burden to decide what to do, in light of that information, would have been on appellant. Appellant's choice would have been to: (1) speak right then, *without* counsel or (2) speak later on, *with* counsel. Appellant might very well have chosen to waive his right to counsel, and under *those circumstances*, the police would have been well within their rights to proceed with their interrogation. But this was not the sequence of events that actually took place.

Instead, when appellant asked the question, "You talking about now?" Officer Knebel chose to ignore it and simply restated his original question in a way that implied appellant *would have counsel provided at that time* ["Do you want an attorney *here* while you talk to us?"]. Appellant said "yes," meaning he did want the attorney "here" while the police talked to him. That answer was unequivocal, triggered the protections of *Edwards*, and required the police to end the questioning. The police failed to do what was required, and thus fell into their own inartfully prepared trap.

Appellant did not create any confusion. He simply answered the questions which were put to him. Respondent's claim that the officer found it necessary to ask follow-up questions because appellant "appeared to be confused about what it meant to have an attorney present during questioning," (RB 47) is simply without foundation. If appellant was ever confused, it would have been because the officer deliberately created the

confusion by *refusing to answer* appellant's question until *after* appellant had clearly asserted his right to counsel.

It was only *after* appellant demanded counsel that the officers chose to "clarify" matters that should have been resolved *before appellant invoked his right to counsel.* Then, after appellant had invoked counsel, the police continued to interrogate and badger appellant until they were able to persuade him to go on, *without* an attorney present. As respondent has so correctly pointed out in its brief, at page 51: "If a defendant 'indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning.'" (*Miranda v. Arizona* (1966) 384 U.S. 436, 444.) Based upon this correct citation to federal law, the questioning should have ended.

Similarly, respondent has failed to establish that appellant's responses were ambiguous. An ambiguous response refers to one which is unclear, uncertain or is subject to more than one interpretation. Under such circumstances, "[i]f the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." (*Davis v. United States* (1994) 512 U.S. 452, 459.) Statements which have been held to be ambiguous are ones such as "*Maybe I should* talk to a lawyer," (*Davis, supra*, 512 U.S. at p. 462, emphasis added) and "*I think I would like* to talk to a lawyer." (*Clark v. Murphy* (9th Cir. 2003) 317 F.3d 1038, 1046-1047, emphasis added.) A suspect's ambiguous response may not trigger the protection of the *Edwards* rule because

> if a questioning officer does not know whether or not the suspect wants a lawyer, requiring the cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'

(*Clark*, supra, at 1045, quoting *Michigan v. Mosley* (1975) 423 U.S. 96, 102.)

However, in this case, nothing about appellant's responses was ambiguous. He was asked if he wanted counsel present and three times he answered that he did. Consequently, the protections provided by the *Edwards* rule required the police to cease their questioning.

B. Appellant Made A Second Unambiguous Request For Counsel, Which Was Also Ignored By the Authorities.

Respondent concedes, as well it must since the transcript of the police interview is in the record and undisputed, that appellant asked a second time for counsel to be present: "I want to see my attorney because you're all bullshitting now." (Supp. 2 CT 84.) This was another clear request for counsel that the officers were bound to honor. But, once again, they ignored appellant and went on with the interview, in direct violation of *Edwards*. Respondent disingenuously describes this interchange as one in which "Detective Knebel tried to stop the conversation." A simple re-read of this portion of the interview transcript demonstrates that Knebel made no such efforts.

First of all, an officer who *wants* to stop a conversation certainly can, and in this case, he should have. But Detective Knebel did *not try to stop anything*. Rather, he asked appellant the same question he asked before ("You want your attorney now?"), presumably for the same purpose as before: so that when appellant said "yes," Kenbel could again talk appellant out of his request for counsel. Knebel asked the question, but before appellant could even respond, the second officer, Salgado, broke in and expressed his opinion that appellant "obviously" was "not ready to tell the truth." There was clearly no effort to "stop the conversation." To the

contrary, the effort that *both officers* made was to persuade appellant to *continue* the conversation *without* counsel. By interrupting appellant and pressuring him, all the while ignoring the request for counsel, the officers were successful in their efforts and the interrogation went forward.

These tactics, far from exhibiting any effort to honor appellant's wishes, reveal the officers' ongoing efforts to discourage appellant from obtaining counsel. The fact that they were successful in their unlawful persuasion, does not make their actions legal. It merely highlights why the Supreme Court has fashioned bright-line rules for guarding the rights of the accused during police questioning.

Since it has been established that appellant properly invoked his right to counsel in the first interview and that the detectives operated outside of the bounds set by the Supreme Court in *Miranda* and *Edwards*, the statements appellant gave to the police in both the first and second interviews were obtained without a valid waiver and should have been suppressed by the trial court.

C. Appellant's Initiation of Contact With the Police Was of No Legal Effect Since the Police Did Not Scrupulously Honor Appellant's Right to be Free from Further Interrogation Once He Asked for Counsel.

Respondent claims that the final police interviews with appellant, conducted on Tuesday, March 28, were properly admitted into evidence because appellant himself had initiated the conversation with the police that led, ultimately, to appellant's verbal waiver on tape. Respondent would be correct were it not for the fact that the police had previously ignored appellant's repeated requests for counsel and had, instead, continued their interrogation. Under such circumstances, the suspect's initiation of conversation with the police is of no legal effect. Any other rule would

render the protections of *Edwards* completely meaningless. A number of courts, including this one, have recognized the truth of this proposition. (*People v. Boyer* (1989) 48 Cal.3d 247, 274-275; *Colazzo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 427 (conc. opn. of Kozinski, J.); *United States v. Gomez* (11th Cir. 1991) 927 F.2d 1530.)

As appellant has fully explained in the Opening Brief (see AOB 42-50), the police may not benefit from the *Edwards* "escape hatch,[1]" unless they have *scrupulously honored* the suspect's demand for counsel by ending all questioning. If the police ignore a demand for counsel, and continue their questioning, they forfeit their right to claim that the suspect's later "initiation" of a conversation was of legal effect under *Edwards*. Appellant previously cited *United States v. Gomez* (11th Cir. 1991) 927 F.2d 1530 for this proposition. As in *Gomez*, since appellant's interrogators continued to question appellant *after* he had requested counsel, it is simply not relevant that appellant later asked to speak further with the police.

Respondent claims that reliance on *Gomez* is misplaced, citing *United States v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164. (RB 64, fn. 10.) While respondent is certainly correct that in *Moreno-Flores* the

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[1] In *Colazzo v. Estelle, supra*, 940 F.2d at 427, Judge Kozinski referred to the initiation exception as an "escape hatch." Normally, once the suspect has asked for counsel, there can be no further interrogation, unless counsel is present. An exception exists when the suspect himself initiates further conversation with the police. However, this "escape hatch" for the police is only available if the police "cease their interrogation as soon as the suspect asserts his right to counsel." (*Id.*) In the present case, as discussed previously, this did not happen. Thus there was no "escape hatch," and appellant's initiation of further conversation with the police may only be viewed as the foreseeable product of the officers' failure to honor appellant's request for counsel.

Ninth Circuit refused to apply the reasoning of the *Gomez* decision, its refusal was for two reasons, both of which distinguish it from appellant's case and lend support to appellant's position that *Gomez* is directly on point.

First, in *Gomez* the defendant *had requested an attorney*, just as appellant had in this case. However, no such request for counsel had been made in *Moreno-Flores*. Second, in *Gomez*, "it was no more than a few minutes after the defendant invoked his right to counsel that the officers interrogated him and obtained an incriminating response." (*United States v. Moreno-Flores, supra*, 33 F.3d at p. 1170.) In *Moreno-Flores*, on the other hand, the Ninth Circuit concluded that the defendant's "post-arrest statements were not the product of interrogation and *his right to cut off questioning was 'scrupulously honored.'*" (*Id.*, at p. 1171, emphasis added.)

Thus, both factors in *Gomez* upon which the *Moreno-Flores* court had relied in finding *Gomez* inapplicable, are factors which *are present* in appellant's case. Appellant *did invoke his right to counsel, and the police immediately continued their interrogation*, which eventually led to incriminating statements which were used against him at trial. The fact that any of his statements were obtained as the result of his own initiation of contact with the police is thus irrelevant under such circumstances. As the court in *Gomez* explained, "Once the agents have . . . violated *Edwards*, no claim that the accused 'initiated' more conversation will be heard." (*United States v. Gomez, supra,* 927 F.2d at p. 1539.)

In addition, respondent attempts to distinguish *People v. Boyer, supra,* 48 Cal.3d 247, on grounds that are legally indistinguishable. For example, respondent points out that in *Boyer* the suspect "had been subjected to over an hour of intensive interrogation," (RB 65, citing *Boyer,* at p. 273), implying that appellant's experience was less oppressive. In fact,

appellant's interrogation extended over a four-day period and included at least four separate interrogation sessions. The first interview alone lasted a half an hour (RT 400) and included repeated threats that he would "fry" in the gas chamber, unless he admitted his involvement. (CT Supp. II 82, 88, 92, 93.)

Respondent also attempts to distinguish *Boyer* on the grounds that Boyer's pleas for counsel "were ignored, and the questioning continued over his objection." (RB 65.) Again, *Boyer* is not distinguishable on those bases. The police in this case also repeatedly ignored the demands for counsel and simply continued their questioning until they were able to secure appellant's permission to continue *without counsel.*

Finally, respondent argues that since the police in appellant's case did not "reenter the interrogation room" or "launch into a monologue on the status of the investigation," the officers did not "effectively invite defendant to make an incriminating response," as was true in *Boyer.* (RB 65.) However, in appellant's case the police did not *need to reenter the interrogation room* since they *never left* it in the first place. The fact that they *stayed in the room* only demonstrates that they did not even *pretend* to end the session, as the police had done in *Boyer.* Moreover, in appellant's case the police conducted themselves in much the same way as the police had in *Boyer*, in that they described in great detail the evidence that had been gathered against appellant (including some that was fictitious), in the hopes that it would prompt appellant to confess to the murder.

In appellant's case, the police did not "*effectively* invite" him to incriminate himself, they *actually* invited him to do so. In fact, it was much more than an "invitation," it was a threat. They told appellant that the only

thing that could save him from the gas chamber was for him to tell the truth and tell them *why* he committed the murder. (CT Supp. II 92-93.)

Respondent also refers to appellant's alleged confession in a prior criminal case as support for the proposition that appellant has a "history of slowly revealing additional information" to the police when he is in custody (RB 66-67), which respondent suggests would undercut the claim that the confession in this case was unconstitutionally obtained. The absurdity of this argument is so apparent that it barely merits discussion. Whatever happened during appellant's interrogation in the prior case, certainly has no bearing on whether the police officers in *this case* violated appellant's rights by refusing to honor his request for counsel. If in fact appellant eventually succumbed to police pressure in the *Taylor* case, that may only indicate that appellant is the type of individual who is highly susceptible to improper police tactics and that the police officers in the present case took full advantage of that vulnerability.

Respondent also suggests that the trial court's ruling somehow rested upon credibility determinations. *People v. Waidla* (2000) 22 Cal.4th 690, 731-732, is cited for the proposition that when a police officer and a defendant give conflicting testimony as to a "defendant's spontaneous initiation of a discussion," the "'ultimate question goes to credibility.'" (RB 53, citing *Waidla, supra.*) However, in appellant's case, there was no need to assess credibility because there was no conflicting testimony regarding the officer's claim that appellant asked to speak to him. Nor did the trial court make any credibility determinations in that regard. Assuming appellant *did* express a desire to speak further with the police, that initiation of contact was simply of no legal effect since the officers *never honored*

appellant's request for an attorney by ending the interrogation until counsel was present. Thus, *Waidla* has no bearing on this issue.

Appellant has relied on *Desire v. Attorney General of California* (9th Cir. 1992) 969 F.2d 802, 804-805, for the proposition that once the suspect has asked for counsel, the police "cannot ask whether he wants to talk about the case *without* a lawyer." (Emphasis added.) Respondent attempts to distinguish *Desire* on the grounds that the police in that case *stopped the interrogation and then returned to reinitiate it.* (RB 57-58.) Respondent apparently believes that since the police in *Desire* "pretended to honor [the suspect's] rights and made a show of halting the interrogation," (RB 58) the conduct of those officers was somehow more egregious than the officers in this case, who did not even *pretend* to honor appellant's rights. Such a claim obviously makes no sense.

Although Knebel and Salgado should have ended the session once appellant asked for an attorney, they did not do so. Instead, they brazenly pressed on, ignoring everything appellant said, and pressuring appellant to continue without counsel. They only listened to him *after* they had secured his waiver of counsel. Their blatant disregard of appellant's rights should put them in no better position than the officers in *Desire*, who left the room temporarily, but returned to continue the questioning. Respondent's claim that the officers were simply trying to "clarify appellant's wishes in order to honor [his rights]" is belied by the transcript of the interrogation tape.

Respondent's reliance on *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1402 [police may advise accused that an appointed attorney is not presently available] is likewise misplaced. The *Lujan* case simply confirmed the holding of *Duckworth v. Egan* (1989) 492 U.S. 195, that providing accurate information to the suspect *in the course of the Miranda*

warning and prior to the suspect's demand for counsel, meets the *Miranda* requirements. Similarly, *if the suspect has not yet requested counsel* and *asks the authorities* about when counsel will be appointed, the police may certainly provide the information, although they are not required to do so. (*Moran v. Burbine* (1986) 475 U.S. 412, 422.) However, no court has ever held that *after the suspect has unequivocally expressed his desire for an attorney* the police may then simply ignore the request in favor of encouraging the suspect to continue the interrogation on the grounds that counsel will not be provided for several days. By the time the accused has demanded counsel, it is simply too late for the police to start providing what may have previously been "useful" information, in the hopes that they might dissuade the accused from his position. The bright-line rule of *Edwards v. Arizona* (1981) 451 U.S. 477, requires that the interrogation end.

The record speaks for itself. Any honest interpretation of the interrogation transcript leads to but one conclusion: the police ignored appellant's constitutional rights and all statements obtained as a result of their illegal interrogation should have been suppressed.

D. Admission of Appellant's Statements Was Prejudicial.

Respondent claims that "appellant cannot demonstrate prejudice," (RB 67) as a result of the admission of his confession in the prosecution's case in chief. However, once it has been demonstrated that constitutional error has occurred, as it has here, the burden is "on the prosecution to show that constitutional error was harmless beyond a reasonable doubt." (*Dyas v. Poole* (9th Cir. 2002) 317 F.3d 934, 936, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Demonstrating that the admission of the defendant's own confession was harmless in terms of securing the

conviction, is a substantial burden to meet, for obvious reasons:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton v. United States* [1968] 391 U.S., [123] at 139-140, 88 S.Ct., at 1630 (dis. opn. of White, J.). See also *Cruz v. New York*, [1987] 481 U.S., [186] at 195, (dis. opn. of White, J.) (citing *Bruton, supra.*).
>
> While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, *a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.*

Arizona v. Fulminante (1991) 499 U.S. 279, 296 (emphasis added.)

In appellant's case, the prosecutor recognized the importance of the post-arrest confession obtained by the police and emphasized this to the jury in arguing that there was sufficient evidence to establish that they had "the right person here in the courtroom to be held responsible." (RT 1298.) After reviewing the physical evidence, which standing alone would have been weak and inconclusive in terms of establishing appellant as the murderer,[2] the prosecutor conceded that the heart of the case against

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[2] As summarized by the prosecutor, the physical evidence was as follows: damage to appellant's car, the "paint transfer" (RT 1298) (which only established that the paint was similar [RT 1180]); alleged "burns" on appellant's hands which were not identified as such by any expert; a bullet found in appellant's apartment that was of the same type that could have

(continued...)

appellant was his confession:

> [W]e have to concede *the most damaging evidence connecting him is his own admissions and confession.* . . . [O]nce you have established that these crimes exist, *then you can use the perpetrator's confession to convict him of the crimes.* . . . [W]ith the defendant's statements you can establish, one, that this is his handiwork, he is responsible for these crimes; and, two, from his own admissions out of his own mouth he said he robbed Mrs. Lacey right there. *That is enough to establish the degree of the crime, which is first-degree murder.*

(RT 1300-1301, emphasis added.)

As in *Fulminante*, it cannot be said that the admission of appellant's confession, fully explaining the motive and circumstances of the crime, was harmless beyond a reasonable doubt. To the contrary, the prosecutor believed it was the most critical piece of evidence in the case and believed that standing alone it was sufficient to establish appellant's guilt. Similarly, respondent has conceded, in its brief, that "appellant's own statements were *the most powerful evidence* in this case." (RB 89, emphasis added.) Respondent cannot, therefore, simultaneously claim that any error in allowing this evidence to come in did not contribute to the verdict obtained, (*Chapman v. California* (1967) 386 U.S. 18, 24), or that the evidence was "unimportant in relation to everything else the jury considered." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.)

Undoubtedly, the jury gave appellant's confession strong weight and without it, it is reasonably likely that the jury would not have convicted appellant. Evidence that Loretta Kelly and/or Margaret Williams, the star

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[2] (...continued)
been used in the gun found at the scene and evidence that appellant may have had possession of at least one item of the victim's jewelry.

prosecution witness, committed this murder might very well have created sufficient reasonable doubt in the minds of the jurors, that appellant might have been acquitted. However, appellant's unlawfully obtained confession sealed his fate. That confession is likely what enabled the jury to reach a decision on guilt in only 2½ hours! (CT 1983.) Its admission was unquestionably prejudicial constitutional error under the *Chapman* standard. Appellant's conviction and death sentence must be reversed.

* * * * *

II.

THE IMPROPER INTERROGATION TACTICS USED BY THE POLICE RESULTED IN A COERCED CONFESSION THAT SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE.

A. The Trial Court's Conclusion That Appellant's Statements Were Voluntary Is Not Supported By The Facts or the Law.

As discussed in the previous argument, the trial court misapplied the law in deciding that appellant's purported waiver of his right to counsel during the interrogation was valid. Because the requests for counsel were ignored, the "waiver" that followed was of no effect. Thus, the trial court's conclusion that appellant's statements were all voluntary because he "[went] right on and says he will talk to [the officer]" (RT 473), ignores applicable law and is therefore clearly in error. In fact, the trial court engaged in almost no analysis of the facts surrounding appellant's custody and interrogation because it mistakenly concluded that his waiver of counsel was a valid waiver.

While a trial court's findings of fact are entitled to great deference on appeal if they are supported by substantial evidence, (*People v. Weaver* (2001) 26 Cal.4th 876, 921), there is no need to apply that standard here because appellant does not dispute any of the facts relevant to the issue of his coerced confession.[3] The facts necessary for finding that the confession

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[3] That is not to say that appellant agrees with all of the trial court's factual findings, but only that he does not dispute those that were relevant to the issue of coercion. For example, the trial court found that "[I]f what he says is true" appellant did not do "what the officers told him to, to implicate somebody else." (RT 472.) While appellant disagrees with this factual finding, since in the transcript of the interrogation sessions appellant very

(continued...)

was coerced by police misconduct are all contained in the transcripts of the interrogation sessions and are a matter of record. Rather than making fact findings, the trial court simply analyzed the interrogation sessions and concluded that all of appellant's statements to the police "were freely and voluntarily made with no coercion on behalf of the officers, that his rights under *Miranda* [were] not violated in any way." (RT 473.) The trial court's determination that the confession was voluntary is thus subject to independent review by this Court. (*People v. Weaver, supra,* 26 Cal. 4th at p. 921.)

B. Contrary to Respondent's Claims, The Entire Interrogation Process Was Structured and Carried Out in A Manner Designed To Coerce A Confession.

Respondent asks this Court to endorse the illegal and coercive tactics of the police interrogators by minimizing the overall effect of each of the individual tactics and simply stating, in conclusory form, that the police respected appellant's rights and "never discouraged [him] from seeking counsel." (RB 74.) However, as appellant has pointed out in his Opening Brief, it was the *cumulative and ongoing* effect of numerous illegal and coercive tactics, taken together over a four day period, that caused appellant to finally break down and move from his initial position - - that he had not been involved in the killing of Mrs. Lacey - - to his final position, in which he essentially confessed to everything that he had been accused of by the police.

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[3] (...continued)
clearly *did* implicate someone else, namely, Loretta Kelly, this particular finding of the trial court was not material to appellant's claim that the police engaged in coercive conduct that led to his confession.

Respondent argues that appellant was not kept incommunicado because there was no evidence that he was prevented from receiving or placing phone calls or seeing visitors during the days leading up to his confession. (RB 70.) Respondent misses the point. Appellant had absolutely no access to an attorney throughout the four-day period between his arrest and his ultimate confession. The record is clear, and there is no dispute, that he asked for counsel, had a right to counsel and yet did not have counsel present during any of the interrogation sessions. The police actively urged him to proceed without counsel, to deal directly with them, and to save himself in the only way that was being made available to him: by confessing to the crimes that were described to him.

This Court can only speculate about whether visitors or phone calls were allowed while appellant was in custody, and, if they were, whether anyone from the outside contacted appellant. While the record is of course silent on these points, the record does reveal that appellant had no mother, and that his father and most of his family members were incarcerated. (RT 1466.) Under those circumstances, it is doubtful that appellant's family would have been available to him. In any event, a suspect facing first degree murder charges, who desires an attorney while the police are questioning him, *needs and should have an attorney present.* Visits from family members may be helpful, but they do not satisfy the constitutional right to have an attorney present while one is being interrogated in a capital murder case.

Since appellant's repeated requests for counsel were ignored and the police cajoled him into proceeding without counsel, respondent's claim that appellant's rights were "respected" is simply untrue.

Respondent defends or dismisses much of the police misconduct, seemingly on the grounds that "appellant was read his rights and the principles underlying these rights was [sic] respected." (RB 71.) While it is true that the police read appellant his *Miranda* rights, those rights were *not* respected. (See AOB Argument I.) Nor were the "principles underlying" those rights respected. Underlying a suspect's *Miranda* rights is the recognition by the courts that once a *Mirandized* suspect has unambiguously asked for counsel, the police must "scrupulously honor" that request. (*Edwards v. Arizona* (1981) 451 U.S. 477.) Not only was this not done in appellant's case - - the opposite was true.

The reading of his rights was transformed into a meaningless and empty act, once appellant attempted to exercise his rights. Moreover, the effect of asking a suspect if he wants counsel, and then denying him counsel after he responds affirmatively, is even worse in many respects than not reading him his rights at all. Had appellant *not been Mirandized*, his confession almost certainly would have been ruled inadmissible. By reading him his rights, but ignoring his request for counsel, the police were able to cover their bases and still accomplish their goal: to secure his confession by demonstrating to him that his *Miranda* rights were, in fact, quite meaningless. Thus, rather than being a protection for the suspect, as the *Miranda* recitation was meant to be, in appellant's case it was used as the most effective weapon in the interrogation arsenal, to secure a coerced confession.

Respondent points to appellant's initial denial of involvement as "evidence" that "his will was not overborne by Officer Salgado's comments. (RB 72.) In support, respondent cites *People v. Massie* (1998) 19 Cal.4th 550, 576. However, *Massie* simply confirms that in determining

whether a confession is voluntary, "[t]he question is whether defendant's choice to confess was not 'essentially free' *because his will was overborne*." The fact that appellant first strenuously denied, and then ultimately confessed, is certainly not evidence that the officer's pressure had no effect. Again, just the opposite is true. One would expect that a suspect whose "will was overborne" would indeed strenuously deny his guilt to begin with, and then, over time, succumb to pressure and reverse his position. In this case, appellant's inability to secure counsel would have reasonably contributed to a feeling of hopelessness, and a sense that his only way out was to ultimately give in to the pressures of the law enforcement officers by confessing. The *Massie* case, rather than supporting respondent, simply confirms that involuntary confessions are ones that are not freely given, but rather given because of ongoing pressure from the police. That is exactly what happened here.

Respondent also claims unabashedly that appellant "was not kept in custody for days or subjected to continuous interrogation." (RB 72.) By respondent's own admission, however, appellant was arrested on Saturday and arraigned the following Friday (March 25 through March 31). Not only was he "kept in custody for days," it was an entire week before appellant was brought to court. Respondent's point seems to be that because *the interrogation itself did not last for days*, there was no unlawful pressure brought to bear upon appellant. Indeed, requiring appellant to sit for days in his cell without any contact with anyone except his interrogators, and with only his interrogators as his advisors, it is little wonder that appellant eventually decided to take their repeated advice to confess. Since they were the only advisors provided, it is not surprising that appellant would have come to see his situation as hopeless.

Respondent refers to the "atmosphere of domination" that the *Miranda* Court sought to dissipate, and implies that such an atmosphere was not present in appellant's case. However, what took place in appellant's case is precisely the situation which the *Miranda* warnings were meant to prevent. Appellant was certainly given the warnings; the problem was that his repeated attempts to invoke the protections of *Miranda* were ignored.

Respondent places significance on the fact that after appellant finally confessed to the police on March 28, 1989, his fourth day in custody, the police no longer spoke with appellant. (RB 73.) For obvious reasons, once the police had secured appellant's confession, they had no need for further contact with him. The point is that the police pressure continued, between Saturday and Tuesday, until the appellant's confession had been taped.

Amazingly, respondent claims that the police officers "never discouraged appellant from seeking counsel." (RB 74.) Respondent apparently forgets that when appellant asked for counsel in the middle of the interview (his second request) Salgado told appellant that he obviously was "not ready to tell the truth." (CT Supp. 285.) This was a clever way of telling appellant that only liars would want an attorney. It placed appellant in an impossible position, and was 100% effective as a strategy for discouraging appellant from seeking counsel.

Respondent's attempts to minimize the effect of each and every unlawful and/or coercive tactic used by the police throughout appellant's custody ignore the practical effect of these tactics, taken together, over time and in the face of failed attempts to obtain an attorney. This Court must uphold the rights of the accused to be free from such tactics to ensure that when confessions are obtained in a custodial setting, they are truly voluntary. The pressures that were brought to bear upon appellant in this

case rendered his confession involuntary and inadmissible. His convictions and death sentence must be reversed.

* * * * *

III.

MARGARET WILLIAMS' TESTIMONY WAS THE PRODUCT OF POLICE COERCION, WAS UNRELIABLE AND PREJUDICIAL, AND SHOULD HAVE BEEN EXCLUDED.

The first judge to rule on the issue of whether Margaret Williams' testimony was the product of police coercion (and therefore inherently unreliable), was Judge Morris, the preliminary hearing judge. Although Judge Morris agreed that coercion produced Margaret's initial statement to the police, he also found that because there was sufficient "attenuation" between the initial coercion, in March of 1989, and her later in-court testimony the following December, that her preliminary hearing testimony was admissible. (CT 368.) At the same time, Judge Morris acknowledged the *very problem which appellant raises on appeal*: that the substance of Margaret's testimony, accusing appellant of the robbery and murder of Joanne Lacey, *could very well have been the product of the "original coercion" by the police.* (CT 368.) Appellant's point, which is not addressed by respondent, is that Judge Morris's concerns were not only well-founded, but were supported by substantial evidence. Those facts should have led Judge Morris to rule that there had not been sufficient attenuation to warrant the admission of Margaret's testimony.

A review of Margaret's testimony at the preliminary hearing, the only forum in which she was examined about whether her fear of the authorities was still influencing her testimony, *revealed that fear was still very much a factor for her, even eight months after her arrest and interrogation.* Had Judge Morris properly ruled on that question, it is likely that Margaret's testimony would have subsequently been excluded by the trial judge. Instead, the trial judge simply adopted the position of Judge

Morris, ignored Margaret's admissions that her fear of the police continued to be a factor motivating her testimony, and allowed her testimony to proceed.

A review of Margaret's testimony at the preliminary hearing reveals that both judges who ruled upon the question were in error. Although Margaret had earlier read and signed a transactional immunity agreement, (CT 279-280), she testified that she had no idea what that grant of immunity meant (CT 373-374); her testimony confirmed that indeed it was meaningless to her. She believed the police had the "power on the streets" (CT 354) and that if she failed to cooperate by testifying against appellant, the police would not leave her alone. Margaret's admitted fear of the police demonstrated that the immunity agreement had little practical significance for her, although her responses to the prosecutor's leading questions seemed to indicate otherwise. In short, despite the eight months that had passed since her arrest and interrogation, Margaret's testimony was still the product of fear, generated by the police at the time of her arrest. (CT 354.)

Substantial, and virtually uncontradicted, evidence thus supported the defense's position that the coercive effects of the first interrogation session had not dissipated, as Judge Morris admitted might be the case. If the passage of eight months and a signed immunity agreement did not cause her fear to dissipate, there was no reason to believe that her fear would have subsided by the time of the trial. Rather, she would have been far less likely, at that point, to present a different version of what had taken place - - a version that might have differed significantly from the story the police demanded that she tell. It is more logical to assume that by the time of appellant's trial, Margaret would have been under even greater pressure to stick with her original story. Once she had testified at the preliminary

hearing, her story was firmly and forever locked into place. Had she changed her story after that time, she knew full well that she could be prosecuted for perjury. (CT 375.)

As appellant noted in the opening brief (AOB 76-77), California law recognizes that when "coercion has affected the third party's trial testimony," (*People v. Badgett* (1995) 10 Cal.4th 330, 344), the testimony may be stricken on the ground that it is involuntary and therefore unreliable. A trial based upon coerced testimony is fundamentally unfair, and any resulting conviction must be set aside as a violation of the defendant's Fifth and Fourteenth Amendment rights to a fair trial, and the Eighth Amendment right to a reliable penalty determination. Since the uncontroverted evidence is that coercion affected Margaret Williams' preliminary hearing testimony, and since that testimony could never be changed without the added fear and pressure of a perjury conviction, it simply cannot be said that the coercion that was found to have been in effect initially, was sufficiently attenuated by the time of appellant's trial. Since Margaret's testimony clearly contributed in a significant way to appellant's conviction, the error in admitting it was not harmless. Appellant's conviction and death sentence must be reversed.

* * * * *

IV.

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRIAL BY FAILING TO GIVE THE ACCOMPLICE INSTRUCTIONS REGARDING MARGARET WILLIAMS' TESTIMONY.

A. There Was Sufficient Evidence For a Jury To Conclude That Margaret Williams Was An Accomplice To Murder.

Respondent argues that there is no substantial evidence that Margaret Williams was an accomplice in this case. However, it was the State's own witness, lead detective John Knebel, that presented the evidence linking Margaret Williams to the crimes. If Officer Knebel is to be believed, Margaret Williams was shown to be an accomplice by her own out-of-court admissions. An anonymous police informant claimed to have had a conversation with Margaret a few days after the murder took place. At trial, the informant was identified as the daughter of John Wright,[4] a man who called the police and put them in contact with his daughter. In a telephone conversation with Knebel, Wright's daughter revealed that Margaret Williams *admitted to her* that she had been paid to purchase gasoline and act as a lookout while someone burned up a car. (RT 1087-1088.)

Respondent claims that evidence was insufficient to raise a question for the jury as to whether Margaret was an accomplice, because *Margaret herself* denied that she ever made such a statement. Obviously, Margaret Williams would not deliberately incriminate herself. Her denial of

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[4] The identity of this informant, with whom the officer conversed, was never revealed at the trial. But her identity is irrelevant for purposes of this argument.

involvement does not mean there was no evidence of her accomplice status, only that it was *disputed.*

Respondent also states that "there was no evidence presented which placed Williams at the crime scene or the gas station," but this is not true either. Officer Knebel testified about the informant's tip, which indicated that Margaret had been paid to buy gas *and to be a lookout* while the car burned. Such evidence *does place Margaret at the scene.*

Unquestionably, the fact that Margaret was *arrested* for the murder does not *prove* she was an accomplice; but neither does her eventual release by the police prove that she was *not involved.* Similarly, the fact that appellant never implicated Margaret certainly does not establish her non-involvement. As respondent has noted, Margaret was the mother of appellant's nephew and he may well have wanted to protect her from prosecution.

Respondent also attempts to refute the evidence of Margaret's involvement by pointing to the fact that Margaret claimed the victim was shot *twice,* in the *head,* while the forensic evidence established that the victim had been shot just *once,* in the *hand.* (RB 92.) However, Margaret's mistake in this regard certainly does not help to establish that she was *not involved.* Rather, it may simply demonstrate that she was aware that more than one shot was fired, even though only one bullet actually struck the victim. Troy Cory, the witness who lived next to where the car fire took place, testified that he heard "gun shots," (plural) before the explosion. If indeed *two* shots were fired, persons present at the crime scene would have known that and may well have believed that both shots hit the victim.

More importantly, the only evidence of *how* the victim actually sustained the gunshot wound to her hand came from Officer Knebel. He

testified that appellant had claimed, during the final interrogation session, that Loretta Kelly had shot the victim "through the seat" after she had been placed in the trunk of the car. (RT 1154.) If that evidence is to be believed, then *none* of the participants to the crime would have known whether the bullet(s) hit the victim in the head, in the hand, or at all. Consequently, Margaret Williams' statement to the police that the victim was shot twice in the head may only establish that she was *guessing* about the nature of the victim's wounds, but certainly does *not establish* that she was not involved.

Finally, if Margaret was present at the scene, as the police informant claimed, then she would have known that there was someone in the trunk of the vehicle, by virtue of the fact that someone shot into the car just prior to it being set ablaze. From all of this evidence, notwithstanding Margaret's denials, there was sufficient evidence for the jury to conclude that Margaret Williams was present and involved, and therefore an accomplice to these crimes.

The State's own evidence, found in the testimony of Officer Knebel and Margaret Williams, raises a dispute of fact as to whether she was an accomplice or not. Unless there is *no dispute,* as to either the facts or the inferences to be drawn therefrom, "whether a person is an accomplice is a question of fact for the jury." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) Given the dispute of fact created by the State's own evidence, appellant had a right to have the jury instructed with the full set of accomplice instructions.

B. The Failure to Give The Accomplice Instruction Was Prejudicial to Appellant.

Respondent argues that the trial court's failure to give the accomplice instructions was harmless because Margaret Williams'

testimony was sufficiently corroborated in any event. This conclusion is only true if the Court completely rejects the issues raised in Arguments I, II, III, *supra*, and V, *infra*. In these arguments, appellant has demonstrated that the coercive tactics used by the police, both with respect to their custody and interrogation of appellant (Arguments I and II) and with respect to their interrogation of Margaret Williams (Argument III) resulted in unreliable evidence that should not have been admitted into evidence. But for the coercive and illegal police tactics, it is unlikely that appellant would have given a confession or that Margaret Williams would have implicated appellant in order to secure her own release from custody. Arguments I through III demonstrate that illegal police procedures produced the testimony that all but assured a guilty verdict. Without the coerced confession and the coerced testimony, the case against appellant likely would have been dismissed.

Moreover, if just appellant's coerced confession is removed from the equation, as it certainly must be, there is really only one piece of compelling evidence remaining connecting appellant to these crimes, and that is the testimony of Margaret Williams. The instructional errors of the trial court - - its failure to give the accomplice instructions, and its error in *giving* CALJIC No. 2.11.5 (Argument V) - - bolstered the credibility of Margaret Williams in two ways.

First, because the accomplice instructions were not given, the jury had no basis for viewing Margaret's testimony with any sort of caution or distrust. (See CALJIC No. 3.18.) Brought in by the prosecution as the key witness, Margaret was given the imprimatur of the State, and cloaked with credibility. Had the proper instructions been given, the jury would have

known that Margaret should not have been trusted since she may well have been involved as an accomplice to murder.

Second, because the trial court improperly instructed the jury with CALJIC 2.11.5, the jury was further prevented from questioning the motives behind Margaret's testimony, because they were told they could *not* consider the State's failure to prosecute her in assessing her credibility. The admission of appellant's confession *in combination with the introduction of Margaret Williams' testimony, and the failure of the trial court to adequately instruct the jury as to how her testimony should be viewed,* produced a body of evidence that pointed overwhelmingly, yet improperly, towards appellant's guilt.

The serious evidentiary and instructional errors set forth in Arguments I through V cannot fairly be viewed in isolation. These errors are all related to the two single-most critical and prejudicial pieces of evidence presented to the jury. The errors must be viewed together and considered for their cumulative effect. Together, the errors combined to produce a deadly result for appellant. Appellant's convictions and death sentence must be reversed.

* * * * *

V.

WITHOUT ANY LIMITING LANGUAGE, GIVING CALJIC NO. 2.11.5 WAS PREJUDICIAL ERROR.

A. Appellant Has Not Waived This Issue.

Respondent argues that appellant has waived this issue because his counsel did not raise it below. However, even when there has been no objection before the trial court, instructional errors are reviewable on appeal to the extent they affect "substantial rights." (*People v. Prieto* (2003) 30 Cal.4th 226, 133 Cal.Rptr.2d 18, 34, citing, *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; see also Penal Code section 1259.) Had Margaret Williams been a minor player in appellant's trial, whose testimony provided only background or detail information, not critical to the prosecution's case, her credibility with the jury would certainly not have been a matter affecting appellant's "substantial rights." However, that was not the case.

Margaret was *the most important witness in this case.* The police understood from the beginning that she was involved in the events leading up to the victim's death, and may well have been the person responsible for the murder. That is why they arrested her and that is why the prosecutor eventually granted her immunity. Her testimony placed her in the middle of the crimes; she was as close to a percipient witness as anyone in the case.

Unlike the witnesses in *People v. Williams* (1997) 16 Cal.4th 153, 227, who "were not the mainstays of the prosecution case," Margaret was the heart of the State's case. More than any other witness, her testimony sealed appellant's fate and conviction. Under the circumstances, the jury instructions which involved the weight and effect to be given her testimony were of utmost importance to appellant. His "substantial rights" certainly were affected by the trial court's erroneous use of this instruction.

B. There Was Sufficient Evidence That Prosecution Witness Margaret Williams Was "Involved" In These Crimes. As Such, CALJIC No. 2.11.5 Was Given In Error.

CALJIC No. 2.11.5, on its face, instructs the jury with respect to persons who were or "*may have been* involved in the crime" for which the defendant is on trial. When such persons are also witnesses, as was true with Margaret Williams, the instruction is *not to be given*. As respondent has correctly noted (RB 97, n. 21), in order to establish the error, appellant need not show that Margaret Williams was an *accomplice*, only that she was someone who *might have been involved* in the crime, an entirely "separate issue." (*People v. Williams* (1997) 16 Cal.4th 153,226, quoting *People v. Cox* (1991) 53 Cal.3d 618, 667.)

In Argument IV of the opening brief, appellant summarizes the evidence which would have allowed the jury to find that Margaret Williams was indeed an accomplice. (AOB 87-89.) For purposes of *this* argument, however, appellant need only show that Margaret *might* have been involved - - a criteria that clearly has been met by the prosecution's own evidence. (RT 1087-1088; RT 1098-1101; RT 1025-1026; RT 1214.) Under the circumstances, it was error for the judge to give CALJIC No. 2.11.5, unless it could be made clear that the instruction *did not apply* to Margaret Williams.

Contrary to respondent's assertion, appellant has not premised this argument on Margaret's status as an accomplice. Nor is it relevant, as respondent claims, that "the prosecution maintained that Williams was not 'involved' with the crime," that the police "never really believed she was in fact a suspect," or that the prosecution assured her that she would not be prosecuted. (RB 97.) Margaret Williams *was a suspect*, as evidenced by the fact that she was arrested and booked for murder, so whether the police

believed she was a suspect or not surely has no bearing on whether the jury might have believed she was "involved." Margaret *was granted immunity from prosecution.* That in itself set her apart from the garden variety trial witness. Immunity agreements are not entered into without a reason and the jury needed to know that the existence of that immunity agreement *was a factor to be considered in assessing Margaret's credibility.*

Finally, respondent concludes its response by arguing that CALJIC No. 2.11.5 did not need to be modified so as to limit it to Loretta Kelly "because [Margaret] Williams could not reasonably be considered an accomplice or participant." (RB 98.) Again, as respondent was so quick to point out, it is not necessary to establish that Margaret was either. *If the jury might have found that she was involved,* the instruction should have been stricken, or alternatively, modified to exclude Margaret Williams.

C. The Error Prejudiced Appellant.

As discussed in Argument IV, *supra* at pp. 26-27, the prejudicial effect of this instructional error cannot be considered in isolation. While this Court has at times concluded that the erroneous use of CALJIC No. 2.11.5 was harmless, in those cases the prejudicial effect of the instruction was offset by the giving of the full set of accomplice instructions. (See cases cited in AOB at p. 100.) No accomplice instructions were given here. Contrary to respondent's assertion, CALJIC Nos. 1.01 (consider the instructions as a whole] and 2.20 [consider full range of factors affecting credibility] were general instructions, hardly sufficient to counteract the very *specific directions* to the jury that they were *not to consider* certain factors (such as a grant of immunity) in assessing the credibility of Margaret Williams. This error, especially considered along with the other instructional errors, requires reversal of the convictions and death sentence.

VI.

THE TRIAL COURT'S FAILURE TO CORRECTLY INSTRUCT THE JURY REGARDING BURDEN OF PROOF REQUIRES REVERSAL OF THE DEATH SENTENCE.

A. This Issue Is Not Waived.

Respondent claims that because the defense did not object to the erroneous burden of proof instruction, the trial court's failure to instruct with CALJIC No. 8.86 has been waived for purposes of this appeal. (RB 104, fn. 25.) However, as appellant has previously pointed out, and *as respondent later concedes in its brief,* "a trial court has a *sua sponte* duty to so instruct." (RB 105.) Hence, no objection was required.

B. The Instructional Error Here Is Not Subject To Harmless Error Analysis And Requires Reversal of the Death Sentence.

Appellant has established in the opening brief (AOB 108-110), and respondent concedes (RB 105), that the trial judge erred in failing to instruct the jury that the prior felony convictions alleged in the penalty phase of appellant's trial had to be proven beyond a reasonable doubt. This instructional error deprived appellant of his rights under California law, as well as his federal constitutional rights to a fair trial and a reliable penalty determination, guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Respondent *further concedes* that one of the prior convictions *was not even admissible as a statutory aggravating factor.* (RB 107-108.) As discussed below, these multiple penalty phase errors are not subject to harmless error analysis, require reversal of appellant's death sentence, and a new penalty phase trial. However, in the alternative, even applying the *Chapman* harmless error standard, respondent cannot establish beyond a

reasonable doubt that these serious errors did not contribute to the death penalty verdict in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

1. There was no jury finding, beyond a reasonable doubt, that appellant had suffered *any* prior felony convictions.

In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the trial court instructed the jury with a definition of reasonable doubt that had been previously held unconstitutional. The United States Supreme Court was asked to rule upon the effect of this instructional error. It found that the Sixth Amendment right to a jury trial included the right to a *jury verdict* of guilty beyond a reasonable doubt. Because the instructional error gave the wrong definition of reasonable doubt, the Court found that, in fact, there was no jury verdict at all. Such an error went to the heart of the Sixth Amendment right to a jury trial, which included the right to a jury verdict on guilt, and as such was found to be "structural error," not subject to harmless-error analysis. (*Id.* at p. 282.)

Although the instructional error in appellant's case took place in the penalty phase of his trial and thus had no bearing on his Sixth Amendment right to a finding of *guilt by a jury*, the reasoning of the *Sullivan* decision is particularly instructive here, because *Sullivan* explains the *effect* of such an instructional error on the *underlying finding itself.* The Supreme Court found that because of the instructional error, *no guilty verdict had in fact been rendered:*

> The inquiry, in other words, is not whether [absent the error] . . . a guilty verdict would surely have been rendered . . . . because to hypothesize a guilty verdict *that was never in fact rendered - - no matter how inescapable the findings to*

> *support that verdict might be* - - would violate the jury-trial guarantee.

(*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279, emphasis added.)

In other words, when the jury is required to make a finding beyond a reasonable doubt, but has not been so instructed, any purported finding which results is itself called into question. As a practical matter, it is as though no such finding has been made:

> [T]he essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, *which vitiates all the jury's findings.*

(*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281, emphasis added.)

In appellant's case, this Court must apply the reasoning of *Sullivan.* Since the jury did not receive the beyond-a-reasonable-doubt instruction as required by California law with respect to the three alleged prior felony convictions, there could have been no findings that appellant suffered *any of the three convictions.*[5] Thus, the jury's determination that death was the appropriate penalty was necessarily based upon a weighing of aggravating and mitigating evidence which included aggravating evidence for which there could have been no underlying factual findings.

2. Respondent concedes the inadmissibility of the 1981 felony conviction.

In addition to the problems in proof caused by the instructional error, respondent has conceded in its brief that evidence of the 1981 conviction

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[5] The jury was instructed that evidence had been introduced to show that appellant had previously been convicted of three felonies: (1) attempted residential burglary [the 1981 conviction]; (2) residential burglary and (3) forcible rape [the 1983 convictions]. (RT 1578-1579; CT 2015-2016.)

for attempted residential burglary was inadmissible. Moreover, even if that conviction *had been* admissible, as appellant has previously noted, the evidence presented in support of that conviction was insufficient under *any standard of proof.* Far from *proving* the conviction, People's Exhibit 75 only established that any paperwork which *might have established* the prior no longer existed. Further, the jury never heard any evidence of a stipulation regarding prior convictions. (AOB 102-103.) Because of the overriding instructional error regarding the correct burden of proof, as well as the *inadmissibility* of the prior conviction, and the *insufficiency* of the evidence, harmless-error analysis is inappropriate. Under these circumstances, automatic reversal of the penalty determination is justified. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 590.)

In *Johnson, supra,* the defendant was convicted of murder and sentenced to death. The jury found three aggravating circumstances,[6] and that aggravating circumstances outweighed mitigating circumstances. After the death sentence was affirmed by the Mississippi Supreme Court, one of the three aggravating circumstances, a prior New York conviction for which the defendant had served time, was reversed.[7]

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[6] The three aggravators in *Johnson* were (1) a prior felony conviction involving violence; (2) that the defendant committed the murder to avoid arrest or to escape and (3) that the murder was especially heinous, atrocious or cruel. The third aggravator was later found to be invalid.

[7] Following the Supreme Court decision in *Johnson,* the "heinous, atrocious or cruel" aggravator was also found to be invalid. On remand, the Mississippi Supreme Court held that since that aggravator had been considered by the jury and argued by the State as a reason for imposing the death sentence, the case should be remanded back to a sentencing jury. "We cannot know what the sentence of that jury would have been in the

(continued...)

In post-conviction proceedings, the United States Supreme Court reversed the death sentence, despite Mississippi's claim that, with or without the prior New York conviction, the death sentence had been appropriate under Mississippi law. In vacating the death sentence, the Court noted that the state supreme court had properly refused to apply harmless-error analysis. Where the error extends "beyond the mere invalidation of an aggravating circumstance *supported by evidence that [is] otherwise admissible*," (emphasis added) the refusal of the state supreme court to apply harmless-error analysis is "plainly justified." (*Ibid.*)

In so holding, the Supreme Court distinguished *Zant v. Stephens* (1983) 462 U.S. 862, in which the invalidation of an aggravating circumstance *did not* require vacation of the death sentence. However, in *Zant* the Supreme Court had "specifically relied on the fact that the evidence adduced in support of the invalid aggravating circumstance *was nonetheless properly admissible at the sentencing hearing.*" (*Id.*, at p. 887, emphasis added.)

The distinction between the harmless-error analysis that was permitted in *Zant* but rejected in *Johnson* was also discussed in *Clemons v. Mississippi* (1990) 494 U.S. 738. In *Clemons*, the Supreme Court was asked to consider whether it was constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that had relied in part on an invalid aggravating circumstance. Although the Court found that there was no constitutional requirement that the jury, rather than the appellate court, perform the weighing function, the Court nevertheless

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[7] (...continued)
absence of this aggravating circumstance." (*Johnson v. State* (1989) 547 So.2d 59, 60.)

recognized that, as in *Johnson*, there were situations in which using harmless-error analysis was inappropriate.

> Given that two aggravating factors had been invalidated *and inadmissible evidence had been presented to the jury*, it was not unreasonable for the Mississippi Supreme Court to conclude that it could not conduct the harmless-error inquiry or adequately reweigh the mitigating factors and aggravating circumstances.

(*Id.* at p. 755, emphasis added.)

In the present case, appellant's situation is more akin to that in *Johnson* than in *Zant.* Appellant's trial court misdescribed the burden of proof. As a result, there have in fact *been no jury findings* with respect to any of appellant's three alleged prior felony convictions. Moreover, by respondent's own admission, at least one of the three alleged prior felony convictions should not have been admitted in the first place. [After considering whether the conviction was admissible under either factor (b) or factor (c) respondent states, "[I]t appears this activity should not have been admitted." (RB 107-108.).] As was true in *Johnson,* more than one of the aggravators should be removed from the equation, and at least one of the aggravators was not even admissible, apart from the overriding instructional error. Following the rationale used by the Mississippi Supreme Court in *Johnson*, this Court must also reject harmless-error analysis.

Should this Court hold that one or more of the prior convictions, used as aggravating factors, be found invalid, inadmissible and/or not to have been found beyond a reasonable doubt, that would mean that the evidence supporting that invalidated aggravator would have to be taken out of the mix of evidence lawfully supporting the death sentence. As the U.S. Supreme Court noted in *Stringer v. Black* (1992) 503 U.S. 222, 232 this

Court [as the reviewing court] "may not assume it would have made no difference if the thumb had been removed from death's side of the scale." (*Id.* at p. 232.) The case must be sent back to the sentencing jury, to reweigh the aggravating and mitigating evidence.

C. The Reweighing of Aggravating Evidence By An Appellate Court, Approved in Clemons, Has Been Called Into Question By Ring v. Arizona.

In *Clemons v. Mississippi, supra,* the U.S. Supreme Court addressed what the Eighth Amendment requires when an aggravating circumstance has been held invalid on appeal. Mississippi, like California, is a "weighing state;" that is, at the death selection stage of the proceedings,[8] the jury is required to weigh aggravating factors against mitigating factors to determine whether death is the appropriate sentence. The *Clemons* decision held that when an aggravating factor has been invalidated, a state appellate court in a weighing state has three options: (1) remand the case for re-sentencing; (2) engage in *de novo* re-weighing of aggravating and mitigating factors to determine if death is the appropriate sentence; or (3) engage in harmless error analysis. (*Id.* at pp. 751-753.)

However, the dicta in *Clemons* which permits an appellate court, after having invalidated one of the special circumstances, to reweigh aggravating and mitigating factors to determine whether a defendant should be sentenced to death, has been called into question by *Ring v. Arizona* (2002) 536 U.S 584.) In *Ring*, the Supreme Court addressed the issue

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[8] The U.S. Supreme Court has distinguished between the process of determining eligibility for the death sentence and actual selection of the death sentence. The former is the process by which a state determines what types of murders make the perpetrator eligible for the death sentence while the latter determines which defendants will actually be sentenced to death.

whether Arizona's capital sentencing scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. In Arizona, the jury determines guilt or innocence but does not participate in the sentencing proceedings. Before a capital defendant can be sentenced to death, the trial judge must find at least one aggravating circumstance exists, and then find "there are [no] mitigating circumstances sufficiently substantial to call for leniency." (Ariz.Rev.Stat. Ann. §§ 13-1105(c); 13-703(f).) Although the Supreme Court had upheld the Arizona procedure previously in *Walton v. Arizona* (1990) 497 U.S. 639, in *Ring* the Court decided the procedure was unconstitutional because

> Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

(*Ring, supra*, 536 U.S. at p. 589.)

The Court found the holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466), controlled their decision. Consequently, the contrary holding in Walton was irreconcilable and overruled. (*Ring, supra*, 536 U.S. at p. 589.) Although the *Ring* decision left open the question of appellate reweighing (*Id.* at p. 597, fn.4), the ramifications of the holding are evident in the majority and concurring opinions. In his concurring opinion, Justice Scalia wrote: "We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." (*Id.* at p. 612.) In another concurring opinion, Justice Breyer noted: "I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." (*Id.* at p. 614.)

Pursuant to *Ring*, any factual findings prerequisite to a death sentence must be made by the jury beyond a reasonable doubt. In California, penalty phase juries have two critical facts to determine in the second stage of a capital case: (1) the existence vel non of aggravating factors, and (2) whether such aggravating factors outweigh the mitigating factors. The delicate calculus juries must undertake when weighing aggravating and mitigating factors is skewed by the presence of invalid aggravating evidence, thereby creating a risk the death sentence was imposed unconstitutionally. (See *Stringer v. Black, supra,* 503 U.S. at pp. 230-232.)

This Court has rejected applying *Apprendi* to the penalty phase of a capital trial, relying in large part on *Walton v. Arizona* (1990) 497 U.S. 639, and on the conclusion that there is no constitutional right to a jury determination of facts that would subject a defendant to the death penalty. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453.) That reliance is now completely misplaced, because the United States Supreme Court overruled *Walton* insofar as it conflicts with *Apprendi*, and stated that any "enumerated aggravating factors" in a death penalty statute which "operate as the functional equivalent of an element of a greater offense" must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona* (2002) 536 U.S. 584, 123 S.Ct. 2428, 2443, quoting *Apprendi, supra*, 497 U.S. at p. 494, fn. 19; but see *People v. Prieto* (2003) 30 Cal.4th 226, 275 [because California's penalty phase determination is "normative, not factual," *Ring* "does not undermine" this Court's prior rulings finding the death penalty constitutional].)

Should this Court find one or more of the aggravators invalid, the finding by the jury that the aggravating evidence outweighed the mitigating

evidence would necessarily also be invalid. The Court may not properly make a factual finding that expands the possible maximum sentence. All such findings must be made by a jury beyond a reasonable doubt.

Because the jury in appellant's trial could not have made any findings, beyond a reasonable doubt, that the three alleged prior felony convictions were true, those aggravators should be removed from the equation. The jury, however, undoubtedly considered that aggravating evidence as part of the calculus in determining that aggravation outweighed mitigation. It would violate the Fifth, Sixth and Eighth Amendments, and the Due Process Clause of the Fourteenth Amendment to permit an appellate court to determine what a jury would have done in the absence of the invalidated aggravators.

D. If The Court Reverses One Or More Of The Aggravators, State Law Requires A Reversal Of The Death Judgment And A Remand For A New Penalty Phase Trial.

As noted previously, the California death penalty statute provides that the jury will determine whether or not to sentence the defendant to death or to life without the possibility of parole. Penal Code section 190.4, subdivision (e) provides for the review of any sentence of death by the trial judge.[9] In *People v. Marshall* (1990) 50 Cal.3d 907, this Court described the role of the trial judge under section 190.4(e) as follows:

> '[T]o make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law.' [Citations.] That is to say, he must determine whether the jury's decision

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[9] This subdivision states in relevant part: "In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision 7 of section 1181."

> that death is appropriate under all the circumstances is adequately supported. [Citation.] And he must make that determination independently, i.e., in accordance with the weight he himself believes the evidence deserves.

(*Id.* at p. 942.)

The trial judge's denial of modification of the death penalty verdict is reviewed in the defendant's automatic appeal to this Court under Penal Code section 1239, subdivision (b). (Pen. Code § 190(e).) In *People v. Mickey* (1991) 54 Cal.3d 612, 704, the Court noted:

> On appeal, we subject a ruling on such an application to independent review: the decision resolves a mixed question of law and fact; a determination of this kind is generally examined de novo. [Citation.] Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; *we do not make a de novo determination of penalty.*

(Emphasis added.) Article VI, section 11 of the California Constitution provides that "[t]he Supreme Court has appellate jurisdiction when judgment of death has been pronounced." The California Supreme Court has original jurisdiction only as to proceedings for habeas corpus, mandamus, certiorari and prohibition. (Cal. Const., art. VI, sec. 10.) Given the fact that the California death penalty statute limits the determination of the death sentence to the jury and/or the trial judge and the California Constitution limits the original jurisdiction of this Court, when on appeal this Court overturns a special circumstance, it should remand for a new penalty phase trial rather than attempt either to re-weigh the evidence or to do a harmless error analysis.

Even in the absence of the decisions in *Apprendi,* and *Ring*, the Court should follow the example of the Nebraska Supreme Court in *State v.*

Reeves (2000) 258 Neb. 511, 604 N.W. 2d 151 in recognizing the limitation on its own power to re-sentence in a death case. The *Reeves* case had taken a long route back and forth through the state and federal courts. In Mr. Reeves' first appeal, the Nebraska Supreme Court reversed the death sentence, finding that the sentencing panel[10] had erroneously considered an aggravating factor relative to one of the victims and failed to consider two mitigating factors as to both victims.

The case then went up to the U.S. Supreme Court on a different issue and was subsequently remanded back to the Nebraska Supreme Court. At this point, after re-examining both the trial and sentencing evidence, the Nebraska high court re-sentenced Mr. Reeves to death. The case again went through the federal courts, up to and including the U.S. Supreme Court. In 1998, the U.S. Supreme Court rejected Mr. Reeves federal habeas petition, and the matter was remanded to the Nebraska state trial court. Mr. Reeves then filed a second petition for post-conviction relief, challenging the state supreme court's re-sentencing of him. The district court denied relief, and the matter was appealed to the Nebraska Supreme Court, which reversed.

The Nebraska high court found that its earlier re-sentencing of Mr. Reeves constituted an erroneous assertion of authority under state law and denial of his "life interest and due process rights." (*Reeves, supra*, 604 N.W.2d at p. 164.) The court determined that this re-sentencing (1) violated the state statute governing procedures for homicide cases and (2) amounted

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[10] Under Nebraska state law, after a conviction for first degree murder, the sentencing determination is to be made by the trial judge or a three-judge panel, which includes the trial judge. (Nebraska's Special Procedure in Cases of Homicide, Section 29-2520.)

to an unreviewable sentence in violation of state law, thus denying Reeves due process of law. The court noted that while *Clemons v. Mississippi, supra*, held that re-weighing and re-sentencing by a state appellate court would not offend federal constitutional principles, that decision was premised on the fact that state law authorized such action. (*State v. Reeves, supra,* 604 N.W. 2d at pp. 164-165.)

Although the Nebraska state statute at issue (Special Procedure in Cases of Homicide, sections 29-2519-29-2546) in the *Reeves* case differs from the California death penalty statute, there are key similarities. First, both the Nebraska and California statutes distinguish between the role of the trial judge (or the sentencing panel in Nebraska) in determining whether a defendant is sentenced to death and the state supreme court's role in reviewing that sentence. The *Reeves* court noted:

> . . . the statutory sections regarding the weighing of aggravating and mitigating circumstances and the determination of the sentence specifically place that role in the district court [trial court], with the judge who presided at trial included in the sentencing determination except where he or she is disabled or disqualified as provided for in section 29-2520(3), in which case a three-judge district court panel shall determine the sentence. There is no similar provision in the statutes authorizing sentencing by this court. The Nebraska Legislature did not authorize this court to perform the same function as the sentencing judge or sentencing panel.

(*Id.* at pp. 165-166.)

Similarly, the California death penalty statute, Penal Code section 190.2 *et seq.*, does not authorize this Court to re-weigh and re-sentence after it has determined that a special circumstance must be reversed because of insufficient evidence.

The Nebraska Supreme Court also found that it had violated state law when it stepped into the sentencing panel's shoes by considering and weighing a factor that the panel had not considered and by rendering a sentencing decision which was, in effect, unreviewable. (*Reeves, supra,* 604 N.W.2d at p. 167.) The court concluded:

> In summary, Reeves had a state statutory right to be sentenced by his trial judge or by a panel of three district judges and then had a right to have that sentence reviewed by this court. When this court re-sentenced Reeves in *Reeves III* [one of the earlier appeals], this court did so in contravention of state law. Given the life interest involved, such erroneous re-sentencing in *Reeves III* denied Reeves of due process. In *Reeves III*, this court acted as an unreviewable sentencing panel in violation of state law . . . . This court's re-sentencing in *Reeves III* denied Reeves of his due process right to the separate and distinct sentencing and review procedures set forth in the state statutes.

(*Id.* at p. 168.)

E. Conclusion

Since there is no dispute that the jury was allowed to consider at least one invalid aggravator (the alleged 1981 attempted burglary conviction), and since the failure to instruct the penalty jury with the correct burden of proof vitiates any jury findings with respect to all three alleged prior felony convictions, this Court should find that it would be a violation of state law and of appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights for this Court to re-weigh the evidence in mitigation and aggravation and re-sentence appellant. In California, such re-weighing is especially problematic because the absence of written findings make it impossible to know what mitigating and aggravating factors were found by the jury. In

this case, as in most California capital cases, the record does not disclose the sentencing calculus actually made by the jurors.

By the same token, the absence of any record clearly setting forth what the jury determined to be the mitigating and aggravating factors makes it impossible to engage in meaningful harmless error analysis. The record in this case does not disclose which aggravating factors and which mitigating factors were actually found by the jury. Without such information, it is impossible to know whether the invalidation of one or more of the aggravators would tip the balance for life.

Assuming this Court declines to follow the *Ring* decision, decisions of the U.S. Supreme Court require that if a state appellate court chooses to review the effect of invalidated aggravators under a harmless error standard, it must employ "close appellate scrutiny." (See, e.g., *Stringer v. Black, supra,* 503 U.S. at p. 230.) To date, the decisions of this Court do not exhibit such close appellate scrutiny. (See *People v. Sanders* (1990) 51 Cal.3d 471; *People v. Benson* (1990) 52 Cal.3d 754; and *Pensinger v. California* (1991) 52 Cal.2d 1210.)

In each of these three opinions, the Court has cited to *Zant v. Stephens* (1983) 462 U.S. 862 in analyzing the effect of the invalidation of one or more special circumstances on the viability of a death sentence. However, this Court's reliance on *Zant, supra,* was misplaced. The capital sentencing procedure at issue in *Zant*, unlike the California system, did not involve weighing. In *Tuggle v. Netherland* (1995) 516 U.S. 10, the U.S. Supreme Court observed: "We noted [in *Zant v. Stephens, supra,*] that our holding did not apply in States in which the jury is instructed to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty." (*Tuggle, supra,* 516 U.S. at p. 11.)

Since California indisputably is a weighing state, this Court cannot rely upon the analysis and reasoning of the *Zant* decision to determine the harmlessness vel non of an invalidated aggravator on the decision to impose the death penalty in appellant's case.

For all of the foregoing reasons, if one or more of the aggravators in this case is set aside, either because it was inadmissible, because there was insufficient or no evidence to support it, or because the jury was not properly instructed that it must make such a finding based upon proof beyond a reasonable doubt, appellant is entitled to a new penalty phase trial.

* * * * *

VIII.

THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTIONS ABOUT PAROLE POSSIBILITIES WAS INACCURATE AND MISLEADING. THE ERROR DEPRIVED APPELLANT OF A FAIR PENALTY DETERMINATION.

A. This Issue Is Not Waived.

Respondent asserts that because trial counsel ultimately agreed to the *Ramos*-type instruction which the trial court gave following the jury's questions, appellant has waived his right to raise this issue on appeal. Respondent is wrong. The trial court's ruling, "That will be overruled," (RT 1590) reveals without question that the defense did indeed raise an objection.[11] Trial counsel, dissatisfied with the court's proposal, suggested that it be supplemented with a further instruction - - one that would let the jury know that if they sentenced appellant to life in prison without the possibility of parole, they could assume the sentence would be carried out. ["I would also respectfully request that the court further instruct the juror [sic] that life without the possibility of parole means exactly that. . . ."] (RT 1590.)

Reassuring the jury that life without parole meant exactly that - - that appellant would never be given a parole date - - was not only important

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[11] As discussed herein, defense counsel's formal objection appears to have been made *off the record*. Nevertheless, the *reported* comments and ruling of the trial judge, leave no doubt that the defense *did object*. Since the trial court failed in its duty to ensure that all proceedings in this capital trial were reported, the full extent of trial counsel's argument to the court is unknown. However, the issue was clearly before the trial court. It was given a full opportunity to consider alternative responses, but turned them down. It cannot be said that this issue is not fairly ripe for review.

information for the jury to hear, but was information that this Court has held to be *required* under the circumstances presented in this case. (*People v. Snow* (2003) 30 Cal.4th 43, 123; *People v. Kipp* (1998) 18 Cal.4th 349, 378-379.) Such an instruction would have been particularly important in appellant's case, since the *Ramos*-type instruction which the trial judge recited did not address the fact that the sentences of twice-convicted felons, such as appellant, could *not be* commuted by action of the governor alone.

While there is no record of the discussion that took place between the trial court and the parties regarding the appropriate response to the jury's question, the record reveals that a conference did take place. (RT 1589.) The result of that conference was the judge's conclusion that the *Ramos* instruction should be given. The fact that trial counsel attempted to supplement the *Ramos* instruction with additional information regarding parole, demonstrates that counsel raised the problem with the trial court during the off-the-record conference. The trial court's response is likewise indicative of the view that the *Ramos* instruction, standing alone, was all that would be permitted. It cannot be fairly argued, from this record, that trial counsel failed to object. Rather, it is clear that trial counsel brought the problem of appellant's parole possibilities to the trial judge's attention, offered supplemental language, but the objection and request were overruled.

It was only after the trial court flatly rejected trial counsel's request ["That will be overruled. . . .The court knows it would be improper at this time to give the instruction." (RT 1590)], that counsel was forced to accept the court's ruling. It was apparent from the court's comments that it did not intend to permit *any other instruction*, other than the one that was given. But the *Ramos* instruction, standing alone, was wholly insufficient to deal

with the concerns raised by the jury, and which trial counsel sought to clarify. The trial court had an obligation to deal with all of their concerns, which required *complete and accurate* information about appellant's *specific parole possibilities.* The trial court failed in that regard. Since an objection was made, and overruled, the issue is certainly cognizable on appeal.[12]

B. The *Ramos* Instruction, By Itself, Failed to Fully Address The Jury's Concerns. Due Process Required More.

1. Under *Kipp*, the trial court had a *sua sponte* duty to reassure the jury that the sentence it chose would be carried out.

On many occasions this Court has addressed the problem of penalty phase jurors potentially misunderstanding their responsibilities, and the duty of the trial court in addressing such concerns. For example, in *People v. Hawthorne* (1992) 4 Cal.4th 43, 75, the defendant claimed that the trial court had a *sua sponte* duty to inform the jury that they should assume that if they voted for death, the penalty would be carried out. Without any factual support in the record, the defendant simply asserted that jurors, in general, would "not appreciate the actual consequences of their sentencing choice, thereby undermining the reliability of their verdict."

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[12] In any event, instructional errors are reviewable on appeal to the extent they affect "substantial rights." (*People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; see also Penal Code section 1259.) Appellant's right to a fair and reliable penalty determination in his capital trial is certainly a substantial right. Where the jury has demonstrated a specific interest in having its questions answered truthfully and accurately, so as to be able to make such a determination, it is apparent that the trial court's response affected a substantial right of appellant.

(*Id.*) This Court was unwilling to impose such a duty upon the trial court to clarify matters about which there had apparently been no demonstrated confusion.

However, when the jury *has expressed confusion* about the effect of its decision or the possibility that other factors might interfere with the verdict being carried out, the duty of the trial court to clarify the particulars is not only prudent, but required. In the recently decided case of *People v. Snow, supra,* the jury sent a note to the judge asking whether a life without parole sentence would assure that the defendant would never be released from prison. The trial court in *Snow* responded that the jury was to apply the common meaning to the two possible verdicts. This Court held that such a response was adequate and that it was sufficiently similar to the response proposed by the defense, namely, that "life imprisonment without possibility of parole means exactly what it said." Further, this Court found that the response satisfied the holding of *Kipp*,

> that when the jury expresses a concern regarding the effect of a life-without-parole sentence, *the court should instruct the jury 'to assume that whatever penalty it selects will be carried out' or give a 'a comparable instruction.* ([citation omitted], emphasis added.)'

(*People v. Snow, supra,* 30 Cal.4th at p. 123.) The *Snow* case thus confirms that there are times when the trial court does have a *sua sponte* duty to look beyond the standard instructions to ensure that the meaning of a life without parole sentence (or death sentence, for that matter) is fully explained to the jury. *Snow* recognizes that when the trial court is put on notice that (1) the jury needs more information about whether a particular defendant is likely to be released in the future and (2) the jury's ultimate sentence may well hinge upon its ability to accurately assess those risk factors, the trial court

has an obligation to inform the jury that it must assume that whatever penalty it chooses *will be carried out.*

In the present case, the jury's questions demonstrated that they were concerned about appellant's parole possibilities: might appellant ever be released, whether he was sentenced to death or to life? The trial court had an obligation to let the jury know what the realistic possibilities were. It could have given the type of instruction suggested in *Kipp,* or it could have explained to the jury about the rule for twice-convicted felons. Had the trial court given complete and accurate information about parole for twice-convicted felons such as appellant, the jury would have understood how remote the possibility actually was that appellant would ever be released from prison. In short, from such an instruction, the jury would have been able "to assume that whatever penalty it selected [would] be carried out." (*People v. Kipp, supra*, 18 Cal. 4th at pp. 378-379.)

2. Due process requires that the jury be provided with accurate information, especially when that information directly impacts the penalty choice.

Appellant has established that the jury in this case was concerned enough about appellant's chances of being released from prison that it interrupted the deliberation process to seek additional information from the trial judge. This Court has made it clear that under such circumstances the trial judge had a duty to inform the jury that it must assume that whatever penalty it selects will be carried out. It is not enough for the trial judge to simply tell the jury that the governor can commute either sentence. Rather than *calming* the jury's fears, such "assurances" would tend to support and validate their fears that a defendant might in fact be released.

In this case, although it was apparent that the jury *was concerned about parole possibilities* as they were deliberating about the appropriate penalty, the trial court did not fulfill its duty to let the jury know that the punishment they chose, in all likelihood *would be carried* out, and they should so assume. Rather than receiving the appropriate message - - "Believe that your punishment will be imposed," - - the jury only received the opposite message - - "The governor can commute either sentence, but put that out of your mind."

Respondent has cited *People v. Hart* (1999) 20 Cal.4th 546, and has stated, without analysis, that "*Hart* is dispositive of appellant's claim." (RB, p. 119.) However, while there are similarities between appellant's case and the *Hart* case, the instruction given in *Hart* went well beyond that given in appellant's case, and *did address* the concern raised by appellant here and by his counsel at the time of trial.

In *Hart*, the jury sent a note to the court asking, "Does life in prison without the possibility of parole mean he will never get out under any circumstances?" While the response the trial judge gave *included* the *Ramos*-type instruction, the very basic and "not fully accurate" (in the case of twice-convicted felons) statement telling the jury that the governor could commute either sentence, the judge in *Hart* gave an additional lengthy statement to the jury that assured them, in clear and convincing terms, that the chances of the defendant ever being be paroled were almost nil. This was the statement which the trial court in *Hart* made to that jury:

> "Does life in prison without the possibility of parole mean he will never get out under any circumstances?" That question causes the Court a great deal of concern and it's caused other courts a great deal of concern, and the reason why, it has an element of speculation in it, it shows that people are worrying

about what's going to happen after the decision in this particular case.

It really is inappropriate for the - - for jurors or for me to rely or even to think about that kind of material, because I don't know what's going to happen because it's speculation, number one, and, secondly, to the extent that people are worrying about someone else doing something, they may take their present job less seriously.

Let me just say, the law does have a provision in the California Constitution that the Governor does have the power to commute both sentences, both the death sentences and the life without possibility of parole sentence to something less than that, if the Governor sees fit.

Now, I've been in the criminal justice system for 13 years and I've never seen the commutation power used. Given the way things are now, I can't imagine in this particular case that power applying.

I think if you approach this case from any other perspective other than death means death or life without possibility of parole means exactly that, you would be deluding yourself. I think you've got to resign yourself that the two choices that you're going to make here are the two sentences that are going to be carried out in this particular case.

Is everybody clear as to what my feelings are? And I think for you to speculate anything else would be inappropriate.

(*People v. Hart, supra,* 20 Cal.4th at p. 654, fn. 42, emphasis added.) The italicized portion of the instruction told the jury that the judge had never seen the commutation power used in the 13 years he had been part of the system, and that they were to *resign themselves* to the idea that the penalty they selected would be carried out, because any other approach was essentially delusional. In *Hart*, the trial judge sent a strong message to the

jury that they could rely on the system keeping the defendant in prison, regardless of the theoretical possibility that the governor's commutation power would be exercised.

In appellant's case, there was no corresponding assurance provided to the appellant's jury. They were clearly worried that he might get out of prison in the future, and the court assured them that their fears were well-founded, nothing more. Because appellant was a twice-convicted felon, the jury should have been given complete and accurate information relative to his parole and commutation possibilities. In the alternative, *at the very minimum*, the jury should have at least been told that they should assume that death meant death, that life without parole meant exactly that, and/or that they were to assume that whatever penalty they selected would be carried out. The juries in *Hart* and *Kipp* were so instructed. This Court, in *Snow,* held that the trial court has a *sua sponte* duty to so inform the jury, when the jury has made it clear that it is confused or concerned. Respondent's reliance on *Hart* is misplaced. Indeed, the *Hart* case is an excellent example of what a trial court *should do* when the jury is concerned about a defendant being released.

Moreover, respondent has totally ignored the many federal and state cases cited by appellant which emphasize the need for *complete accuracy* when instructing the jury, especially regarding issues that go directly to the life and death penalty determination. (AOB 126-134.) This Court recently affirmed the importance of penalty instructions that are "precisely accurate." (*People v. Smith* (2003) 30 Cal.4th 581, DJDAR 4959, 4973 [Trial court did not err in denying the defense's request for an instruction that a life without parole sentence would mean exactly that, since

Governor's commutation powers could arguably be exercised. Rather, the instruction given was "precisely accurate."].)

Accurate information about parole possibilities is particularly critical when future dangerousness of the defendant has been raised and argued by the prosecution, as was the case here. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 165, fn.5, 169, 177; *Bollenbach v. United States* (1946) 326 U.S. 607; *Coleman v. Calderon* (9th Cir. 1998) 150 F.3d 1105, 1117-1118, rev'd on other grounds and remanded (1998) 525 U.S. 141 aff'd (9th Cir. 2000) 210 F.3d 1047; *Gallego v. McDaniel* (9th Cir. 1997) 124 F.3d 1065, 1075; *Hamilton v. Vazquez* (9th Cir. 1994) 17 F.3d 1149, 1160; *People v. Roybal* (1999) 19 Cal.4th 481, 524.

Respondent has offered virtually no legal analysis in response to the argument that appellant had a due process right to have the jury instructed with *accurate* information about his parole possibilities when the jury itself raised the issue with the court *and* where the prosecutor placed great emphasis on appellant's future dangerousness, in arguing that death was the only appropriate penalty. As the Supreme Court held in *Simmons v. South Carolina, supra*, 512 U.S. at p. 165, fn. 5, emphasis added:

> 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.

Respondent ignores the federal due process argument raised by appellant, except to cite the *Hart* case, which went well beyond the

minimal, misleading and inaccurate instruction provided by the trial judge in this case. For all of the reasons previously addressed in appellant's opening brief, the death sentence must be reversed.

* * * * *

XI.

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS REQUIRE REVERSAL.

The convictions and death sentence in this case were obtained wholly through a series of constitutional violations which, taken together, simply cannot be ignored. But for these multiple violations, appellant would not have been convicted and sentenced to die. In a capital case, a criminal defendant should be entitled to more, not less, constitutional protections than defendants in non-capital cases. Nevertheless, respondent takes the position that the many errors in this case simply do not matter, whether viewed alone or in combination.

This case began with the arrest of Margaret Williams. Upon her arrest, it is undisputed that her original statement to the police, in which she implicated appellant, was forced from her by unlawful police interrogation tactics. Her unreliable coerced statement became the basis for appellant's subsequent arrest and interrogation by the police. Despite appellant's repeated requests to end the interrogation and to speak with appointed counsel, the police ignored appellant and his *Miranda* rights and, over time, they were able to secure appellant's confession.

Multiple instructional errors enabled the prosecution to present Margaret as a disinterested witness, who was simply coming forward as a matter of civic duty, rather than as a participant in the crime and someone having a strong reason to shift the blame to appellant. Those same instructional errors *prevented* the jury from considering Margaret's involvement and grant of immunity in assessing her credibility, which likely would have caused the jury to give less weight to her testimony.

If that were not enough, the errors in the penalty phase of the trial further lightened the burden of the prosecution, by articulating the wrong standard of proof for establishing prior felony convictions. Respondent has conceded that the wrong burden of proof was articulated and that inadmissible aggravating evidence was presented and argued to the jury. Still respondent argues that the errors are all harmless. Finally, the trial court failed to give the jury accurate information about appellant's chances of ever having his sentence commuted, a factor which the jury obviously found to be significant, or they would not have sent a note to the trial judge requesting the information. None of these errors could be considered *de minimus,* even standing alone. Taken together, they presented overwhelming obstacles, and were literally fatal for appellant.

Throughout the entire pendency of these criminal proceedings, from the moment of his arrest, until the jury deliberated in his penalty trial, appellant was deprived of important constitutional rights. The rights denied him are supposed to be guaranteed to every criminal defendant, particularly when that defendant is on trial for his life. The cumulative effect of these multiple serious errors led directly to appellant's convictions and death sentence. Reversal is required.

* * * * *

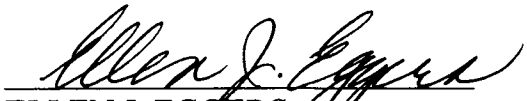
CONCLUSION

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: June 17, 2003

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 **June 17, 2003**, I served the attached

APPELLANT'S REPLY 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
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Mr. Richard Leonard
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Ms. Suzanne Papagoda
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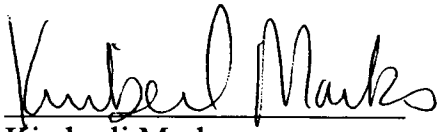
Clerk of the Superior Court
(for delivery to Judge Smith)
L.A. County Superior Court
210 W. Temple Street
Los Angeles, CA 90012-3210

I declare under penalty of perjury that the foregoing is true and correct. Executed on **June 17, 2003**, at Sacramento, California.



Kimberli Marks