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S161399

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	Supreme Court No. S161399
Plaintiff and Respondent,	
vs.	Alameda County Superior Court No. H038118
CARL EDWARD MOLANO,	
Defendant and Appellant.	

SUPREME COURT
FILED

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DEATH PENALTY APPEAL

APPELLANT'S REPLY BRIEF

Automatic appeal from a judgment of the Superior Court of the State of California, in and for the County of Alameda, Hon. Allan Hymer, Judge Presiding

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DEATH PENALTY

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S161399

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **vs.** **CARL EDWARD MOLANO,** **Defendant and Appellant.**	**Supreme Court No. S161399** **Alameda County Superior Court No. H38118** **APPELLANT'S REPLY BRIEF**

INTRODUCTION

In his opening brief, appellant raised six separate assignments of error, many of which contained subissues. Respondent disputes each of these assignments of error, and appellant will now reply with respect to each of these issues. Appellant notes, however, that many of respondent's contentions have been adequately addressed in the opening brief, and therefore not all of respondent's specific contentions merit a reply. Accordingly, while appellant has submitted replies with respect to each of the six general issues in the appeal, appellant's decision not to reply to a specific contention included in respondent's brief should not be regarded as a concession of any point.

Before turning to the legal issues in the case, appellant briefly notes a number of inaccuracies in respondent's introductory factual statement. First, on the day before Suzanne McKenna's body was found, her former neighbor Paulette Johnson went to McKenna's home to pick up houseplants

she'd left with McKenna. Respondent contends that this visit happened in the afternoon, and that Johnson went into McKenna's home. (RB 4). However, Johnson's testimony was that she went to McKenna's home in the morning and spoke with McKenna for 20-30 minutes on her porch, but never went inside. (15RT 2165-2166.)

Respondent states that when appellant was being interrogated at Eden Township Substation (ETS) on March 31, 2003, "appellant requested to speak to the district attorney's office." (RB 18.) She cites the testimony of investigating officer Edward Chicoine. (*Id.;* 14RT 2011-2013.) In appellant's view, appellant was actually asking whether he could speak to the district attorney with a public defender also present. At the station, in response to the officer's questioning, appellant said "what I would like, you know, I can talk to you guys. *I can even talk to the DA, . . . you know with my Public Defender there or whatever right,* . . ." (People's Pretrial Exh. 5A at 8, emphasis added.) After a brief exchange, appellant then reiterated, "Can I sit down with the DA?" (*Id.,* at 9.) Based upon the context of the exchange, at this point in the interrogation appellant was asking to speak with the district attorney with a public defender representing him.

Respondent's statement of the facts presented during penalty phase is also inaccurate in several respects. (RB 28-34.) For example, appellant grew up with his half-brother Ernest, not Ernesto. (26RT 3373.) Ernest and appellant changed their last names to Molano at the behest of their sister, Dolores, not their sister Cynthia. (26RT 3376-3377.) Lula Ellis was appellant's step-grandmother, not his biological grandmother. (26RT 3387.) Bonnie Alexis, not Dottie Harris, testified at appellant's trial (24RT 3439-3453), and Alexis testified about appellant's relationship with his niece, not his daughter. Respondent contends that appellant was "very upset" and "angry" with his mother because she did not tell him the identity

of his biological father. (RB 32.) The evidence shows only that "it was unclear [to appellant] who his father was, and upsetting to him." (26RT 4420.) Respondent also states that "appellant spent a lot of time with his older brother Ernesto using alcohol and drugs." (RB 33.) The evidence regarding Ernest and appellant using drugs and alcohol together came in the form of the testimony of appellant's social historian, who testified only that the brothers "used alcohol together, [and] they also used drugs together as they got older in the their teens." (26RT 3417.) There was no evidence regarding the amount of time spent or frequency with which their drug and alcohol use occurred.

I. THE TRIAL COURT'S RULING ON THE *MIRANDA* ISSUE IN THIS CASE WAS ERRONEOUS BECAUSE THE FACTS SHOW A CLEAR PATTERN OF DISREGARD FOR APPELLANT'S RIGHTS AND APPELLANT'S STATEMENTS WERE THEREFORE INVOLUNTARY AS A MATTER OF LAW.

In his opening brief, appellant contended that his Fifth and Fourteenth Amendment rights were violated when law enforcement officers made intentional misrepresentations in order to trick him into waiving his right to counsel and then disregarded his unequivocal invocations of that right, all in clear violation of the rules of *Miranda v. Arizona* (1966) 384 U.S. 436 and *Edwards v. Arizona* (1981) 451 U.S. 477. (AOB 74, 90.) Specifically, appellant first showed that the officers' lies about both their identity as homicide investigators and the nature of their investigation rendered appellant's waiver involuntary. Appellant also showed that the officers subsequently disregarded or ignored two separate and unequivocal invocations of appellant's right to counsel. Consequently, appellant contended, the statements made by appellant on March 21 and March 31, 2003, should have been suppressed and reversal of appellant's conviction is

now required.

Respondent argues that appellant's *Miranda* waiver made on March 21, 2003, was voluntary and that appellant's subsequent statements did not violate the *Edwards* rule. (RB 51, 55.) Respondent is wrong on both counts.

A. Investigating Officers' Lies About Their Identity and the Nature of Their Investigation Were Calculated to Mislead Appellant About the Nature of the Rights Being Waived and the Consequences of the Waiver.

Determining whether appellant voluntarily waived his *Miranda* rights on March 21, 2003, requires this court to address and resolve the question the United States Supreme Court expressly left open in *Colorado v. Spring* (1987) 479 U.S. 564, i.e., whether, and under what circumstances, an "affirmative misrepresentation" by law enforcement officers regarding the scope of interrogation constitutes the kind of trickery or deception which *Miranda* teaches will render a waiver involuntary. Appellant submits that, at a minimum, intentional deception by law enforcement which misrepresents the officers' identities and fails to at least inform the suspect that he is under investigation for a crime vitiates the waiver, particularly where, as here, the record clearly shows the defendant would never have waived his rights had he been informed of the true identity and nature of the investigation. Indeed, any holding to the contrary would effectively nullify *Miranda's* prohibition against police use of trickery and deceit to obtain waivers.

Respondent asserts that "[a]ppellant does not claim that any police action caused him to misunderstand the nature of his rights or the consequences of his decision to waive them." (RB 51.) To the contrary, in his opening brief, appellant specifically argued that the detectives'

"misrepresentations vitiated the waiver because appellant was entirely misled about the scope of the investigation, the nature of the offense itself, the identities of the officers to whom he was speaking, and the potential consequences of speaking to them." (AOB 80-81.) It is undisputed that the officers' actual purpose on March 21, 2003 was to interrogate appellant– by then their prime suspect– regarding the June 1995 homicide of Suzanne McKenna. It is also undisputed that investigating officers devised a plan in which they lied to appellant about both their identity *and* the nature, subject matter, and scope of the interrogation in order to obtain a *Miranda* waiver. Indeed, they misled him into believing that they were not there to investigate any crime at all but for a purely routine administrative purpose. The officers gave appellant their true names but told him that they were investigators from a sex crimes unit who wanted to conduct a routine interview about his "past crimes and some of the sex registration laws and things like that." (People's Pretrial Exh. 3A [p. 1] (transcript of audiotape); People's Exhibit 38 (audiotape).) They assured appellant that the type of interview they wished to conduct was so routine that it was conducted with "every single sex registrant . . . ." (3RT 315-316; People's Pretrial Exhs. 3 and 3A [p. 2, ln. 25].) Based on these misrepresentations, appellant signed a *Miranda* waiver and made statements which were then admitted at trial over his objection.

"[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (*Miranda v. Arizona, supra*, 384 U.S. at p. 476.) A waiver of Fifth Amendment rights must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon

it." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

The lies the officers told appellant were intended to convince appellant that he would be waiving his rights and agreeing to speak with them solely for the purpose of a routine pre-release interview that concerned his prior sex crimes and the requirement that he register as a sex offender when released. This intentional deception by the officers about the subject matter of the interview prevented appellant from understanding the consequences of waiving his rights– precisely the kind of deception that the United States Supreme Court has repeatedly held renders a waiver involuntary.

Respondent argues that courts considering the issue of when misrepresentations by police invalidate a *Miranda* waiver have drawn a distinction between misrepresentations that are coercive, deceptive, or otherwise affect a defendant's understanding of his rights and the consequences of waiver, on one hand, and misrepresentations that simply lead an accused to make an "unwise" decision to waive his rights, on the other. (RB 54; *Colorado v. Spring* (1987) 479 U.S. 564, 577.) Appellant agrees with respondent's analysis that "a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that might...[affect] his decision to confess." (*Spring* at p. 576; RB 52.) Indeed, *Spring* itself stands for the proposition that merely failing to inform a defendant of all of the possible subjects of the interrogation in advance does not constitute the kind of trickery or deception that *Miranda* prohibits.

However, respondent's argument entirely fails to address the central problem presented here, to wit, that these officers *intentionally* deceived appellant in order to obtain a *Miranda* waiver by concealing the fact that they were conducting a criminal investigation. This kind of intentional

trickery and deception plainly affected appellant's understanding of the nature of the rights he was asked to waive and the potential consequences of waiver.

As noted in his opening brief, appellant has not found any published case upholding a waiver where law enforcement officers investigating a crime falsely stated they wanted to speak to the defendant for any reason other than criminal investigation. Nor does respondent cite any such case. As discussed in greater detail below, the cases respondent cites, which purportedly involve trickery or police ruses (RB 54), all involve situations in which the officers *at least* informed the defendant they were investigating a crime. There is a fundamental difference between advising a defendant that he is about to be interrogated as part of a pending criminal investigation and advising him that he is being interviewed only about past crimes for strictly administrative or bureaucratic purposes. The first advisement at least alerts the suspect to the nature of his rights and the consequences of waiving them. The second advisement entirely misleads the subject into believing that he is not under criminal investigation *at all* and is merely discussing crimes for which he has already been convicted and punished and thus cannot be punished again. The second advisement not only fails to alert the defendant about the potential consequences of the waiver but entirely conceals those consequences, leading him to believe the interview will have no criminal consequences at all. By intentionally tricking appellant into lowering his guard by leading him to believe there could be no criminal consequences if he spoke to them, the officers committed precisely the kind of trickery and deceit which *Miranda* condemns.

It is also abundantly clear from the record that appellant would never have waived his rights and agreed to speak with these officers but for their

intentional deceit. Chicoine's testimony and the sequence of events after appellant signed the waiver plainly demonstrate that had the officers been forthright about their identity as homicide investigators and the subject matter of their intended interview, appellant would never have signed the waiver. After more than an hour of questioning about appellant's priors and post-release plans– questioning that was meant to support the investigators' ruse and lower appellant's defenses– Dudek asked appellant if he knew McKenna and whether anyone thought appellant had killed her. (People's Pretrial Exhs. 3 and 3A [p. 42-43].) Appellant admitted that he knew McKenna, that he had sex with her shortly before her death, and that his ex-wife thought he killed McKenna because appellant told her he knew what had happened to McKenna. (*Id.* at p. 34-44.) However, when questioned further about his ex-wife's suspicions, appellant finally understood the true nature of the interrogation, became "extremely nervous," got "an alarmed look on his face," and insisted that he be allowed to leave the interrogation room to use the restroom. (*Ibid.*; 3RT 329.) When he returned five minutes later, appellant immediately and unequivocally invoked his right to counsel. The detectives then cut off questioning, executed a search warrant, and left. (People's Trial Exhs. 3 and 3A [p. 44]; 3RT 332.) The timing and circumstances of appellant's invocation show once he understood the nature and consequences of waiving his *Miranda* rights in relation to the McKenna investigation, he was absolutely unwilling to do so. Because the officers' intentional deception induced appellant's misunderstanding at the time of waiver, the waiver was involuntary.

In his opening brief appellant also provided a thorough discussion of *People v. Tate* (2010) 49 Cal.4th 635, and argued both that *Tate* is distinguishable from this case and that, to the extent that it can be read to prohibit only those misrepresentations by police that are likely to induce

false statements, *Tate* is also not in accord with the U.S. Supreme Court's decisions in *Miranda* and its progeny, including *Colorado v. Spring* (1987) 479 U.S. 564, to the extent that those cases prohibit deception and trickery to obtain a waiver. (AOB 77-89.)

Respondent disagrees with both appellant's contentions and argues as follows:

> [A]ll courts to consider the issue have consistently drawn a distinction between information that is coercive or affects the accused [sic] understanding of his rights, and information that affects the wisdom of exercising or waiving those rights. [Citations.] Trickery or ruses, that merely affect the 'wisdom' of the decision to waive, be it a failure to convey information or a communication of misinformation are simply not relevant [citation]. The analysis employed by this Court in *Tate* is in accord.

(RB 54.)

Respondent cites a number of cases which she contends show that trickery or ruses that merely affect the "wisdom" of the decision to waive are irrelevant to the determination of the voluntariness of a waiver. (RB 54.) Appellant disagrees.

First of all, respondent argues that trickery and deceit are *acceptable* if they merely affect the "wisdom" of the defendant's waiver. (RB 54.) However, that is not what *Spring* held at all. In *Spring*, the U.S. Supreme Court upheld a *Miranda* waiver against an allegation of police trickery and deceit where federal agents arrested the defendant, advised him he was under investigation for federal firearms violations, and obtained a *Miranda* waiver. During the course of the interrogation, the agents asked the defendant if he had ever shot anyone and he admitted he had done so. Two months later, as a result of the federal investigation, he was investigated by Colorado law enforcement personnel for murder. The Supreme Court

rejected Spring's contention that his initial waiver was involuntary because he had not been informed that he would be questioned about topics other than firearms charges and that the Colorado investigation was fruit of the poisonous tree. The high court held that mere silence by the federal agents regarding some possible subjects of interrogation did not constitute the kind of trickery or deceit prohibited by *Miranda*. The court reasoned that "[h]ere, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature." (*Spring, supra*, 479 U.S. at p. 577.)

Contrary to respondent's contention, *Spring* does not endorse trickery or deceit by law enforcement under *any* circumstances. Rather, it says that additional information about all subjects of the interrogation that affect only the wisdom of a defendant's decision to waive his rights need not be provided to a defendant in order to obtain a valid waiver. However, *Spring* does not undermine or limit *Miranda's* prohibition on police trickery or deceit to obtain waivers; it merely says that silence about some possible subjects of an interrogation is not the same thing as trickery or deceit. Indeed, in *Spring* there was no intentional trickery or deceit at all. The agents warned Spring that they were investigating him for firearms charges, and it appears that the questions regarding whether he had ever shot anyone arose naturally during the court of the interrogation and were not intentionally concealed.

Moreover, as noted above, even assuming *arguendo* that some level of trickery and deceit is acceptable if the misrepresentations only affect the "wisdom" of waiving *Miranda* rights, all the cases cited by respondent in support of this argument (RB 54) either do not say this, are distinguishable from this case, or are actually favorable to appellant's position. For example, *Moran v. Burbine* (1986) 475 U.S. 412, 421 involved a situation

similar to *Spring* in which interrogators merely withheld information that might have been useful to the defendant (they did not disclose that the defendant's attorney had called the station). The court held this did not misrepresent the nature of the defendant's rights or the consequences of waiving them. The case does not say that police trickery or deceit are acceptable methods for obtaining waivers if they affect only the wisdom of a defendant's waiver, nor does the case ever draw a distinction between deception and withholding information that affects the wisdom of waiving rights. Indeed, the word "wisdom" does not appear anywhere in the decision. Accordingly, the case does not support respondent's proposition. Indeed, to the extent that the withholding of information about the defendant's attorney constituted a form of trickery or deceit, it was unrelated to the subject matter of the waiver.

The remaining three cases respondent cites are all from the 11th Circuit, and are distinguishable from this case. Respondent cites *Hart v. Attorney General of the State of Florida* (11th Cir. 2003) 323 F.3d 884, 894-895 and *United States v. Beale* (11th Cir. 1991) 921 F.2d 1412, 1435, in support of the proposition that the courts draw a distinction between information that is coercive or affects the accused's understanding of his rights and information that merely affects the wisdom of exercising or waiving those rights. What respondent does not say, however, is that in both of these cases the court held the defendant's waiver was *involuntary* due to police trickery or deceit.

In *Hart*, a waiver was held involuntary when a detective effectively contradicted the *Miranda* warnings by telling the defendant that having a lawyer present would be a "disadvantage" and that "honesty wouldn't hurt him." (*Hart, supra*, 323 F.3d at p. 894-895. Similarly, in *Beale*, the waiver was held involuntary when an agent told an illiterate defendant that signing

a waiver form "would not hurt him." (*Beale*, *supra*, 921 F.2d at p. 1435.) Neither case involved a misrepresentation regarding the scope or subject matter of the interrogation. However, in both cases, the police affirmatively misrepresented the consequences of the waiver, and the waiver was held involuntary for that reason. Once again, contrary to respondent's contention, in neither case did the court ever draw a distinction between trickery and information that only affects the wisdom of waiving rights, and once again the word "wisdom" never appears in either case.

The remaining case cited by respondent is *United States v. Farley* (11th Cir. 2010) 607 F.3d 1294. There, the defendant claimed his *Miranda* waiver was involuntary because the agents represented that they wanted to talk to him regarding his possible involvement in terrorism when, in fact, they were actually investigating him for sex crimes with children.

Regarding the *Miranda* issues the *Farley* court held as follows:

> Of course, it defies common sense to posit that Farley was actually "deceived" by Agent Paganucci's remark about terrorism. Farley's argument would have us believe he actually thought that by incredible coincidence the FBI had mistakenly identified him as a terrorist on the same day he just happened to be committing a serious crime that had nothing to do with terrorism. Given the number of times Farley had worried out loud about walking into a sting operation and being met with "cops and TV cameras," he had to know what was up from the moment the agents detained him.
>
> Even if we assume for the sake of discussion that Farley really thought the agents were investigating terrorism and nothing else when he waived his rights, his argument requires more to succeed. It also requires us to assume that if Farley had known that the agents suspected him of the crime he actually did commit, he would have kept his mouth shut. That assumption is belied by what actually happened. Once the direction of the agents' questioning made it clear that they suspected Farley of planning to have sex with a child, any effect the "terrorism" deception had must have ended. Farley

> had to know when the agents started questioning him about coming to Georgia to have sex with a minor that they were investigating whether he had come to Georgia to have sex with a minor. Among the warnings Farley acknowledged reading and understanding was that he had "the right to stop answering at any time" (emphasis added). At the point in the interview when Farley was questioned about the crime he actually had committed, he was aware of what he was being questioned about and knew that he was free to stop answering the questions. He chose to continue talking.

(*Farley, supra*, 607 F.3d at p. 1330.)

The foregoing quotation plainly shows that *Farley* is distinguishable from this case. First, the 11th Circuit appeared to find incredible Farley's contention that he had been advised only of the agents' intention to investigate him for terrorism and did not understand that the interview would deal with child sex crimes. However, even assuming for the sake of argument that Farley's contention had been factually correct, the case is similar to both *Spring* and *Moran v. Burbine*– and distinguishable from this one– in that the defendant actually was informed he was under investigation for a crime. Although he was not informed of all possible crimes or subjects which might be discussed during the interview, the agents did not deceive Farley into thinking this was merely an administrative interview rather than a criminal investigation. *Farley* also stands for the proposition that the analysis of whether a waiver should be deemed involuntary must include consideration of whether the record shows that the defendant would not have waived his rights had he been given a proper advisement.

Thus, *Farley* does not support respondent's contention, and the factors recited in the court's analysis actually militate in appellant's favor. Here, unlike *Farley*, the credibility of the defendant's contention that he

was intentionally misled or the nature of the misrepresentation is not in question. Both Detective Chicoine and respondent have admitted that the detectives intentionally concocted what Chicoine generously termed a "ruse" to induce appellant into waiving his rights. Unlike the situation in *Farley*, here law enforcement officers concealed the fact that the defendant was under investigation for a crime. Finally, again unlike the circumstances in *Farley*, the record plainly shows that if he had been properly advised that the detectives were actually there to investigate him for a crime– the McKenna homicide– appellant would never have waived his rights.

In short, respondent's contention that police trickery or deceit is acceptable if it merely affects the "wisdom" of the defendant's decision to waive is incorrect. *Spring* does not hold that, nor do the cases cited by respondent, which actually favor appellant's position.

Respondent contends that this Court's analysis in *Tate*, *supra*, 49 Cal.4th 635, is in accord with her analysis, and fails to address appellant's contentions that the case is both factually distinguishable and, to the extent it can be read as contradicting *Miranda*, was incorrectly decided. For this reason, appellant will not fully recapitulate here the more specific arguments he made with regard to *Tate* in his opening brief. Briefly, however, in *Tate* there was no obvious affirmative misrepresentation, except to the extent that officers represented that the victim had been "hurt" when she actually had been killed. Otherwise, the disclosures made by the officers at the time of the advisements, coupled with the fact that the defendant was being interrogated in the homicide department by officers he knew to be homicide detectives, were sufficient to put him on notice of the nature and scope of the questioning and the consequences of a waiver. To the extent that *Tate* can be read as prohibiting only misrepresentations likely to induce false statements, it is based upon state case law that predated