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February 1, 2010

Chief Justice of the State of California and
Associate Justices of the Supreme Court of California
350 McAllister Street, 1st Floor
San Francisco, CA 94102

Re: *People v. David Earl Williams*
California Supreme Court Case No. S029490

Dear Mr. Chief Justice and Associate Justices:

The Court has ordered supplemental briefing on whether, at the penalty phase of a capital trial, the trial court has a *sua sponte* duty to instruct the jury that prior felony convictions admitted under Penal Code section 190.3, factor (c), must be proved beyond a reasonable doubt. As explained below, the trial court does have this *sua sponte* duty.

This Court has long recognized the trial court's duty to instruct the jury on the general principles of law governing the case, with or without a request from a party. (*People v. Wade* (1959) 53 Cal.2d 322, 334 (overruled on other grounds in *People v. Carpenter* (1997) 15 Cal.4th 312, 381.) As explained a half-century ago, "The rule seems undoubtedly designed to promote the ends of justice by providing some judicial safeguards for defendants from the possible vagaries of ineptness of counsel under the adversary system." (*People v. Wade, supra*, 53 Cal. 2d at p. 334.)

Of course, that is not to say that the trial court must anticipate every possible theory that may fit the facts of the case or "fill in every time a litigant or his counsel fails to discover an abstruse but possible theory of the facts." (*Ibid.*) However, the court must instruct the jury *sua sponte* on the general legal principles that are "closely and openly connected with the facts presented at trial." (*People v. Ervin* (2000) 22 Cal.4th 48, 90; cf. *People v. Wade, supra*, 53 Cal.2d at p. 335 [no duty to instruct on a theory that the evidence did not "strongly illuminate" and place before the court].

In the present case, the trial court had a *sua sponte* duty to instruct the jury on the correct standard of proof with respect to factor (c) evidence under Penal Code section 190.3. The prosecution's decision to present aggravating evidence, including evidence that appellant had suffered a prior felony conviction, was made known well in advance of trial.[1] The presentation of such evidence in the penalty phase of capital

[1]The state's intention to present prior crimes evidence was fully set forth in its "Notice of Intention to Introduce Evidence in Aggravation Pursuant to Penal Code Section 190.3." (3 CT 669-671.) The evidence fell into three categories: the

trials was nothing new or unexpected. Nor could it be said that the evidence was being offered under some obscure or unusual legal theory. Quite to the contrary, instructing the jury as to the proper standard of proof for considering this evidence fell squarely within the trial court's obligation to provide instructions on the general legal principles that are "openly connected with the facts presented at trial." (*People v. Ervin*, supra, 22 Cal.4th at p. 90.) As such, the trial court had a *sua sponte* duty to instruct the jury on the beyond a reasonable doubt standard of proof.

The relevant standard jury instruction in effect at the time of appellant's trial was CALJIC No. 8.86. It provided that evidence that the defendant had been convicted of other crimes, other than the first degree murder for which the defendant had been convicted in that case, could only be considered as an aggravating circumstance if the jury was first "satisfied *beyond a reasonable doubt* that the defendant was in fact convicted of the prior crime(s)." (CALJIC No. 8.86, emphasis added.) The use note for that instruction states, "*This instruction must be given sua sponte* in all cases where the People claim prior criminal conviction and especially where CALJIC 8.85, subparagraph (c) is given." (Use Note to CALJIC No. 8.86 (Fall 2008 ed.), emphasis added.)

When the new standard jury instructions were adopted in 2005, CALCRIM No. 765 retained this same burden of proof with respect to prior convictions under Penal Code section 190.3, subsection (c).[2] The bench notes accompanying CALCRIM No. 765, also state,

> The court has a **sua sponte** duty to instruct that alleged prior felony convictions offered in aggravation must be proved beyond a reasonable doubt. (See *People v. Robertson* (1982) 33 Cal.3d 21,

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circumstances of the present offense [Pen. Code sec. 190.3(a)]; criminal activity involving the use of force or violence [Pen. Code sec. 190.3 (b)]; and prior felony convictions [Pen.Code sec. 190.3 (c)]. (*Ibid.*)

[2]CALCRIM No. 765 provides: "The People allege as an aggravating circumstance that [the defendant] was convicted of [name of felony] on [date of conviction]."

"The People must prove this allegation beyond a reasonable doubt. If you have a reasonable doubt whether [the defendant] was convicted of the alleged crime, you must completely disregard any evidence of that crime. If the People have proved that [the defendant] was convicted of the alleged prior crime, you may consider the fact of that prior conviction as an aggravating circumstance."

"You may not consider any other evidence of alleged criminal activity as an aggravating circumstance [except for the alleged criminal activity I discussed in the previous instruction]."

> 53-55 [188 Cal.Rptr, 77, 655 P.2d 279]; People v. Davenport (1985) 41 Cal.3d 247, 281 [221 Cal.Rptr. 794, 710 P.2d 861].)

(Bench Note to CALCRIM No. 765 (2007-2008), emphasis in the original.) These use and bench notes are consistent not only with the rule that the trial court has a duty to instruct the jury on general principles of law, but also with California law regarding the proper standard of proof. (*People v. McWhorter* (2009) 47 Cal.4th 318, 379 [trial court need not instruct on burden of proof "*except for prior violent crimes evidence and prior felony convictions under section 190.3, factors (b) and (c).*" (Emphasis added.)]; *People v. Harris* (2005) 37 Cal.4th 310, 360 [beyond a reasonable doubt instruction normally required for factor (c) evidence, even absent a request]; *People v. Milwee* (1988) 18 Cal.4th 96, 161 [prior felony convictions under factor (c) could not be considered in penalty "absent proof beyond a reasonable doubt that defendant was in fact convicted of the prior crime."].)

Although a few cases have suggested that only unadjudicated criminal acts under factor (b) need to be proved beyond a reasonable doubt, and that this standard would not apply to prior *convictions*, those cases were based upon misinterpretations of previous decisions. Those cases also depart from the longstanding rule in California that in the penalty phase of a capital trial *all prior crimes*, whether they result in a conviction or not, must be proved beyond a reasonable doubt. (See e.g., *People v. Hillary* (1967) 65 Cal.2d 795, 805; *People v. Mitchell* (1966) 63 Cal.2d 805, 816; *People v. Polk* (1965) 63 Cal.2d 443, 450.)

The cases which suggest a departure from this longstanding rule are few in number but appear to have begun with *People v. Gates* (1987) 43 Cal.3d 1168, 1202. *Gates* was cited in this Court's order of January 13, 2010, as an example of contrary authority on this issue. However, in *Gates* this Court *did not hold* that evidence of prior convictions need not be proven beyond a reasonable doubt. Rather, it simply held that the trial court's error in failing to give the beyond a reasonable doubt instruction *sua sponte* was harmless, and further, that the error *principally affected* the evidence of prior unadjudicated crimes. However, *Gates* never held that the trial court had no *sua sponte* duty to instruct on the prior convictions.

Nevertheless, two years later, in *People v. Morales*, the state adopted that erroneous analysis of *Gates*. This Court noted the state's position without actually endorsing it:

> With respect to the burglary and robbery, *the People observe* that the *Robertson* instruction need not be given where defendant already has been convicted of the prior offense. (See *People v.*

Gates (1987) 43 Cal.3d 1168, 1202.

(*People v. Morales* (1989) 48 Cal.3d 527, 566, emphasis added.) The defendant had correctly noted, however, that in *Morales* the evidence extended beyond the mere fact of the robbery conviction and included evidence of the assaults on the victims. The *Morales* Court assumed that a "Robertson instruction" should have been given but found it doubtful that the defendant had been prejudiced by the omission.

What is not clear from *Gates* and *Morales* is whether the Court used the term "Robertson instruction" to refer only to the instruction which must be given when the prosecution presents evidence of unadjudicated criminal acts under Penal Code section 190.3, factor (b); or whether the "Robertson instruction" refers generally to any instruction which requires the prosecution to prove factor (b) or factor (c) aggravating evidence in the penalty phase beyond a reasonable doubt. If the "Robertson instruction" is simply another way of referring to CALJIC No. 8.87, "Penalty Trial - Other Criminal Activity - Proof Beyond A Reasonable Doubt," then it goes without saying that this instruction is not required with respect to factor (c) evidence.

However, if *Gates* and *Morales* are read to mean that in the penalty phase of a capital trial proof of prior convictions need not be established beyond a reasonable doubt, then such an interpretation runs contrary to well-settled California law and must be rejected. Whenever evidence of a defendant's "other crimes" are being presented as aggravating evidence at penalty, the jury must be instructed with the beyond-a-reasonable-doubt standard regardless of whether the crimes have been adjudicated or not.

In *People v. Hillary, supra*, 65 Cal.2d 795, 805, the Court considered the admissibility in the penalty phase of the defendant's commission of criminal acts similar to the one for which he was being tried. The Court rejected the defendant's attempt to keep out those other criminal acts on the grounds they had not led to a conviction: "There is no requirement that a defendant must have been convicted in order to introduce evidence of *other criminal conduct* during the penalty phase." (*Ibid*, citations omitted, emphasis added.) "Other criminal conduct" was thus meant to include both adjudicated and unadjudicated criminal acts; and with or without a conviction, the trial court had properly instructed the jury that "evidence of prior offenses" could only be considered if believed beyond a reasonable doubt. (*Ibid*, citing *People v. Mitchell, supra,*63 Cal.2d 805, 817 and *People v. Polk, supra,* 63 Cal.2d 443, 451.)

Nearly twenty years later, in *People v. Phillips* (1985) 41 Cal.3d 29, this court reached a similar conclusion with respect to evidence of "other crimes."

Although the Court held that the trial court had no *sua sponte* duty to instruct the jury about the *elements* of all of the crimes that may have been introduced in the penalty phase, the court did have such a duty when it came to instruction on the burden of proof:

> [T]he court had to instruct the jury that it could "consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt." (Citations omitted.) *Evidence of other crimes could be introduced in the penalty phase even if the defendant had not been convicted of the crimes.* (Citations omitted.)

(*Id.* at p. 68, emphasis added.) Over the years, this Court has not always distinguished between adjudicated and unadjudicated criminal acts which the prosecution introduces in the penalty phase of a trial. In either case, they are considered evidence of "other crimes," and in either case those unadjudicated crimes or adjudicated convictions must be proven to a jury beyond a reasonable doubt.

Although this Court held otherwise in *People v. Wright* (1990) 52 Cal.3d 367, 437, and *People v. Pinholster* (1992) 1 Cal.4th 865, 965 [reasonable doubt instruction is not required as to proof of a prior felony conviction] insofar as those holdings relied exclusively on *Morales* and *Gates*, those holdings are not well-founded, and run contrary to well-settled principles of California law.

In a separate line of cases, concluding with *People v. Kennedy* (2005) 36 Cal.4th 595, 637, this Court specifically held that the reasonable doubt instruction need not be given for "other crimes of which [the defendant] had been convicted," and only applied to "*unadjudicated* violent criminal activity." (Emphasis added.) The Court cited *People v. Welch* (1999) 20 Cal.4th 701, 766 for this proposition. While *Welch* did so hold ["only unadjudicated violent criminal activity must be so proven"] as did *People v. Samayoa* (1997) 15 Cal.4th 795, 862, upon which *Welch* relied, the cases cited in *Samayoa* – *People v. Sanchez* (1995) 12 Cal.4th 1, 80-83, *People v. Stanley* (1995) 10 Cal.4th 764, 842, and *People v. Crittenden* (1994) 9 Cal.4th 83, 153 – simply do not address the issue of whether a trial court has the *sua sponte* duty, under California law, to instruct the jury that prior convictions under factor (c) must be proven to the jury beyond a reasonable doubt.

Rather, *Sanchez, Stanley and Crittenden, supra*, all stand for the proposition that as a matter of *federal constitutional law*, "The trial court is not required to instruct the jury that it must find *any aggravating factor* true beyond a reasonable doubt ." (*People v. Crittenden, supra*, 9 Cal.4th at p. 153; *People v. Sanchez, supra*, 12 Cal. 4th at pp. 80-81, emphasis added.)

In conclusion, the answer to the Court's question is a relatively simple matter of California law. Trial courts have a *sua sponte* duty to instruct the jury on the general principles of law which govern the facts that are presented in a case. Requiring the trial court to provide these basic instructions on its own initiative is intended to promote justice by providing safeguards for defendants whose counsel may be asleep at the wheel. While trial courts are not expected to uncover hidden legal theories based on obscure facts, there were no hidden facts or theories at play here.

Appellant David Williams was simply entitled to the standard jury instruction that is routinely given, *sua sponte*, in every capital case in which factor (c) evidence has been presented. Irrespective of whether or not appellant had a *federal* constitutional right to such an instruction, (*People v. Sanchez, supra,* 12 Cal.4th at pp. 80-81), he had a well-established right to the instruction under California law.

Where, as here, the evidence of his prior convictions consisted of hearsay and stipulations that were never presented to the jury, as well as inadequate evidence of prior juvenile adjudications, the difference between the preponderance of the evidence standard, which was given, and the beyond a reasonable doubt standard, to which appellant was entitled, may well have made the difference between finding the conviction(s) to be true or not.

Respondent has previously conceded that the trial court's failure to instruct the jury with CALJIC No. 8.86 was error (Respondent's Brief, page 105), and this Court should so find.

Respectfully submitted,

Michael J. Hersek
State Public Defender

Ellen J. Eggers
Deputy State Public Defender
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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. David Earl Williams**
Case Number: **Supreme Court No. Crim. S121187**
Superior Court No. A579310

I Saundra Alvarez, declare that I am over 18 years of age, a citizen of the United States, and not a party to the within cause; my business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT LETTER BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X** / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on February 1, 2010, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Feburary 1, 2010, at Sacramento, California.

Saundra Alvarez