IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

[redacted]

PETITIONER,

vs.

STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

[redacted]
Attorney at Law
[redacted]
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Does the decision of the California Court of Appeal in this case that a suspect's inquiry into the availability of counsel prior to custodial interrogation constitutes a request for clarification of the suspect's constitutional rights rather than an invocation of the Fifth Amendment right to counsel conflict with the principles articulated by this Court in Miranda v. Arizona, 384 U.S. 486 (1966) and its progeny?

II. What are the consequences of an ambiguous or equivocal request for counsel preceding interrogation; must all interrogation immediately cease; or, are the police entitled to continue interrogation until a request for counsel is clearly expressed; or, lastly, must interrogation immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel? (This issue was noted but left unresolved in Smith v. Illinois, 469 U.S. 91 (1984).)

III. When a defendant who has received his Miranda warnings inquires whether he can have the assistance of counsel prior to police interrogation, and in response to this inquiry is told by the police that an attorney will be made available to him upon his arraignment, is the suspect's subsequent decision to speak with the police voluntary within the meaning of Miranda and the Fifth Amendment?

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STATE OF CALIFORNIA

The Petitioner, [redacted], respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, Division Four, on which judgment the Supreme Court of the State of California entered its order denying discretionary review on August 19, 1992.

OPINION BELOW

On May 28, 1992, the California Court of Appeal, Second Appellate District, Division Four, filed its opinion affirming the judgment of conviction of petitioner for first degree murder in violation of California Penal Code section 187. A copy of that opinion, which is not to be published, is attached hereto as Appendix A-1. On June 15, 1992, the Court of Appeal denied

petitioner's petition for rehearing. A copy of that order is attached hereto as Appendix A-2. On August 19, 1992, the Supreme Court of the State of California entered its order denying petitioner's petition for review of the Court of Appeal decision. The order denying discretionary review is attached hereto as Appendix A-3.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 62 Statutes 928, 28 U.S.C. Section 1254 (1), and under article III, section 2 of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person ... shall be compelled in any criminal case to be a witness against himself....

STATEMENT OF THE CASE

On May 2, 1988, at approximately 2:15 p.m. an industrial waste inspector for the City of Los Angeles was shot and killed. Petitioner was arrested at 7:00 a.m. on May 11, 1988 on suspicion of his involvement in the shooting death. He was brought to the Parker Center City Jail in the City of Los Angeles where he was later interviewed at 10:19 a.m. (CT 37; ACT 1; ART 17-18)_[1]/ At the outset of the audiotaped interview, petitioner and Detectives [redacted] and [redacted] of the City of Los Angeles Police Department engaged in the following discussions concerning petitioner's Fifth

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[1]. Reference to "RT" is to the Reporter's Transcript, "CT" is to the Clerk's Transcript, and "ACT" is to the augmented Clerk's Transcript. References to the Augmented Reporter's Transcript are to "RT" followed by the date of the hearing.

Amendment right to counsel:

"I'm Detective [redacted], and this is Detective [redacted]

"I'm gonna advise you of your Constitutional rights.

"You don't have to speak *** you have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law.

"You have the right to speak to an attorney and to have the attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning.

"Do you understand those rights?

"[Petitioner]: Yes.

"[[redacted]]: Okay. Do you wanna give up the right to remain silent? [redacted], you wanna talk to us about this incident?

"[Petitioner]: Can get an attorney right now?

"[[redacted]]: Pardon me?

"[Petitioner]: You can have attorney right now?

"[[redacted]]: Ah, you can have one appointed for you, yes.

"[Petitioner]: Well, like right now you got one?

"[[redacted]]: We don't have one here, no. There's not one present now.

"[[redacted]]: There will be one appointed to you at the arraignment, ah, whether you can afford one. If you

can't, one will be appointed to you by the court.

[Petitioner]: All right.

"[redacted]: ***

"[Petitioner]: I'll-- I'll talk to you guys.

"[redacted]: Okay. You wanna talk to us without a lawyer here, right?

"[Petitioner]: Yeah." (ACT 2-3)

Petitioner subsequently confessed to the robbery and killing of the decedent. (ACT 3-12)

There were 40 to 50 signs posted in the jail and holding cells of the Parker Center which set forth the defendant's right to call a public defender within three hours of his arrest pursuant to Penal Code section 851.5_[2]/; however, petitioner was not taken

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[2]. California Penal Code section 851.5 provides:

(a) Immediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls, as described in subdivision (b).

The arrested person shall be entitled to make at least three such calls at no expense if the calls are completed to telephone numbers within the local calling area.

(b) At any police facility or place where an arrestee is detained, a sign containing the following information in bold block type shall be posted in a conspicuous place:

That the arrestee has the right to free telephone callus within the local dialing area, or at his own expense if outside the local area, to three of the following:

(1) An attorney of his choice, or, if he has no funds, the public defender or other attorney assigned by

along the route where the signs were posted. (ART 35-38) On the posted signs was the phone number of the public defender. (ART 38) The public defender maintains Miranda duty lawyers around the clock. (ART 38) Detective [redacted] was aware that the public defender maintained Miranda duty lawyers, and he did not give that information to petitioner. (CT 29; ART 89) In his 19 years as a police officer, Detective [redacted] did not remember ever having explained to a defendant that the public defender maintained Miranda duty lawyers. (CT 29-31)

This case was originally filed on August, 1988, as information number 968920, which charged petitioner with murder, a violation of California Penal Code section 187. (RT (9/14/89) p. 88) Thereafter, petitioner moved pursuant to section 402 of the Evidence Code[3]/ to preclude the prosecution from introducing

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the court to assist indigents, whose telephone number shall be posted. This phone call shall not be monitored, eavesdropped upon, or recorded.

(2) A bail bondsman.

(3) A relative or other person.

(c) These telephone calls shall be given immediately upon request, or as soon as practicable.

(d) This provision shall not abrogate a law enforcement officer's duty to advise a suspect of his right to counsel or of any other right.

(e) Any public officer or employee who willfully deprives an arrested person of any right granted by this section is guilty of a misdemeanor.

[3]. California Evidence Code section 402 provides in pertinent part:

(a) When the existence of a preliminary fact is

evidence of audiotaped and videotaped confessions by petitioner on the grounds that the confessions were obtained in violation of Miranda v. Arizona, supra, 384 U.S. 436. (Ibid.)

The motion was granted by Judge Cooper. (CT 45; RT (9/14/89) p. 87; RT (1/10/89) p. 61.)

The District Attorney then requested and received a dismissal of the case, and refiled the case under case number [redacted] charging petitioner with murder, and a second count of unlawful vehicle taking (Cal. Pen. Code § 10851, subd. (a).). (ACT 29; CT 57-59)

Petitioner again moved in limine to exclude his taped confessions under section 402 of The Evidence Code. (CT 72) Petitioner specifically alleged that his questions as to the availability of an attorney, whether a clear or ambiguous assertion of the right to counsel, must be deemed to be an assertion of the right to counsel. (RT (9/18/89) at 71-76.) Petitioner also argued that any waiver of the Fifth Amendment right to counsel was involuntary because the detectives did not explain the petitioner's right to a lawyer under Miranda and California Penal Code section 851.5. (RT 9/18/89 pp. 69-70.) Petitioner stated:

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disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

I believe that I have briefed fairly thoroughly the ambiguous assertion notion and it is the defense position that my client asserted his rights three different times. Now three different times should have stopped interrogation immediately. And that was in response to the Miranda advisement he asked have you got an attorney her present now.

***

When the court again talked about, ambiguous statements are to be construed as invocations. The right to remain silent is by any words or conduct reasonably inconsistent with the present willingness to discuss his case freely and completely.

***

But I think the fact that the police officers were less than candid, that they were deliberately misleading, that the officer testified that he never called a Miranda lawyer.

The fact that the client was held beyond the three hours [prohibited by California Penal Code section 851.5], the fact that the client was not put anywhere that he could see that he had a right to a public defender, the fact that the police officers didn't ask any clarifying questions; they didn't say, well, do you want us to go get you a public defender; they didn't say we can have a public defender here tomorrow. They didn't say we can have a public defender here in a half hour. They didn't say anything that would illuminate that right to Miranda.

What they did by their statements was to imply that there was no meaningful right to a lawyer. (RT (9/18/89) at 65-67.)

The court denied the motion. (CT 73-74)

Petitioner was tried by jury and found guilty as charged of murder in the first degree and unlawful vehicle taking. (CT 119-120) He was sentenced to the statutorily prescribed term of 25 years to life for the murder, and to a consecutive two year term for a firearm use enhancement, and a consecutive two year determinate term for the vehicle taking. (CT 124-125)

On May 28, 1992, the California Court of Appeal, Second Appellate District, Division Four, by written opinion affirmed the judgment of the California Superior Court.

On June 15, 1992, the California Court of Appeal, Second Appellate District, Division Four, denied petitioner's petition for rehearing.

On August 19, 1992, the California Supreme Court denied petitioner's petition for review.

REASONS FOR GRANTING REVIEW

I.

THIS COURT SHOULD GRANT REVIEW TO SETTLE THE CONFLICT BETWEEN THE DECISION OF THE CALIFORNIA COURT OF APPEAL IN THIS CASE AND THE DECISIONS OF COURTS OF OTHER STATES WHETHER A SUSPECT INVOKES HIS FIFTH AMENDMENT RIGHT TO COUNSEL BY INQUIRING ABOUT THE AVAILABILITY OF COUNSEL PRIOR TO CUSTODIAL INTERROGATION

The Fifth and Fourteenth Amendment right to counsel applies during custodial interrogation. Miranda v. Arizona, supra, 384 U.S. 436; McNeil v. Wisconsin, 498 U.S. ___, 111 S. Ct. 2204, 2208 (1991); Norman v. Ducharme, 871 F.2d 1483, 1486 (9th Cir. 1989). Moreover, "[d]oubts must be resolved in favor of protecting the constitutional claim. [We must] give a broad, rather than a narrow, interpretation to a defendant's request for counsel." Michigan v. Jackson, 475 U.S. 625, 633, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986). "Suspects should not be forced, on pain of losing a constitutional right, to select their words with lawyer-like precision." United States v. Gotay, 844 F.2d 971, 975 (1988).

It has been stated that "[w]ith respect to requests for counsel under the fifth amendment, '[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous.'" Bruni v. Lewis, 847 F.2d 561, 564 (9th Cir. 1988) citing Connecticut v. Barrett, 479 U.S. 523 (1987). In context, the questions asked by petitioner needed no interpretation. Petitioner was told that he had the right to speak with an attorney and that one would be appointed to him prior to questioning. In this context, petitioner asked: "Can get an

attorney right now?" "You can have attorney right now?" "Well, like right now you got one?" In other words, petitioner wanted to know if an attorney was available for consultation immediately. Petitioner's questions indicated a present unwillingness to speak with the police without the assistance of counsel, and all questioning should have ceased at that point.

Moreover, the petitioner agreed to talk to the police only after he was told that he could not get an attorney appointed to represent him until the arraignment. If the police did not understand petitioner to be requesting the presence of an attorney, then why did they respond that an attorney was not available?

Additionally, the fact that petitioner agreed to be interviewed after he was told that his Sixth Amendment right to counsel did not attach until his arraignment should not be deemed to affect the validity of petitioner's invocation of his Fifth Amendment right to counsel. To hold otherwise would make the issue of whether the suspect invokes his right to counsel dependent upon the response the suspect receives from the police to the question whether or not an attorney is available to the suspect. The invocation of the right to counsel is not dependent upon a "yes" or "no" answer by a police officer to a suspect's question whether an attorney is available. See Smith v. Illinois, supra, 469 U.S. 91, 98 n. 7, 83 L. Ed. 2d 488, 495 n. 7 ("To the extent the dissent suggests that an accused's Fifth Amendment right to counsel should turn on whether the authorities initially honor his request, we reject this approach as palpably untenable under Edwards [Edwards

v. Arizona, 451 U.S. 477 (1981)]."")

Indistinguishable from the instant case are several state appellate court decisions. Most similar are the Florida and Michigan appellate court cases of People v. Lewis, 47 Mich. App. 450, 209 N.W.2d 450 (1973), and Harris v. State, 396 So. 2d 1180 (Fla. App. 1981). In People v. Lewis, supra, after being arrested at approximately 5:00 a.m. and after being advised of his constitutional rights, a suspect asked the interrogating officers whether it was possible to obtain an attorney at that hour, to which the officers replied that it was not possible, whereupon the accused told the officers to "forget it" and the questioning began. The court held that it was readily apparent that the accused, by inquiring as to whether it was possible to obtain an attorney at that early hour, sufficiently indicated a desire to consult an attorney before speaking.

Likewise, in Harris v. State, supra, during the course of interrogation, in response to the officer's question "Do you wish to answer questions at this time?", the accused responded, "Uh, is I want an attorney. Could I have one now?", whereupon the officer stated "Not right this minute, no. That means the court will appoint you an attorney at a later date," to which the accused answered, "Oh. Might be a week from now, two?", to which the officer replied, "Possibly, yes." The court interpreted the conversation between the accused and the detective as a request that counsel be present before any questioning take place.

Similarly, in State v. Chapman, 84 Wash. 2d 373, 526 P.2d 64

(1974), the court held that the defendant had invoked her right to counsel when she hesitated in signing a statement form and asked if she could have an attorney "now." The court said that it was clear that the defendant's question if she could have an attorney "now" was, in fact, a request to have an attorney, even if not artfully expressed.

Also apposite is People v. Harris, 191 Colo. 234, 552 P.2d 10 (1976), wherein the suspect asked the detectives "When can I get a lawyer?" The Colorado Supreme Court affirmed the District Court's suppression of the defendant's statements, holding that the accused had made a request for an attorney and that the police officers were thereby placed on notice that he intended to exercise his constitutional rights.

Likewise, in Hall v. State, 255 Ga. 267, 336 S.E.2d 812 (1985), the Georgia Supreme Court held that a murder suspect's question of his interrogators "When do you think I'll get to see a lawyer" constituted an ambiguous request for counsel, and that any response by the interrogators was limited to clarifying whether the accused was invoking his right to counsel.

A California Court of Appeal has reached the same conclusion in People v. Duran, 140 Cal. App. 3d 485, 189 Cal.Rptr. 595 (1983), certiorari denied, 464 U.S. 991. In Duran, the suspect was given a Miranda warning and the following conversation occurred:

> "Having these rights in mind, do you want to talk to us about the activities last night?
>
> "A: First of all, let me ask you a question. Am I charged with this homicide?

"Q: You're under arrest for homicide, yes.

"A: Well then I think it's better that I have an attorney here. But other than that, I'll give you my version of it, you know. Don't ask me no questions. All right? Is that okay?

"Q: You don't want us to ask you any questions?

"A: No.

"Q: Okay.

"A: I'll just tell you what, you know, what I did and, you know but I mean, or have you got an attorney right here present, close?

"Q: It will take quite a while to get one. But go ahead.

"A: You got a recording or anything, you want to record it?

"Q: It's being recorded.

"A: Oh, okay. Ah ... okay, this is yesterday, right?

"Q: Yeah.

"A: We decided to go to visit my sister-in-law, may wife's sister ...."

The Duran court found that Duran invoked his Miranda rights. The court found: "Assuming that [Duran's] first statement that "It's better that I have an attorney here" did not constitute an invocation, petitioner's question "Have you got an attorney right here present, close? must be so construed." Id., at 492, 189 Cal. Rptr. at 598-99.

In denying petitioner's motion to exclude his confession in this case, the trial court construed this Court's decision in Duckworth v. Eagan, 492 U.S. 195, 106 L. Ed. 2d 166 (1989), as tacitly recognizing that the question "when do I get an attorney?"

"is a legitimate question and not an ambiguous assertion to a right to counsel." (ART 73) The trial court was incorrect in so interpreting Duckworth.

In Duckworth v. Eagan, supra, before confessing the defendant was given a waiver form which informed him that "you have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning." The form also stated: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Some 29 hours later, after having been placed in lockup, respondent was given another waiver form to read, which he read and signed, which indicated that he had the right to the presence of an attorney during questioning, and that he could stop the interview and request an attorney. He proceeded to confess to the stabbing.

With regard to the "if and when you go to court" language in the warning, the Seventh Circuit Court of Appeal thought the language suggested that "only those accused who can afford an attorney have the right to have one present before answering any questions," and "implied[d] that if the accused does not 'go to court', i.e.[,] the government does not file charges, the accused is not entitled to [counsel] at all." (Id. at p. 203.) This Court disagreed. This Court stated:

> In our view, the Court of Appeals misapprehended the effect of the inclusion of "if and when you go to court" language in Miranda warnings. First, this instruction accurately described the procedure for the appointment of counsel in Indiana. Under Indiana law, counsel is appointed at the defendant's initial appearance in court, Ind Code 35-33-7-6 (1988), and formal charges must be filed at or before that hearing. [citation.] We think it

> must be relatively commonplace for a suspect, after receiving Miranda warnings, to ask when he will obtain counsel. The "if and when you go to court" advice simply anticipates that question. Second, Miranda does not require that attorney be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one. The Court in Miranda emphasized that it was not suggesting that "each police station must have a 'station house lawyer' present at all times to advise prisoners." [Citations.] If the police cannot provide appointed counsel, Miranda requires only that the police not question a suspect unless he waives his right to counsel. [citation.] Here, respondent did just that." (Id. at p. 204 quoting Miranda v. Arizona, supra, 384 U.S. 436, 474.)

Duckworth concerned the adequacy of Miranda advice, not whether an accused by words or conduct has invoked his Fifth Amendment right to counsel. Petitioner made a request for a lawyer invoking the Fifth Amendment right to counsel; Mr. Duckworth did not. The Supreme Court in Duckworth merely observed that the "if and when you go to court" language accurately informed the accused of his right to counsel under Indiana law. The advisement merely anticipated the question "When do I get a lawyer?", i.e., when does local state law provide me with an attorney. The "if and when you go to court" language in the Miranda warning in Duckworth did not operate as a limitation on the right to counsel before or during interrogation. However, in this case, the advise given petitioner as to his Sixth Amendment right to counsel could easily have been construed by petitioner as a limitation on his Fifth Amendment right to counsel. This Court has stated:

> "'Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney ... he

> does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel.... The simple fact that defendant has requested an attorney indicates he does not believe that he is sufficiently capable of dealing with his adversaries single-handedly.'"

Michigan v. Jackson, supra, 475 U.S. 625, 632-33 & 633-34 n. 7, 106 S.Ct. 1404, 89 L. Ed. 2d 631.

Thus, Duckworth cannot be deemed authoritative on the issue of what constitutes an ambiguous invocation of the Fifth Amendment right to counsel when the court did not consider that issue. (See also, Guzman v. Kelly, 728 F. Supp. 219, 221-224 (S.D.N.Y. 1990) aff'd 923 F.2d 843 (post-Duckworth opinion holding that a suspect's inquiries as to when he would receive counsel constituted an ambiguous invocation of the right to counsel permitting clarifying questions).

In sum, the decision of the California Court of Appeal in this case is at odds with decisions of the courts of other states, those of lower federal courts, and the decisions of this Court, interpreting Miranda so as to give a broad interpretation to the suspect's request for counsel. This Court should grant the writ of certiorari to resolve the conflict between the courts on this issue of whether a suspect's inquiry as to the availability of counsel constitutes an invocation of the Fifth Amendment right to counsel, and to provide general guidance to the lower courts as to the legal standard to be employed in determining the existence of an ambiguity in the request for counsel.

II.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AMONG THE STATE AND FEDERAL COURTS ON THE QUESTION OF WHAT THE LEGAL CONSEQUENCES ARE OF AN AMBIGUOUS REQUEST FOR COUNSEL

This Court has recognized that sometimes "an accused's asserted request for counsel may be ambiguous or equivocal." Smith v. Illinois, supra, 469 U.S. 91, 95 & n. 3. In Miranda, this Court indicated that where the person to be interrogated "... is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent.... Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts." Miranda, supra, 384 U.S. at 485-86 n. 55. This Court "has not defined ambiguity in this context or ruled on the consequences thereof." United States v. Gotay, supra, 844 F.2d 971, 974 citing Smith v. Illinois, supra, 469 U.S. 91, 95-96 & n. 3, 99-100.

The federal and state courts have developed differing standards for determining the consequences of an ambiguous request for counsel. Some courts have held that even an equivocal or ambiguous reference to counsel requires cessation of questioning. See, e.g., Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978); People v. Superior Court (Zolnay), 15 Cal. 3d 729, 736, 125 Cal.Rptr. 798, 802, 104 P.2d 654 (1975); People v. Duran, supra, 140 Cal. App. 3d 485, 492, 189 Cal.Rptr. at 599; Ochoa v. State,

573 S.W.2d 796, 800-01 (Tex. Crim. App. 1978). Others have attempted to define a threshold standard of clarity, and have held that requests for counsel which fall below that standard do not invoke the right to counsel. See, e.g., People v. Krueger, 82 Ill. 2d 305, 311, 412 N.E.2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel") cert denied, 451 U.S. 1019, 69 L. Ed. 2d 390. The trend among the federal circuit courts is to adopt the approach "that when a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." United States v. Gotay, supra, 844 F.2d 971, 975 (noted that the First, Fourth, Fifth, and Ninth Circuits had followed this approach). The rationale of this later rule is that by allowing custodial authorities to clarify ambiguous requests, reviewing courts will have an easier time identifying the intent behind a suspect's request for counsel. (Ibid.)

Petitioner would argue that the interests of the suspect in being protected from police badgering or overreaching that might otherwise wear down the accused or dissuade him from standing on his assertion of his constitutional rights would best be served by a "bright-line" rule that if a suspect in any manner requests to consult with counsel prior to speaking, that all questioning,

including questioning designed to "clarify" the suspect's assertion of his or her rights, shall be prohibited. A workable rule would be as follows: With respect to those requests for counsel which appear to be merely expressions of the suspect's desire to have the appointment of counsel at some future time, the police will be permitted to ask clarifying questions to determine if the suspect desires counsel in the present. However, if the request for counsel reasonably could be construed as indicative of the suspect's desire to have the assistance of an attorney prior to questioning, then all questioning must cease until such time as the suspect is provided an attorney, or the suspect voluntarily initiates further conversation with the police. Edwards v. Arizona, supra, 451 U.S. 477, 484-85. Certainly, if the police misinterpret a suspect's questions concerning counsel as an invocation of the right to counsel, the suspect will so inform the interrogating authorities when they terminate the interview.

Furthermore, a legal standard requiring a suspect to unambiguously invoke his right to counsel in order to terminate questioning would be untenable. As stated by the California Court of Appeal in People v. Duran, supra, 140 Cal. App. 3d 485, at page 492, 189 Cal.Rptr. 595, at page 599:

> "If courts were to construe ambiguous references to attorney as something other than invocations of a suspect's right to remain silent, experienced criminal would get attorneys and not incriminate themselves, while the less experienced offenders would be 'trapped' by failing to use the precise words of invocation."

In this case, even an experienced criminal would have had trouble divining a request for counsel that would impart to the police the

following concept which petitioner implied but could not expressly convey: "I want an attorney now, but I will speak with you after I consult an attorney so don't go away."

However, even if this Court decides to employ the rule permitting police "clarification" of ambiguous requests for counsel, the explanations afforded the petitioner by the police of his Sixth Amendment right to counsel did not "clarify" whether petitioner was seeking to invoke his Fifth Amendment right to counsel. Here, when petitioner asked whether an attorney was immediately available to him and the police told him that one was not available, the police response may have clarified for the police whether petitioner was willing to waive the right to counsel once invoked (an inquiry expressly prohibited by Smith v. Illinois, supra, 469 U.S. at 100), but the colloquy shed no light on whether petitioner was invoking his right to counsel. If the police officers had sought clarification as to whether petitioner was invoking his right to counsel, their response should have been "Do you want an attorney now?" rather than an explanation of when counsel would be appointed. Cf. Hall v. State, supra, 255 Ga 267, 336 S.E.2d 812; United States v. Gotay, supra, 844 F.2d 971, 976

Review should therefore be granted by this Court to decide the legal standard for determining whether an assertion of the Fifth Amendment right to counsel is ambiguous, and to resolve the conflict between state and federal courts on the legal standard to be employed in determining the consequences of such an ambiguity.

III.

THIS COURT SHOULD DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION WHETHER A SUSPECT'S DECISION TO SPEAK TO THE POLICE AFTER BEING TOLD THAT LEGAL COUNSEL IS UNAVAILABLE IS FREE AND VOLUNTARY WITHIN THE MEANING OF THE FIFTH AMENDMENT AND MIRANDA

The government bears the burden of demonstrating that a defendant knowingly and intelligently waives his privilege against self-incrimination and his right to retained or appointed counsel. Miranda v. Arizona, supra, 384 U.S. 436, 747-75. The issue must be resolved on the whole record including the facts and circumstances surrounding the case and the characteristics of the accused. Bruni v. Lewis, supra, 847 F.2d 561, 563.

A court should not find a valid waiver of the Fifth Amendment right to counsel when police give misleading advice to the accused regarding the availability of counsel. At least two state courts have found misleading the advice given petitioner in this case that an attorney would not be available until the arraignment because Miranda requires the cessation of questioning until an attorney is present. (See, Harris v. State, supra, 396 So.2d 1180, 1181 (even if request could "be construed as a question as to timing" of appointment of counsel, the response given by the detective that counsel would be appointed at a later date was misleading); People v. Lewis, supra, 47 Mich. App. 450, 209 N.W.2d 450, 451 (police officers violated the letter and spirit of Miranda requiring the cessation of questioning upon a request for counsel when the defendant asked whether it was possible to obtain an attorney early in the morning hours and the police responded that it was not

possible).

Moreover, in this case, the police advice not only violated the letter and spirit of Miranda by telling petitioner that an attorney was unavailable until the arraignment, but the advice by the police to petitioner that an attorney was unavailable to him until his arraignment was simply false. In fact, counsel was just a phone call away.

In People v. Dominick, 182 Cal. App. 3d 1174, 227 Cal. Rptr. 849 (1986), the California Court of Appeal rejected a defendant's contention that his waiver of his Miranda rights was involuntary because the detective misled him as to the availability of the services of the public defender. There, the accused was told that the public defender would not be available until the accused's arraignment in the morning. The Dominick court noted that there was no evidence presented to the trial court in regard to the issue whether the defendant could afford to retain counsel, or whether or not a public defender was available around 8:00 p.m. when the interview took place. Id., at 1192, 227 Cal.Rptr. at 859. Here of course, such information was available and presented to the court.

Additionally, the California Court of Appeal in People v. Locke, 152 Cal. App. 3d 1130 (1984), held that when a suspect elects not to speak with the police without the presence of counsel, at a minimum the arrested suspect must be informed

> "of his or her right, and be given an opportunity, to use a telephone for the purpose of securing the desired attorney. Such telephone calls should be allowed immediately upon request, or as soon thereafter as practicable. (Cf. Pen. Code, § 851.5, subd.'s (b)(c)....) Anything less would make of Miranda a hollow

ineffectual pretense.

People v. Locke, supra, 152 Cal. App. 3d at 1132.

If, according to Locke, it is a Miranda violation for the police to fail to immediately inform the suspect who has invoked the right to counsel of his or her right to contact a public defender, then should it not also be a Miranda violation for a police officer to inform a suspect who inquires about the availability of counsel that an attorney will not be available until the arraignment? The decision of the Court of Appeal in this case creates an untenable distinction between the situation in which the suspect states "I want an attorney" or its equivalent before asking about the availability of an attorney, and the suspect who merely asks about the availability of an attorney without including the "talismanic" phrase. The former is told of his statutory right to contact the public defender, and the later is not. Since in both cases the suspect must have this information in order to make an intelligent decision whether to waive the right to counsel, the distinction is without any logical justification, and unfairly penalizes the inarticulate defendant.

In addition, there are strong public policy reasons why the availability or unavailability of an attorney to an indigent suspect should not be determinative of whether the accused is deemed to have invoked his or her Fifth Amendment rights. The purpose of the Miranda right to counsel is to dispel the inherent coercive atmosphere of custodial interrogation and to curb abusive police practices designed at extracting confessions or admissions.

In pursuit of this purpose, the Miranda Court did not promulgate a rule which provided the police with the option of refusing to provide an attorney to the accused who requests the presence of an attorney. If counsel is requested, the police are given only one option: to cease interrogation until an attorney is present. (Miranda, supra, 384 U.S. at 473-475.) The ruling of the appellate court in this case creates an additional option for the police: the police may say to the suspect, "we can't provide counsel to you, but do you want to speak to us anyway." Since the police are not required to have station house attorneys (Duckworth v. Eagan, supra, 492 U.S. 195, 204), then the Fifth Amendment rights of the accused will be effectively undermined by the police policy against informing the accused of the availability of the public defender for consultation prior to custodial interrogation. The right to consult an attorney prior to questioning until an attorney is provided is meaningless if the interrogators merely inform the accused that an attorney is unavailable.

Further, if police comply with Miranda by simply telling an indigent suspect who desires the presence of an attorney that an attorney will be appointed for the suspect after he becomes an accused and is before the court at the arraignment, then the police are given free reign to deceive the suspect concerning the availability of an attorney. There was a public defender available to petitioner for consultation, and petitioner was not told.

This Court should grant review to determine the important question whether it is a violation of Miranda for the police to

tell a suspect who has inquired about the availability of counsel that an attorney will be appointed at the arraignment, and whether it is a Miranda violation to mislead the suspect concerning the availability of appointed counsel.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, Division Four.

DATED: November 17, 1992

Respectfully Submitted,

Attorney for Petitioner

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

[redacted]

Defendant and Appellant.

[redacted]

[redacted]

COURT OF APPEAL - SECOND DIST.
FILED
MAR 30 1992
ROBERT N. WILSON Clerk
F. G. STAPLETON, Jr.
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed and modified.

[redacted], under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Acting Senior Assistant Attorney General, John R. Gorey and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

[redacted] appeals from the judgment entered following a jury trial in which he was convicted of first degree murder (count 1) and driving or taking a vehicle (count 2). He was also found to have personally used a firearm during the murder within the meaning of Penal Code section 1203.06, subdivision (a)(1) and section 12022.5, causing the offense to be a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(8). (Pen. Code, § 187, subd. (a) and § 189.) He contends his statements were admitted in violation of Miranda v. Arizona,[1/] that he received inadequate notice that he would be tried under a felony murder theory, and that the court erred at sentencing.

STATEMENT OF FACTS

On May 2, 1988, [redacted] was a senior industrial waste inspector for the City of Los Angeles, working at a laboratory on Doris Place in Los Angeles. He left the laboratory at approximately 2:15 p.m. and returned approximately 15 minutes later, asked for help and collapsed in the lobby. [redacted], also working at the laboratory, observed that [redacted] had been shot and there was blood coming from his chest and wrist. [redacted] gave the license plate number and a description of the car his assailant was driving to [redacted].

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1. Miranda v. Arizona (1966) 384 U.S. 436; Edwards v. Arizona (1981) 451 U.S. 477.

Los Angeles Police Officer [redacted] responded to the shooting at 2:30 p.m. She drove in the vicinity of the shooting and in less than a minute located the car the assailant had been driving.

Los Angeles Police Officer [redacted] responded to the shooting. In the street directly across from the laboratory, [redacted] found an expended shell casing and bloodstains. The blood was almost in a continuous stream from where the shell casing was found near the victim's car to the laboratory lobby. [redacted] had the assailant's car impounded and had a mug found in the car held for prints.2/

[redacted], a forensic print specialist for the Los Angeles Police Department, dusted the impounded vehicle for prints and found 12 latent print lifts. One print found outside the driver's front window was appellant's left index finger. [redacted], a forensic print specialist for the Los Angeles Police Department, lifted three prints from the mug found inside the impounded car. Two of the prints were the right index finger of appellant. The third print was not identifiable as appellant's.

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2. [redacted] testified that he owned the impounded car and that on April 29, 1988, he had loaned it to a friend. Later that evening, [redacted] heard from his friend. Based on that conversation, [redacted] went looking for the car. [redacted] could not find his vehicle and reported it stolen. [redacted] had not given appellant permission to drive the car and the mug found inside the car did not belong to [redacted].

Los Angeles County Deputy Medical Examiner, Dr. [redacted], conducted an autopsy of the victim and determined the cause of death was a fatal gunshot wound to the right side of the abdomen, below the rib cage. [redacted] recovered a bullet from the victim's body.

After the prints on the car were positively identified as appellant's, an arrest and search warrant were prepared. On May 11 at 7:00 a.m., Los Angeles Police Detective [redacted] and several other officers went to appellant's residence to serve the warrants. They knocked on the door, identified themselves as police officers, and stated they had a warrant. [redacted] observed appellant inside the residence running rapidly from one side of the room to the other, and forced the door, and arrested appellant. In the residence, the officers found a .22 caliber long rifle mini-magazine with 100 rounds in each plastic container.

Appellant was transported to Parker Center and taken to room 818. He did not pass through the jail area, where there were 40 to 50 signs posted with the phone number of the "Miranda-duty lawyers" who were maintained around the clock by the Los Angeles Public Defender's Office. At approximately 10:00 a.m. appellant was interviewed by [redacted] and his partner, Detective [redacted]. Prior to this interview, appellant was advised of and waived his rights pursuant to Miranda v.

Arizona.[3] The conversation lasted only a few minutes and [redacted] then went to retrieve a tape recorder. When [redacted] returned approximately five to ten minutes later with a tape recorder, the officers activated the tape recorder and initiated a second conversation. Prior to this second interview, [redacted] advised appellant of his constitutional rights.[4]

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3. [redacted] advised appellant that they were investigating the murder of [redacted] and they had certain evidence implicating appellant as the suspect. [redacted] read from a form and advised appellant that he had the right to remain silent, and that if he gave up the right to remain silent, anything he said could and would be used against him in a court of law. Appellant was advised he had the right to have an attorney present during questioning and if he so desired and could not afford an attorney one would be appointed for him without charge before questioning. Appellant stated he understood these rights and that he would speak to the officers. [redacted] did not offer appellant any inducement to speak and did not threaten appellant in any manner. Appellant, at all times, appeared to be willing to cooperate and at no time during the interview did he indicate that he did not want to talk to [redacted].

4. The tape recording indicates the following conversation:

"[redacted] You don't have to speak . . . you have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law.

"You have the right to speak to an attorney and to have the attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning.

"Do you understand those rights?

"[Appellant] Yes.

"M Okay. Do you wanna give up the right to remain silent? [redacted] you wanna talk to us about this incident?

(Fn. continued.)

Thereafter, appellant stated that he tried to take the victim's money but the victim did not want to give it up and started to attack appellant. Appellant told the victim to get back. Appellant still had not cocked the gun back. The victim kept coming at appellant and stated, "No, you got to shoot me first." Appellant told him to get back but the victim would not. Appellant cocked the gun back once and said, "I'm gonna shoot you. Get back." The victim pretended he had a gun and scared appellant a little. Appellant tried to hit the victim below the waist because he did not want to kill him and shot him below the waist. Appellant got into the car and drove off. Appellant claimed if he had wanted to kill the victim he would have shot him in the face or heart. Appellant stated he was driving a car he found. The key was in it and it was

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(Fn. 4 continued.)

"A Can get an attorney right now?
"M Pardon me?
"A You can have attorney right now?
"M Ah, you can have one appointed for you, yes.
"A Well, like right now you got one?
"M We don't have one here, no. There's not one present now.
"L There will be one appointed to you at the arraignment, ah whether you can afford one. If you can't, one will be appointed to you by the court.
"A All right.
"M . . . .
"A I'll -- I'll talk to you guys.
"M Okay. You wanna talk to us without a lawyer here, right?
"A Yeah."

rolling slowly. After the shooting, appellant "dumped" the gun in the river.[5/]

APPELLANT'S STATEMENTS

Apart from whether appellant's trial counsel took all necessary technical steps to preserve this issue for review, we will treat the issue as not having been waived. (Cf. People v. Boyer (1989) 48 Cal.3d 247, 270.) "As the reviewing court, it is our duty to examine the uncontradicted facts of this case in order to make an independent determination of whether the trial court properly concluded that defendant's extrajudicial statement was voluntary." (People v. Jennings (1988) 46 Cal.3d 963, 979.) The burden of proving that a confession is voluntarily and knowingly made is on the prosecution and proof is by a preponderance of the evidence. (Lego v. Twomey (1972) 404 U.S. 477, 488; People v. Thompson (1990) 50 Cal.3d 134, 166; People v. Jennings, supra, 46 Cal.3d at p. 976.) Similarly, waiver of Miranda rights need only be proven by a preponderance of the evidence. (Colorado v. Connelly (1986) 479 U.S. 157, 168-169; People v. Kelly (1990) 51 Cal.3d 931, 947; People v. Markham (1989) 49 Cal.3d 63, 65, 71.)

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5. Appellant was interviewed a third time by a deputy district attorney. The interview was videotaped. Prior to the interview, appellant was advised of and waived his rights pursuant to Miranda v. Arizona, supra, 384 U.S. 436.

"Miranda v. Arizona (1966) 384 U.S. 436, 473-474 . . . held that 'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.' [Citations.] [¶] People v. Turnage (1975) 45 Cal.App.3d 201, 211 . . . , held that the case law 'permits clarifying questions with regard to the individual's comprehension of his constitutional rights or the waiver of them; on the other hand, it prohibits substantive questions which portend to develop the facts under investigation. [Citations.]' However, 'just as Miranda prohibits continued police interrogation into the substantive crime after a clear indication that a suspect wants an attorney present, it also prohibits continued police efforts to extract from a suspect a waiver of his rights to have an attorney present after a clear indication that the suspect desires such an attorney' [citation]--or, it may be added, that he desires to remain silent." (People v. McGreen (1980) 107 Cal.App.3d 504, 521-522.) (Emphasis in original.) Appellant did not make a clear indication that he wanted an attorney present. Appellant asked a question whether he was entitled to an attorney at the time he was being questioned and was advised that he could have an attorney appointed. Additionally, appellant asked if there was an attorney then present. He was told that there were no attorneys present; that one would be appointed for him. The conversation between appellant and the

officers consisted of a clarifying colloquy regarding appellant's right to have an attorney present, appellant's comprehension of his constitutional rights, and clarification whether in fact appellant was willing to waive his constitutional rights. Appellant then, unequivocally, stated he would talk to the officers and that he would talk to the officers without a lawyer present. It was only then that the officers asked substantive questions about the crime.

Additionally, the record indicates that appellant's statements were voluntarily made. There is no indication of threats or promises to appellant (see People v. Morris (1991) 53 Cal.3d 152, 200; People v. Thompson (1990) 50 Cal.3d 134, 169-170), or that the officer's statements to appellant were coercive. (See People v. Thompson, supra, 50 Cal.3d 134 at 167.)

NOTICE OF FELONY MURDER THEORY

Appellant was charged by information number [redacted] with the crime of murder with malice aforethought in violation of Penal Code section 187, subdivision (a). During trial, the court asked the prosecution whether the case was being tried on a felony-murder theory. When the prosecution indicated, "yes," the court noted that it had read a recent Ninth Circuit opinion which had set aside a felony murder conviction for lack of notice, relying in part upon the fact that the indictment had not spelled out that it was a felony murder. The court indicated that it had assumed from the preliminary hearing and

from the proceedings that the prosecution was proceeding on a felony murder theory but wanted to "get that on the record." Appellant's counsel indicated she had not looked at the record to see if the record was devoid of that notice.[6/]

The trial court allowed the prosecution to amend the information to plead felony-murder and gave appellant the opportunity to recess the trial to avoid the effect of surprise. No such request for continuance was made. The jury was instructed on first degree felony murder, with robbery as the underlying crime.

Appellant contends the amendment to the information on the final day of trial was untimely and denied him due process

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6. This case has a lengthy history. At the conclusion of the first preliminary hearing, appellant was held to answer on Penal Code section "187A/189." The prosecution indicated that there had been recent case law that notice should be given when the People were proceeding under a felony murder theory.

Following a hearing pursuant to Evidence Code section 402, the prosecution dismissed the case.

The case was then refiled as a "187/189 (a)" alleging appellant had committed the crime of murder with malice aforethought and in perpetration of a robbery.

Following the second preliminary hearing, appellant was held to answer to a violation of Penal Code section 187. Felony murder was not mentioned and the felony murder charge was dropped from the information.

During trial, appellant indicated that it was entitled to rely on the withdrawal of the felony murder allegation and that the prosecution could not at the close of its case indicate they were proceeding on a felony murder rule theory. Appellant made an offer of proof that he and his attorney had declined a second degree murder offer because appellant wished to preserve his appellate right on the confession issue. The decision was predicated on the notion that under second degree murder appellant faced 15 years to life and thought that it was worth the risk to allow appellant to appeal the confession issue.

of law. Appellant additionally alleges the information alleging murder with malice pursuant to Penal Code section 187 was inadequate to put him on notice that he would have to defend against the charge of felony murder. Appellant asserts that consequently the felony murder instructions to the jury were improper. Appellant's contentions are without merit. "Whether murder is committed with malice, or in the context of felony murder, the crime committed is still murder. And while identification of the statute violated is advisable, it is not required. [Citation.] Therefore, an information charging murder is sufficient to charge either a violation of section 187 or section 189." (People v. Watkins (1987) 195 Cal.App.3d 258, 267; see also People v. Scott (1991) 229 Cal.App.3d 707, 713-718; People v. Johnson (1991) 233 Cal.App.3d 425, 453-457.) Additionally, there was ample pretrial notice and notice throughout the trial regarding the felony murder theory and an opportunity to request a continuance.

SENTENCING[7/]

At the time of sentencing, the court indicated that it had read and considered the probation report. The report listed as factors in aggravation that the crime involved a high degree of cruelty and callousness, the crime involved planning and premeditation, appellant had engaged in a pattern of

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7. Appellant was sentenced to prison for 25 years to life for count 1 plus two years for the firearm use enhancement. Appellant was sentenced to the middle term of two years for count 2 which was ordered to run consecutively to the count 1 sentence.

violent conduct and appellant's prior adjudications were of increasing seriousness. While the trial court failed to articulate a reason for imposing consecutive sentences for the two counts, remand is unnecessary. In view of the record it is highly unlikely that appellant would obtain a result more favorable. (See People v. Avalos (1984) 37 Cal.3d 216, 233; People v. Watson (1956) 46 Cal.2d 818, 836; People v. Preyer (1985) 164 Cal.App.3d 568, 577.)

As conceded by respondent, appellant was arrested on May 11, 1988, sentenced October 30, 1989, and, therefore, entitled to 538 days actual custody credits and 268 days conduct credits. (See People v. Bravo (1990) 219 Cal.App.3d 729, 732-735.)

DISPOSITION

The judgment is modified to give appellant 538 days actual custody credits and 268 days conduct credits for a total of 806 days. The trial court is directed to amend the abstract of judgment accordingly and to forward a copy to the Department of Corrections. As modified, the judgment is affirmed.

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS

STEPHENS, J.*

We concur:

WOODS (Arleigh), P.J. EPSTEIN, J.

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*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Case Name: People v. [redacted] No. [redacted]

I declare that: over the age of 18 years and not a party to the within entitled cause; my business address is P.O. Box 348, Monterey, California 93942.

On July 7, 1992, I served the attached

APPELLANT'S PETITION FOR REVIEW

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Monterey, California, addressed as follows:

COURT OF APPEAL, SECOND APPELLATE DISTRICT
DIVISION FOUR
300 So. Spring Street
2nd Fl., No. Tower
Los Angeles, CA 90013

ATTORNEY GENERAL
300 So. Spring Street
5th Floor
Los Angeles, CA 90013

CALIFORNIA APPELLATE PROJECT
Los Angeles Office
611 Wilshire Blvd.
2nd Floor
Los Angeles, CA 90017

FRANK S. ZOLIN, County Clerk
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90010
ATTN: Hon. Donald F. Pitts, Judge

IRA REINER, District Attorney
210 West Temple Street
Room 18000
Los Angeles, CA 90012

[redacted]

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Monterey, California, on July 7, 1992.
(Date)

_____ _____
(Typed Name) (Signature)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 4 DATE: 06/15/92

[redacted]

RE: People of the State of California
vs.
[redacted]

THE COURT:

Petition for rehearing denied.

Second Appellate District, Division Four, No. B046225
S027563

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

MARIO ALVAREZ, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice