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DEPARTMENT OF JUSTICE

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January 21, 2010

Honorable Chief Justice Ronald M. George
and Honorable Associate Justices
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

RE: *People v. David Earl Williams*
Supreme Court of California, Case No. S029490

Dear Chief Justice George and Honorable Associate Justices:

Respondent respectfully submits this letter in response to this Court's Order filed on January 13, 2010, asking the parties to address the question of "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. [Citations.]" (Order filed Jan. 13, 2010.)

According to well established authority, the trial court did not have a sua sponte duty to instruct the jury that appellant's prior felony convictions admitted under Penal Code section, factor (c) must be proved beyond a reasonable doubt.

At the conclusion of the guilt phase, appellant admitted a prior conviction for rape in case number A564356 (Peo. Exh. 74) for the purposes of Penal Code section 667, subdivision (a). (6RT 1394-1395.)

At the penalty phase, the rape victim, Raina Taylor, testified for the prosecution. The prosecutor asked Taylor if appellant's penis was erect when he placed it in her vagina and anus. Defense counsel objected stating, "Your honor, I'm going to object to this. The man has already plead[ed] guilty. I think this is over doing it." (6RT 1415.) Appellant's codefendant in the rape and burglary, Shelby Fulcher, also testified at the penalty phase for the prosecution. Fulcher said that appellant raped the victim when they burglarized her house in March 1983. (6RT 1424-1427.) Appellant pled guilty to the crimes at the same time Fulcher pled guilty. (6RT 1429-1430.)

The trial court admitted into evidence, without objection, certified copies of records showing appellant's prior felony convictions of rape and residential burglary against victim Raina Taylor in Los Angeles County Superior Court case number A564356. The court also moved into evidence certified copies of documents from the California Youth Authority (CYA) showing that appellant had been convicted of residential burglary in 1981. (6RT 1448-1449; see 7CT 2136-2137 [Prob. Rpt.].) The court then admitted People's Exhibit Number 75, which was a transcript of portions of the conversation between appellant and the detectives on March 25, 1989, wherein appellant described his convictions and sentence for breaking in to Ms. Taylor's home, which had been deleted for the guilt phase. (6RT 1449-1450.)

The prosecution also requested that the complete tape of the interview (Peo. Exh. 4A) be moved into evidence. The court moved this tape into evidence without objection. (6RT 1450.) The prosecutor read into the record portions of the tape (Peo. Exhs. 76 & 77) that had been previously deleted at the guilt phase. (6RT 1451-1453.)

As stated in the Respondent's Brief, the trial court instructed the jury with CALJIC No. 8.85 in relevant part as follows:

> In determining which penalty is to be imposed [on each defendant], you shall consider all of the evidence which has been received during any part of the trial of this case [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . . .
>
> (b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(7CT 2012; RB at 102-103.)

The trial court did not instruct the jury with CALJIC No. 8.86. (RB at 103.) Instead, the trial court instructed the jury with a special version of CALJIC No. 2.50.1, which combined some of the principles of CALJIC No. 8.86, as follows:

> Within the meaning of the preceding instruction [CALJIC 8.85], prior felony convictions for which the defendant purportedly has been convicted must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the defendant was convicted of the crimes purported in the documents of conviction.
>
> The prosecution has the burden of proving these facts by a preponderance of the evidence.
>
> Evidence has been introduced for the purpose of showing that the defendant has been previously convicted of three (3) felony crimes:
>
> Attempted Residential Burglary in violation of Penal Code Section 664/459;
>
> Residential Burglary in violation of Penal Code Section 459 and Forcible Rape in violation of Penal Code Section 261.2.
>
> A juror may consider any evidence of a prior felony conviction as an aggravating circumstance if the juror is convinced by the preponderance of evidence that said conviction has been proven.
>
> It is not necessary for all jurors to agree. If any juror is convinced by the preponderance of the evidence that conviction occurred, that juror may consider that conviction as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(RB at 103-104; 7CT 2015-2016.)

The prior instruction (CALJIC No. 8.85) had referenced section 190.3, factors (b) and (c). Respondent argued that:

> It appears that the trial court erred by instructing "with the jury the hybrid instruction combining CALJIC Nos. 2.50.1 and 8.86, as CALJIC No. 2.50.1 is appropriately given only in the guilt phase of a trial. (*People v. McClellan* (1969) 71 Cal.2d 793, 804; accord *People v. Medina* (1995) 11 Cal.4th 694, 763.)

(RB at 105.) Respondent, thus, argued that it appeared that the trial court failed to sua sponte instruct on the requisite burden of proof as to appellant's prior convictions. (*Ibid.*) However, as explained below, CALJIC No. 8.86 did not apply to prior convictions.

CALJIC No. 8.86 states:

> Evidence has been introduced for the purpose of showing that the defendant [_____] has been convicted of the crime[s] of [ ] [and] prior to the offense of murder in the first degree of which [he] [she] has been found guilty in this case.
>
> Before you may consider [any of] the alleged crime[s] as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant [_____] was in fact convicted of the prior crime[s]. You may not consider any evidence of any other crime as an aggravating circumstance.
>
> Normally such an instruction is required, even absent a request, when evidence of prior crimes is introduced or referred to as an aggravating factor pursuant to section 190.3, factor (c). (*People v. Davenport* (1985) 41 Cal.3d 247, 280, 221 Cal.Rptr. 794, 710 P.2d 861; *People v. Robertson* (1982) 33 Cal.3d 21, 53, 60, 188 Cal.Rptr. 77, 655 P.2d 279.)

(*People v. Harris* (2005) 37 Cal.4th 310, 360.)[1] "Of course, the instruction is not required as to proof of a prior felony conviction. (*People v. Wright* [(1990] 52 Cal.3d [367,] 437; *People v. Morales* (1989) 48 Cal.3d 527, 566 [257 Cal.Rptr. 64, 770 P.2d 244].)" (*People v. Pinholster* (1992) 1 Cal.4th 865, 965; see *People v. Harris*, *supra*, 37 Cal.4th at p. 360.)

As stated above, certified court documents were admitted showing that appellant had been convicted of rape and residential burglary in March 1983 Los Angeles County Superior Court case number A564356. Furthermore, copies of CYA documents showed that appellant had been convicted of residential burglary in 1981. (6RT 1448-1449; see 7CT 2136-2137 [Prob. Rpt.].) Therefore, undisputed evidence of appellant's prior *convictions* were admitted at the penalty phase. Similarly, in *People v. Harris*, *supra*, 37 Cal.4th 310, the parties stipulated to the admission of documentation ("prison packet") from the United States Department of Justice showing the defendant's federal drug conviction. (*Id.* at p. 360.) The defendant argued that the trial court erred in failing to sua sponte instruct the jury with CALJIC No. 8.86 in light of the introduction of the federal "prison packet." (*Ibid.*) This Court rejected this claim stating:

> Normally such an instruction is required, even absent a request, when evidence of prior crimes is introduced or referred to as an aggravating factor pursuant to section 190.3, factor (c). (*People v. Davenport* (1985) 41 Cal.3d 247, 280, 221 Cal.Rptr. 794, 710 P.2d 861; *People v. Robertson* (1982) 33 Cal.3d 21, 53, 60, 188 Cal.Rptr. 77, 655 P.2d 279.) Under the circumstances of this case, however, it was not necessary. *Defendant* first told the jury of the conviction, and the prison packet was admitted by stipulation, so there was no question whether he suffered the conviction. All that CALJIC No. 8.86 would have done was to imply that the conviction was a factor in aggravation, which would, if anything, have aided the prosecution, not defendant. Any error was harmless beyond a reasonable doubt.

(*Ibid.*)

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[1] Respondents notes that *Davenport* and *Roberston* both involve evidence of criminal activity involving force or violence under Penal Code section 190.3, subdivision (b). Neither case involves any instruction under 190.3, subdivision (c), regarding prior felony convictions.

Based on the foregoing, the trial court did not have a sua sponte duty to instruct the jury that appellant's prior convictions, which were supported by certified documents and his admission introduced under Penal Code section 190.3, factor (c), must be proved beyond a reasonable doubt. Furthermore, as frequently determined by this Court, the absence of this instruction is not prejudicial when the evidence of the defendant's commission of a violent crime is uncontroverted such as is the case here. (See *People v. Pinholster*, *supra*, 1 Cal.4th at p. 965.)

In its Order, this Court cites CALCRIM No. 765. (Order filed Jan. 13, 2010.) "The California Judicial Council withdrew its endorsement of the long-used CALJIC instructions and adopted the new CALCRIM instructions, effective January 1, 2006." (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465.) CALCRIM No. 765, of course, was not used in appellant's trial because he was tried before the CALCRIM instructions were adopted. In any event, Respondent notes that there is an apparent contradiction in this instruction.

CALCRIM No. 765 states:

> The People allege as an aggravating circumstance that (the defendant/ <insert name of defendant>) was *convicted* of <insert name of felony *conviction*> on <insert date of *conviction*>. <Repeat for each felony *conviction* alleged.>
>
> The People must prove (this/these) allegation[s] beyond a reasonable doubt. If you have a reasonable doubt whether (the defendant/ <insert name of defendant>) was *convicted* of (the/an) alleged crime, you must completely disregard any evidence of that crime. If the People have proved that (the defendant/ <insert name of defendant>) was *convicted* of (the/an) 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].

(Italics added.) The use of the words "convicted" and "conviction" in this instruction appears to conflict with this Court's well established holding that this type of instruction

is not required in the penalty phase as to proof of prior felony convictions, as opposed to unadjudicated prior criminal acts. (See *People v. Harris*, *supra*, 37 Cal.4th at p. 360; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 965; *People v. Wright* (1990) 52 Cal.3d 367, 437; *People v. Morales* (1989) 48 Cal.3d 527, 566; *People v. Gates* (1987) 43 Cal.3d 1168, 1202.)

Respectfully submitted,

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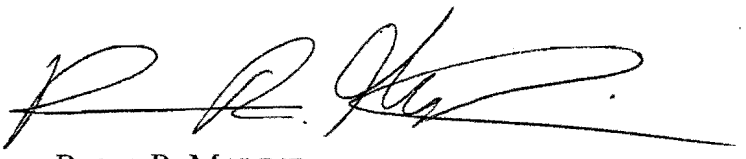

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DEATH PENALTY CASE

Case Name: **People v. David Earl Williams** Case No.: **S029490**

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I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **January 22, 2010**, I served the attached **LETTER BRIEF DATED JANUARY 21, 2010** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in San Francisco by US mail.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 22, 2010**, at Los Angeles, California.

Erlinda Zulueta
Declarant

Erlinda O. Zulueta
Signature

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