IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROBERT ALLEN BACON,** Defendant and Appellant.	S079179 **CAPITAL CASE**

Solano County Superior Court No. FC42606
The Honorable R. Michael Smith, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On January 22, 1999, the Solano County District Attorney filed a second-amended information. Count One of the information charged appellant with first degree murder (Pen. Code, § 187), with the special circumstances that appellant had committed the murder by lying in wait (Pen. Code, § 192, subd. (a)(15), and that he had committed a previous murder (Pen. Code, § 190.2, subd. (a)(2)). The information further alleged that appellant's prior murder and robbery convictions also constituted "strike" (Pen. Code, § 1170.12, subds. (a)-(d)), and "serious felony" convictions (Pen. Code, § 667, subd. (a)). (4 CT 1024-1026.) Counts Two and Three of the information charged appellant with forcible rape (Pen. Code, § 261, subd. (a)(2)), and sodomy (Pen. Code, § 286, subd. (c)). Count Four of the information charged appellant with the crime of being an accessory after the fact (Pen. Code, § 32), as an alternative to the murder charge. (4 CT 1025-1026.)

On January 20, 1999, appellant waived his right to a jury trial on the prior murder special circumstance. (4 CT 928.) Jury trial commenced on February 3, 2000, and was submitted to the jury on February 17, 2000. (4 CT 1072.)

On February 18, 2000, the trial court found the prior murder special circumstance true. (4 CT 1149.) The jury subsequently found appellant guilty of first degree murder, rape, and sodomy, and rendered a true finding on the lying-in-wait special circumstance. (4 CT 1144.)

On February 23, 2000, the penalty phase commenced. On February 25, 2000, the jury returned a verdict of death. After the trial court declined to set aside the death verdict, this appeal followed. (11 RT 2566-2567.)

STATEMENT OF FACTS

On October 26, 1995, Fairfield residents Edward Johnson, and his wife Rosy, were driving to Grizzly Island for a night of fishing. About midnight, a white car passed them at a high rate of speed, forcing Johnson to the side of the road. (6 RT 1125-1127.) When Johnson reached the intersection of Grizzly Island and the Montezuma Slough, he saw a white car that had run off the road and was sitting in the slough with its lights on, and the engine running. (6 RT 1126.) Johnson then called 911 to report the situation. (6 RT 1128.)

Highway Patrol Officers Horsman and Morrell responded to Johnson's 911 call. (6 RT 1138-1139.) As Horsman began to conduct an inventory search of the car, he saw a purse on the front seat. The officers decided to put the purse in the car's trunk for safekeeping while the car was being impounded and towed. When Officer Morrell opened up the trunk, he jumped back and was "very startled" to discover a woman's "brutalized" dead body. (6 RT 1142-1143.)

The police then determined that Charlie ("Charlie") and Deborah ("Deborah") Sammons were the registered owners of the vehicle, and that the woman in the trunk was Deborah. Detectives Mike Travers and Charles Elliot drove to Charlie's Vacaville residence located on 3541 Nut Tree Road. Detective Travers told Charlie that Deborah had been found murdered. Charlie briefly appeared shocked for a moment, and then resumed cooking his

breakfast. (6 RT 1154-1155, 1357.) When asked if he had anything to do with his wife's death, Charlie responded, "Not quite." (6 RT 1155.)

The police searched the home and found a few drops of what appeared to be blood on the washing machine. (6 RT 1156.) When the spots tested positive for the presumptive presence of blood, Travers told Charlie to get dressed so he could go to the police station for questioning. (6 RT 1157.) As Charlie started putting on a pair of tennis shoes, Travers noticed that they appeared to have blood on them and seized the shoes. (7 RT 1354.) Subsequent DNA testing revealed that it was Deborah's blood on the shoes. (6 RT 1285; 7 RT 1324, 1401-1402.)

At the police station, Charlie initially denied knowing anything about Deborah's murder, but later implicated appellant, saying, "I didn't do it, Boe did it."[1/] (7 RT 1544.) After receiving this information, police arrested appellant at his apartment in Vacaville. (6 RT 1170-1171.) During the arrest, the police seized a tire iron in appellant's bedroom, as well as appellant's tennis shoes which had blood on them. (6 RT 1174; 7 RT 1324-1328.) DNA tests proved that the blood on appellant's shoes came from Deborah. (7 RT 1410-1411.)

The police also conducted a second search of Charlie's residence where they found small amounts of Deborah's blood in the master bedroom on the bed frame, dresser, and sliding closet door. Blood stains were also found on the living room fireplace in which police recovered burnt fabric, as well as the remnants of Deborah's bra. (6 RT 1164-1168, 1262-1267.) In addition, the police confiscated a wooden-handled steak knife which was believed to be the murder weapon. (6 RT 1167.)

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1. "Boe" was appellant's nickname. (1 CT 297.)

The Autopsy And Sexual Assault Exam

Dr. Brian Peterson conducted Deborah's autopsy. At the time of the autopsy, Deborah was wearing a blood-stained floral print dress with a black half slip. (6 RT 1182.) Deborah's body had three types of injuries: strangulation, blunt force, and sharp force. Peterson first observed strangulation injuries consisting of multiple ligature furrows on her neck, as well as petechial hemorrhages in Deborah's eyes which were indicative of death by asphyxiation. (6 RT 1188-1191.)

Peterson next observed "blunt force injuries." (6 RT 1192.) Deborah had a broken nose, as well as lacerations over her eyebrow and nose. A long rectangular bruise extended all the way across her face and nose. That bruise "was a nice fit" with the shape of the tire iron found in appellant's apartment. (6 RT 1193-1196, 1216.)

Deborah also had numerous stabbing injuries. Deborah was stabbed once under her left eye, once under her chin, and twice in the chest. One of the stab wounds to Deborah's chest went through her lung all the way into her abdomen. The other stab wound went through Deborah's heart, piercing its left ventricle. (6 RT 1197-1198.) Peterson believed that all of the stab wounds were consistent with the wooden-handled steak knife recovered from Charlie's home. (6 RT 1203-1204.)

Peterson further opined that all of Deborah's massive injuries were inflicted while she was alive based on the large amount of blood pooled in her chest cavity which would not have occurred if her heart had not been pumping blood as she was stabbed repeatedly. Similarly, the blood-filled ligature wounds on Deborah's neck also indicated that Deborah's heart was beating as appellant strangled her. (6 RT 1200-1201.) Peterson did not find any evidence of trauma to Deborah's vagina or rectum. (6 RT 1237.)

Deborah Cassinos, a sexual assault expert, examined Deborah's genital area with a colposcope, a high-powered magnifying instrument which detects injuries invisible to the naked eye. (6 RT 1247.) Cassinos's examination revealed a linear tear just below Deborah's vaginal opening. (6 RT 1249.) Deborah's "anal cavity had more trauma to it." (6 RT 1250.) Cassinos "found a lot of redness" in the area right past the sphincter. (6 RT 1250.) The cavity was also "purple and bruised looking from about six o'clock to eleven o'clock on the right-hand side." (6 RT 1250.) These injuries were consistent "with blunt force trauma to the rectum" which will get "bruising and tearing" when something is forced inside it. (6 RT 1250.)

Events Leading Up To The Murder

Bill Peunggate ("Bill") was Deborah's boyfriend. At the time of the murder, Bill had known Deborah for about 10 years. In February 1995, the relationship was re-kindled when Deborah called Bill seeking assistance with her car. Deborah left Charlie, moved in with her friend Dixie Jensen ("Dixie"), and began dating Bill steadily. (7 RT 1467-1469.)

On October 26, 1995, the day of the murder, Bill called Deborah at Bay Star Ambulance, Deborah's employer. (7 RT 1469.) Bill and Deborah had planned to go shopping that evening to buy accessories for their Halloween costumes. Deborah, however, told Bill that Charlie had asked her to come over "to take care of some bills at her place." (7 RT 1471.) Deborah said she would call Bill after she finished paying the bills. (7 RT 1471.) As the evening progressed without hearing from Deborah, Bill grew worried and called Dixie to see if she had heard from Deborah. Bill asked Dixie to page Deborah, but Deborah did not respond to Dixie's pages. (7 RT 1472.)

Bill then drove to the Sammons's residence on Nut Tree Road; there were no cars out front and the lights were off. Bill drove away and phoned Dixie again. Dixie told Bill that the police had called and said they had found

Deborah's car. (7 RT 1472-1473.) After learning this, Bill drove back to the Nut Tree residence and knocked on the door. Charlie answered the door; his hair was wet and he looked like he had just taken a shower. Charlie was acting "evasive" and would not make eye contact with Bill. (7 RT 1474.)

After allowing Bill to use the phone, Charlie just "walked away" and began watching television. (7 RT 1474.) Bill then drove to Grizzly Island where Dixie said Deborah's car had been found. As Bill reached Grizzly Island, he saw the coroner removing Deborah's body out of her car. (7 RT 1474.)

Charlie Testifies For The Prosecution

Charlie testified for the prosecution. At the time of his testimony, he was also charged with Deborah's murder and had not made a plea bargain with the prosecution. (7 RT 1484-1485.) Charlie hoped, however, that the prosecutor would give him some consideration for his testimony. Charlie denied that there was any unspoken agreement between the prosecution and himself. Charlie also denied receiving any special privileges in exchange for his testimony. (7 RT 1485.)

Charlie testified that he had suffered from Multiple Sclerosis (MS) for about 17 years, and that his symptoms waxed and waned. During appellant's trial, Charlie was in a wheelchair as a result of the disease. However, at the time of the murder, Charlie was ambulatory and capable of performing physical labor. (7 RT 1488-1489.)

In 1995, Deborah moved out of the family home on Nut Tree Road; Charlie remained in the residence with their daughter. (7 RT 1486.) After Deborah's departure, Charlie met appellant through appellant's stepmother, who was friends with Charlie's daughter. In the weeks before the murder, appellant and his family visited Charlie's home several times. (7 RT 1489-1490.)

A few days before the murder, Charlie went to appellant's house and helped him perform a car repair. (7 RT 1491.) In return for Charlie's assistance, appellant agreed to help Charlie with a painting project and stayed at Charlie's home for the next three days. On the first day of painting, Charlie told appellant that he and Deborah were separated, and that Deborah was reluctant to have sex with him. Charlie told appellant that he would "like to have her out of the picture." (7 RT 1491-1492.) Appellant responded that "he could take care of it for a price." (7 RT 1492.) Charlie thought appellant was joking around, consistent with his customary demeanor. (7 RT 1492.) Charlie was unsure whether appellant mentioned any price for killing Deborah. (7 RT 1493.)

On the night of the murder, appellant was still assisting Charlie with the painting project. Charlie asked Deborah to come to the family residence to help him pay bills. Deborah agreed, and arrived at the house about 6:00 p.m. (7 RT 1493.) As Deborah pulled up in her car, appellant told Charlie that he would go into the back bedroom and that Charlie should knock on the bedroom door if he "wanted her taken care of." (7 RT 1493-1494.) Charlie professed not to know what appellant meant by this statement because he was tired from painting all day. (7 RT 1494.)

Deborah came into the house and went to the kitchen table to pay the bills. (7 RT 1494-1495.) For the next two hours, Deborah paid the bills and talked to Charlie about their relationship. Charlie asked Deborah "if she was coming back." (7 RT 1495.) Deborah responded that she "didn't know." (7 RT 1495.)[2/] Charlie was not angry because this was the same response Deborah customarily gave when Charlie asked this question. (7 RT 1495.) Charlie suspected that Deborah was seeing Bill Peunggate. (7 RT 1495-1496.)

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2. However, in his statement to the police, Charlie said that Deborah had told him she was not coming back. (8 RT 1582.)

After Deborah finished paying the bills, she walked to the back bedroom to put away the receipts and checks. (7 RT 1496.) Charlie then heard Deborah "scream like she [had] seen a mouse." (7 RT 1497.) Charlie waited a few moments and "hollered back to her," asking, "Everything all right?" (7 RT 1497.) Charlie "didn't hear nothing" and decided to go investigate. (7 RT 1497.) Charlie explained that he had not immediately gone to Deborah's aid when she first screamed because he thought she just "might have seen a mouse." (7 RT 1497.) When Charlie went into the bedroom, he saw appellant "beating her . . . He had one hand around her neck, holding her up," with her feet off of the floor. (7 RT 1498; 8 RT 1584.) Deborah, who was bleeding from the side of her head, said something like "Help me." (7 RT 1498.)

When Charlie asked appellant what he was doing, appellant turned around, pointed a gun at Charlie, and told him to go back to the kitchen. (7 RT 1499.) Charlie said he went to the phone to call for help, but was dissuaded by appellant who inexplicably yelled from the back bedroom, "I told you not to try to do anything." (7 RT 1499.) Charlie was too "scared" to seek assistance from the neighbors. (7 RT 1500.)

About five minutes later, Charlie returned to the bedroom "to see what was going on." (7 RT 1500.) When asked what was happening, Charlie responded, "Nothing really. She was bent over the bed. He was standing over her." (7 RT 1500.) Charlie did not know whether Deborah was still alive. Appellant again instructed Charlie to return to the kitchen. Charlie obeyed appellant's directive and returned to the kitchen. (7 RT 1500-1501.) Appellant then summoned Charlie back to the bedroom. Deborah was in the same position as she had previously been, and was still dressed. Appellant told Charlie to "help him wrap her body in a tarp." (7 RT 1501.)

Charlie retrieved a blue tarp from the backyard, and told appellant he was too squeamish to assist in this endeavor. Appellant "wrapped her up" and

told Charlie to "put her body in the trunk of the car in the garage." (7 RT 1502.) After loading Deborah's body in the car, appellant said to Charlie, "Think of a place to dump her body and [her] car." (7 RT 1504.) When Charlie said he did not really know where a good place would be, appellant told him to "hurry up and think of a place or he would shoot [him] right there." (7 RT 1504.) Charlie then thought of dumping Deborah's body at Grizzly Island. Charlie drove the red car holding Deborah's body while appellant followed in Deborah's white car. (7 RT 1505.) Once the two reached Grizzly Island, they transferred Deborah's body into the trunk of her car, and appellant drove the car off an embankment into the slough. (7 RT 1506-1507.)

On cross-examination, defense counsel sought to prove that Charlie was physically capable of committing the murder, was callously indifferent to Deborah's fate, and had the motive to kill her. Thus, although Charlie was wheelchair-bound at the time of trial, he acknowledged that at the time of the murder he was receiving disability payments, but was physically capable of installing sprinkler systems, and building a patio cover. (7 RT 1511-1514.) Charlie further acknowledged that he initially lied to the police about his involvement in the murder, and had shown no concern about her death. (7 RT 1515-1516, 1526-1528, 1539-1541, 1546-1549.)

Charlie admitted that he had been upset about Deborah's relationship with Bill Peunggate, and that he had gotten into a shoving match with Bill over Deborah. (7 RT 1532-1534.) Charlie also acknowledged that he had always been jealous about Deborah, monitored her movements, and had his neighbors and relatives spy on her. (7 RT 1534-1535, 1554-1556.) Before Deborah left, she was refusing to have sex with Charlie and the two slept in different bedrooms. Deborah finally moved out of the home because of Charlie's sexual demands. (7 RT 1535-1537.) Charlie was angry about Deborah's refusal to have sex with him. (7 RT 1538.)

Charlie's statement that he had initially seen appellant holding Deborah by the throat when he first entered the bedroom was impeached by a prior statement in which he had said Deborah was on her knees while appellant "beat the shit out of her." (8 RT 1588-1590.) Charlie had also failed to mention anything about appellant having a gun until his third interview with the police 18 months after the murder. (8 RT 1611-1612.)

Jailhouse Informant Testimony

Martin L'Esperance ("Martin") was incarcerated in county jail with appellant after Deborah's murder. Martin, who had numerous theft-related convictions, believed he may have been serving time for a petty theft conviction at the time. (7 RT 1418.) Martin's cell was about two cells down from appellant's cell. (7 RT 1416-1417.) Martin often talked to appellant during a one-hour period when the inmates were allowed to socialize outside their cells. Martin also spoke to appellant through the ventilation system which Martin compared to a "phone line." (7 RT 1419.)

Appellant told Martin that he was being charged with murder, and that he had "stabbed a lady to death" in the "back room of a house" located in Vacaville. (7 RT 1419.) Appellant stated that he had "fucked the bitch in the ass." (7 RT 1420.) According to appellant, he was "supposed to meet [Deborah's] daughter," who was a friend of his father's new wife. (7 RT 1421.) Appellant did not really speak about whether Charlie had been involved in the murder, except to say that "he was making the husband get rid of the body with him" which they had "put in the trunk of the car." (7 RT 1426.)

Martin and appellant discussed using Methamphetamine. Appellant said that "shooting dope" was a "good high," but that "murder was a better high." (7 RT 1420.) Appellant informed Martin that he "would never know a high until [he] killed someone." (7 RT 1420.) Appellant also said that having sex

in this case. When asked why he had not done so, Martin explained: "Well, there comes a point, you got to reap what you sow. I had made a mistake and I had to pay the piper." (7 RT 1425.)

Martin added that as a result of his participation in the drug recovery programs, he had learned that he needed "to pay the price" for his own mistakes. (7 RT 1425.) Martin said that he was not concerned about having a "snitch jacket" because a "snitch would tell you something and expect something in return. I don't. It's just that what is right is right." (7 RT 1427.)

On cross-examination, Martin freely acknowledged that he had previously used several aliases in connection with his criminal activity. (7 RT 1427-1429.) Martin also admitted that he had a lot of "experience" as an inmate and had "definitely" "manipulated" his way into obtaining preferential protective housing. (7 RT 1436-1437, 1440.) Martin said that his manipulative behavior was a character trait because he was an "alcoholic and addict." (7 RT 1441.) When asked whether lying was also a character trait of alcoholics and drug addicts, Martin responded, "Lying, manipulating, stealing, whatever it takes." (7 RT 1441.)

Martin acknowledged that inmates frequently exaggerated their crimes in order to try to be a "big shot." (7 RT 1455.) Martin denied getting any benefit for his testimony, stating: "No. I got no pending court cases. I got nothing to gain from this, but a day out of work." (7 RT 1442.)

On re-direct, the prosecutor asked Martin why he was testifying against appellant. Martin responded:

> I didn't set out to testify against Bacon. I set out to do what was right. I mean, the guy told me he killed a girl. He stabbed her to death. If that was my sister or my mom or my daughter, I wouldn't want him out there, you know. It could be anyone in this room that something like that happens to. I don't know if he's guilty or not, but I know what he told me.

(7 RT 1464-1465.)

with a dead body "was better than regular sex." (7 RT 1422.) Appellant did not say whether he had sodomized Deborah before or after her death. (7 RT 1457.)

Martin did not tell authorities about appellant's statements for nearly a year. (7 RT 1422.) Martin explained that after being transferred to a drug program in a different county, he was returned to the Solano County jail where he encountered Charlie, appellant's co-defendant. Charlie, who was in a wheelchair, was a "very bitter person" and easily recognizable. (7 RT 1422-1423.) Based on appellant's confession to the murder, Martin was "kind of shocked" that Charlie was still in custody, and told Charlie to have his attorney speak to him. (7 RT 1423.)

At the time Martin spoke to the authorities, he had a pending case in which he had just taken a plea bargain and was waiting to have a pre-arranged sentence imposed. (7 RT 1423-1424.) Martin received "absolutely nothing" in exchange for his disclosure. (7 RT 1424.) When asked why he provided such information, Martin responded, "I want to say human decency. I have a mother, sister, wife, kids. You, know, what is right is right. Even though I have been incarcerated, I still know the difference between right and wrong." (7 RT 1424.)

Martin acknowledged that he had a "drug and alcohol problem" which caused him to commit thefts. After informing authorities about appellant's murder confession, Martin successfully completed a drug program, but re-offended again, causing him to suffer a new charge of petty theft with a prior. (7 RT 1424-1425.) Martin did not tell his attorney representing him on the new charge about his disclosure of appellant's murder confession. Nor did he say anything to a member of the District Attorney's office about his cooperation

Appellant's Statement To The Police

After appellant was arrested, he was read his *Miranda*[3] rights and agreed to speak to the police. (1 CT 59.) During the interview, Detective Grate established a friendly rapport with appellant by discussing appellant's job at a skydiving business, as well as by giving him muffins and cigarettes. (1 CT 57-62.) After engaging in small talk, appellant told Grate that he had taken two days off work to help Charlie paint his patio. (1 CT 66.) Appellant explained that Charlie had MS and that he had been helping Charlie with his painting project in exchange for Charlie having helped him fix his car. (1 CT 66-67.)

Grate told appellant that they believed "Charlie offed his wife." (1 CT 68.) Appellant said he had never met Charlie's wife. (1 CT 68.) Grate thought that appellant might have been an unwilling witness because the murder happened during the time when appellant had helped paint the patio. (1 CT 68-69.) Grate set forth a scenario in which Charlie killed Deborah in a fit of rage, leaving appellant as an innocent bystander who was required to deal with the aftermath of the slaying. (1 CT 69.) Grate opined that Charlie might have used appellant's parole status to force appellant to become an accessory after the fact. (1 CT 71-75.) When Grate confronted appellant with the possibility that there might be physical evidence connecting him to the crime scene, appellant said, "I never even met her, dude." (1 CT 69.)

After Grate continued expounding on the possibility that appellant was an unwilling accessory after the fact, appellant admitted that Deborah had come over that night around 6:00 p.m. while he was painting. (1 CT 70-75, 78-79.) Referring to Deborah's murder, appellant asked, "How was she done?" (1 CT 81.)

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3. *Miranda v. Arizona* (1966) 384 U.S. 436.

Grate explained that he could not go into those details. Appellant then acknowledged that the police were going to find his "semen samples" because he had "fucked her." (1 CT 82.) Appellant said that the intercourse was consensual and that Deborah "was loose." (1 CT 82-83.) Appellant did not recall Charlie saying anything about wanting to kill Deborah. (1 CT 84.)

Grate asked appellant what Charlie had done, and added that appellant had been in the "wrong place at the wrong time." (1 CT 85.) Appellant then stated,"Yeah, I think it'd probably be a good idea . . . for me to get an attorney." (1 CT 85.) Grate responded, "Alright. It's up to you." (1 CT 85.) After Grate again reminded appellant that it was up to him whether he wished to have an attorney, appellant affirmatively implored Grate to continue the interview, stating, "Talk to me," on three separate occasions. (1 CT 85-86.)

When the interview resumed, appellant suggested that he was not the murderer because he had been in prison, and if he were "gonna waste somebody, it's gonna be clean and simple. No blood. Don't know 'em, don't know anybody that knows 'em." (1 CT 88.) Grate discussed his beliefs regarding Charlie's role in Deborah's murder, prompting appellant to ask, "Do you know, was she wasted in the house or outside, or where?" (1 CT 89-90.)

Following further discussion regarding Charlie's involvement in the murder, appellant stated that he "didn't see him waste her," but "she was definitely dead." (1 CT 96.) Appellant explained that he had been out painting when Deborah arrived; he described her as a "fuckin' fine little blonde chick." (1 CT 96.) Appellant added, "I'm a walking hornball," "one hundred percent high octane testosterone-injected walking hormone." (1 CT 97.) Appellant heard Charlie arguing with Deborah about the house. Deborah was saying that she did not want women staying there who would come to believe they owned the place. (1CT 97.)

When Charlie went to the garage, appellant viewed his departure as an "opportunity to check her out." (1 CT 98.) Appellant stated: "So I went in, 'Hi, how you doin? Who are you? Bla bla bla bla bla.' And I don't know how it happened or why it happened, but next thing I know we're on his bed fuckin." (1 CT 97-98.) Appellant said that it was "five minutes" "at the most" before they commenced having intercourse. (1 CT 109.) While having sex, appellant did not hear Charlie, who "never said a word." (1 CT 98.) Deborah did not seem concerned about whether Charlie found out they were having sex. (1 CT 110.)

After having intercourse for ten or fifteen minutes, appellant went back outside to continue his painting. About fifteen minutes later, Charlie told him to come inside. When appellant did so, he saw that Charlie had blood on his hands and his shirt. Although appellant had not heard any noise when he was out painting, he knew Deborah had been murdered, stating: "I knew. I fuckin knew. I don't know how I knew. I just knew." (1 CT 98, 101.)

The "next thing" appellant knew, he was in the back bedroom where he saw Deborah on the bed. When asked what she looked like, appellant said that he "didn't want to fuck her," and that there "was blood everywhere." (1 CT 99.) Charlie told appellant that if he "didn't help him, he was going to call [appellant's] dad and tell him [appellant] just wasted his wife." (1 CT 99-100.) Appellant assumed Charlie had killed Deborah because "she was gonna take everything." (1 CT 101.)

Charlie and appellant then rolled Deborah up in a tarp which is how appellant got Deborah's blood on his shoes. (1 CT 100.) The two loaded Deborah's body into Charlie's red car which Charlie drove to the slough while appellant followed behind in Deborah's white car. (1 CT 101-102.) Charlie and appellant then transferred Deborah's body into the white car and got rid of the car by driving it into the slough. (1CT 103-104.)

After dumping Deborah's body, Charlie and appellant returned to the house. Appellant said "something"— rags or a blanket —"was tossed in the fireplace." (1 CT 104.) When Grate asked appellant whether he had cleaned his clothes, appellant said, "Shit, tore them off and cleaned the shit out of them" in Charlie's washing machine. (1 CT 106-107.) Referring to his fingernails, appellant announced, "You ain't gonna find nothin' under these." (CT 106.) Appellant explained that because there had been blood under his fingernails, he had cleaned his fingernails and "bit them down so bad [he] bled." (1 CT 107.)

Appellant discussed Charlie's motive for the murder, stating that Charlie told him that Deborah was not having sex with him and that Charlie had been talking to him "about doing her." (1 CT 112.) Appellant never said he would kill her, but suspected that Charlie believed he might do it. (1CT 114.)

Appellant then changed his version of events yet again. In the latest version, appellant stated that after Deborah's arrival, Charlie had gone to the store and told him that he "knew what needed to be done." (1 CT 113.) Appellant said that he and Deborah had talked for about five minutes before they started kissing. Deborah did not "struggle," and the two and "wound up in the bedroom." (1 CT 114.) Deborah had not given him "any head" because she thought that "was disgusting." (1 CT 115.) Deborah, however, "liked to be eaten," and he liked "eating pussy." (1 CT 115.) Appellant stated: "So I ate her for a while, fucked her for a while, and I asked her if she ever had anal. She said yeah. She said it didn't really do anything for her, but she didn't mind it." (1 CT 115.) Appellant thought he ejaculated during the anal intercourse. Deborah never told him that it hurt, or asked him to stop. (1 CT 115.)

Appellant then repeated his prior statement about Charlie threatening to call the police if he did not assist him in disposing of Deborah's body. Appellant described the difficulties he encountered when he tried to drive Deborah's car into the slough. After leaving Deborah's body in the slough,

appellant returned back to Charlie's home. There, he helped clean up the crime scene and burn Deborah's nylons and similar clothing. (1 CT 117.)

At the conclusion of the interview, appellant asked if he could take his muffin back with him to a jail cell. (1 CT 118-119.)

Defense Case

Appellant presented the testimony of numerous witnesses to establish that Charlie was obsessively jealous over Deborah, was extremely angry about her leaving him, and was physically capable of committing the murder himself. Charlotte Hedrick was close friends with Deborah and Charlie. (9 RT 1839-1840.) Charlie was very jealous and seemed to be extremely angry at Deborah in the months leading up to the murder. (9 RT 1841, 1845-1846.) Although Charlie had MS, he was not an invalid and could perform physical labor such as building a patio. (9 1843-1844.) Photographs taken by Hedrick's husband depicted Charlie climbing on ladders and performing physical labor while building a deck. (9 RT 1849-1852.)

Lynette Holsey, Deborah's sister, observed Charlie installing a sprinkler system which involved digging long and deep trenches. (9 RT 1853, 1854.) During the months before the murder, Charlie asked Holsey to marry him on at least two occasions. Charlie was very unhappy about Deborah having a boyfriend. (9 RT 1854-1856.) One time, Charlie told Holsey that he had been having Deborah followed by somebody in order to see if she was actually at work. Charlie said that if he could not have Deborah, then nobody could, and that Deborah would never get the house. (9 RT 1855-1857.)[4/]

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4. Holsey's friend, Victoria Stafford, also testified that Charlie was able to perform physical labor, acted "possessive" towards Deborah, and talked about following Deborah. (9 RT 1857-1860.)

Charlie's step-sister, Sheila Shelley, also observed Charlie's jealous behavior. In the fall of 1995, Shelley recalled Charlie having people spy on Deborah to see if she was at work. (9 RT 1861-1866.)

Janette Preston also testified concerning Charlie's jealous behavior. Preston recalled one incident during the summer before the murder. Preston had dropped off Charlie at the Nut Tree home after returning from Reno. Charlie darted out of the car as it pulled into the driveway and immediately commenced interrogating Deborah on her whereabouts during his absence. (9 RT 1874-1876.)

Cheradee Bacon, appellant's stepmother, testified that Charlie had asked appellant to help him with a painting job, and that Charlie had appeared very upset about Deborah's departure from the family residence. (9 RT 1877-1880.)

Howard and June Wilkerson were good friends with Charlie's father. (9 RT 1881-1883.) About one week before the murder, Charlie and the Wilkersons were over at Charlie's father's house. (9 RT 1885.) According to Howard, "Charles was very upset. He said he wanted to kill Debbie *or have somebody kill her*." (9 RT 1886, emphasis added.) Charlie was in a rage when he made this threat, and did not say it in a joking manner. On the contrary, "He was serious. He was mad." (9 RT 1886.)

Appellant also sought to corroborate his claim that Charlie left the house to go to the store which gave him the opportunity to have sex with Deborah. Kathy Allison was a neighbor who lived a few houses away from Charlie and Deborah. (9 RT 1836-1837.) On the evening of the murder, Allison saw Deborah's white car in the driveway while Charlie was standing out front talking to an elderly gentleman. (9 RT 1837-1839.)

Forensic Evidence

Appellant introduced forensic evidence to show that Deborah had not been raped, and that she had been beaten with Charlie's gun, rather than the tire

iron found in his house. Criminalist Charles Morton examined Charlie's Taurus semi-automatic pistol for possible blood evidence. (9 RT 1814.) Morton found a reddish stain inside the barrel which was about one twenty-fifth of an inch in diameter. (9 RT 1815-1816.) The stain tested positive for the presumptive presence of blood. (9 RT 1817.)

Dr. Paul Hermann, a pathologist, reviewed Deborah's autopsy report. He opined that a number of patterned facial injuries matched the size and shape of Charlie's gun. (9 RT 1796-1804.) Although those injuries were also consistent with the shape of the tire iron found in appellant's apartment, he believed they were more likely to have been inflicted with a gun because a tire iron would probably have caused more extensive lacerations and facial fractures than those found on Deborah. (9 RT 1803-1806.) Dr. Hermann believed that the injuries on Deborah's face appeared to have been caused by the "slapping action of a gun." (9 RT 1805.) Had Deborah been struck by a tire iron, he would have expected the force to have fractured her cheekbone. Although Deborah's nose was broken, Dr. Hermann explained that the nose bones are "much more fragile than the cheek bones." (9 RT 1805.)

Dr. Hermann also reviewed Nurse Cassinos's sexual assault report and believed that the micro-abrasions she documented had "nothing to do with sex whatsoever," but were simply "part of the stresses of life" and could have been caused by "underclothing or sanitary pads or what have you." (9 RT 1808.) Alternatively, such injuries could have been caused by the unlubricated swabs which were inserted into Deborah's vagina and rectum during the autopsy itself. (9 RT 1808-1809.)

Lisa Calandro, a DNA analyst, testified that appellant's DNA was not found in fingernail scrapings taken from Deborah. (9 RT 1827-1828.)

Court Trial On The Prior Murder Special Circumstance

When the jury retired to deliberate after closing arguments, the trial court conducted a court trial on the special circumstance that appellant had committed a prior murder in Arizona. After reviewing the evidence and hearing argument, the trial court found true the prior murder special circumstance. (10 RT 2064-2071.)

Penalty Phase

The prosecution introduced aggravating evidence at the penalty phase concerning appellant's prior murder and robbery convictions which occurred in Arizona. Leo Duffner was a former Deputy Sheriff who investigated the prior murder appellant committed. (10 RT 2135.) On October 26, 1982, at about 9:20 a.m., deputies stopped two hitchhikers identified as John Noble and Boe Allen Rush (appellant's former name). (10 RT 2136-2137.) The men had a large white dog with them. Noble said he was attempting to get a job at a nearby race track. (10 RT 2152.) The deputies conducted a field interview of the men and left after getting the men's names and other information. (10 RT 2136-2137.)

At 12:15 p.m. Duffner was called to the scene where appellant and Noble had been previously interviewed. Noble's body was lying face down under a tree on the side of the road. Drag marks near the body indicated Noble had been moved away from the road. (10 RT 2138-2139.) According to the autopsy report (2 CT 507, 519), Noble had "*multiple*, sharp force wounds to the right side" of his neck which the pathologist believed could have been inflicted by a bloody, broken beer bottle recovered at the scene. (10 RT 2140, 2149, emphasis added.) The "incised wounds were confined to a small area on Noble's neck." (10 RT 2149.) Noble also had multiple contusions on his upper lip, his lower lip, as well as his chin and neck area. (10 RT 2141.) In addition,

Noble had abrasions to his right cheek, his left cheek, his forehead, his nose, his scalp, and the side of his head (10 RT 2141), and lacerations on his upper and lower lip, his right and left ears, both cheeks, and to the eyebrow area. (10 RT 2141.) Noble's nose was broken and he had contusions and abrasions over his torso and legs. The autopsy report further reflected that there were injuries on Noble's face, chest, and arm which had a "v-shaped" pattern that appeared to match the pair of shoes appellant was wearing. (10 RT 2142, 2155-2156.)

At the crime scene, Duffner found a broken beer bottle, "the neck of which had a lot of blood on it and it appeared like it could have been used as a weapon." (10 RT 2141.) No fingerprints were recovered from the beer bottle. (10 RT 2150-2151.) At the time of his murder, Noble had a .18 blood alcohol level, and a .22 urine reading. (10 RT 2151.)

Several witnesses reported seeing a man on the ground and another man over the top of him hitting and kicking him. (10 RT 2143.) The man on the ground "wasn't doing anything. He was just lying there." (10 RT 2144.) The witnesses did not see a weapon in the hands of the man inflicting the beating. (10 RT 2154.)

Gary Dhaemers, a former Pima County homicide detective, interviewed appellant regarding Noble's murder. Appellant was found several hundred feet from Noble's body; he was "very dirty" and had blood on him. Appellant appeared to have a bruise on his forehead, and also had a "gouge on his knuckles." (10 RT 2161-2162, 2174.) Appellant told Dhaemers that he had met "another person," whom he identified as "John," while he was hitchhiking. Appellant had gotten into a confrontation with "John" over his dog, and had hit him. Appellant, however, said he knew nothing about John Noble ("Noble"). (10 RT 2161-2162.)

Appellant initially told Dhaemers that he had kicked "John" in the head, and then changed that story to say that he had kicked the person in the shoulder

and then left. (10 RT 2162.) Appellant added that if somebody kicked his dog, he would kill him for that transgression. (10 RT 2162-2163.) When Dhaemers asked appellant if he was involved in Noble's death, appellant insisted that he was not involved. Dhaemers told appellant he did not believe his story which did not "jive" with everything else he had discovered. (10 RT 2163.)

During a tape-recorded statement, appellant changed his story to say that he had seen "John" beating Noble. After observing this beating, appellant went "to check to see if he was all right, and he was, you know, pretty close to dead . . . ." (10 RT 2165.) Appellant "checked his pulse and this and that," and therefore got blood on his hands. (10 RT 2165.) Appellant also "checked him for his wallet and for his identification that would have anything to do with his, you know, disappearance, you know, et cetera, et cetera." (10 RT 2165.) Appellant said that he had taken the wallet "to find any identification on it that might identify that person if he should come up dead, which he did." (10 RT 2166.)

After Dhaemers again told appellant he did not believe his story, appellant provided yet another rendition of events. This time, appellant said he had gotten into a fight with Noble and had kicked him. (10 RT 2167.) Appellant told Dhaemers that the fight had started when Noble had kicked his pregnant dog. (10 RT 2177.) Appellant had told Noble not to kick his dog, and Noble had responded, "I'll kick this dog if I want to." (10 RT 2177.)

Appellant said that Noble had been bleeding from the neck because "he had fallen on a bottle." (10 RT 2167.) Appellant said his fingerprints would be on the bottle because he "had picked it up and thrown it away." (10 RT 2167.) According to appellant, he had told Noble:

> Man, I says, you better knock it off before I hurt you, you know, and I already warned you that, you know, my hands and feet were registered. And he said, big deal, so what, you know. So he kept it up, so I told him, I says, Man, I says, you know, I says, you better back off before I hurt you. This is serious business. And I hit him in the face. Right in the mouth, right kind of like right here, you know, and it was just kind of like a glance, you know. It didn't really hurt me, and I just hit him about three times right in the face. I hit him in the neck and I think I cut his neck or something because, you know, he started bleeding more than he was, and then he fell down and, uh, you know, like I said, I checked his neck for a pulse. There was just barely a pulse. But you know, I got blood all over my hands, and I tried to wipe, you know, to see if it would come off and it wouldn't come off and it wouldn't come off. And, uh, that's about it, you know. I went to catch my ride, like I started in the first place."

(10 RT 2168-2169.)

On cross-examination, defense counsel elicited testimony that appellant had told the police that the fight with Noble occurred as a result of Noble kicking appellant's dog, and that Noble accidentally fell on the beer bottle during the fight. Appellant smelled of alcohol and had a silver-colored substance on his face during the interview. (10 RT 2179-2182.)

The parties stipulated that Noble died as a result of a "sharp force injury" to his neck which pierced his carotid artery. (10 RT 2276-2277.)

The Parole Violation

The prosecutor also presented aggravating evidence concerning a parole violation appellant incurred. Ann Cleary was appellant's parole agent after he was released from prison in Arizona. (10 RT 2186-2187.) On February 24, 1995, Cleary conducted a parole search of appellant's room in the trailer where he was staying. Cleary discovered a ".25 caliber Raven right underneath his pillow." (10 RT 2187-2188.) The gun was loaded and she found additional ammunition in a night table. Appellant told Cleary that the gun was not his and

that he had no idea how it got there. (10 RT 2188-2189.) Cleary further noted that appellant's clothes and prison records were located in the room where the gun was found. (10 RT 2191.)

The Defense Case

The defense presented evidence concerning the extensive neglect and abuse he suffered as a child. Appellant's aunt, Glenna Healy, was very close to appellant's mother, Kathleen Bell Scott ("Scott"). Healy and Scott were sisters and lived in Washington state together as children. Scott had a congenital heart condition. Consequently, she never attended school for any extended period of time. (10 RT 2202-2204.) At age 16, Scott began having a relationship with Robert Bacon, who was in the Navy. Scott subsequently left home and married Bacon. The couple moved to San Diego. Scott had an affair with Bacon's friend, Gene Schroeder, while Bacon was out at sea. Bacon was hurt and angry when he learned that Scott had become pregnant with Schroeder's child during his absence. (10 RT 2206-2207.)

Appellant was born on January 20, 1963. Shortly thereafter, Scott and appellant moved back to Washington where Scott supported herself through prostitution. Scott had poor parenting skills and twice asked Healy to adopt appellant. Healy declined to do so because of her poor economic circumstances. (10 RT 2212-2213.) Scott was subsequently arrested for being an accessory to a robbery. After Scott was incarcerated, appellant was placed in foster care. (10 RT 2209-2210.)

Julie Waldrop was appellant's foster mother, and also the sister of appellant's grandmother. Appellant was six months old when he arrived at Waldrop's home. Appellant was catatonic and could not sit up or roll over. He did not cry and had no facial expressions. These problems did not last long because appellant was around numerous other children who provided him with lots of stimulation. (10 RT 2225-2227.)

Appellant remained in Waldrop's care for six months before authorities returned him to his mother. Waldrop considered running away with appellant, but could not prevent him from being returned to Scott. (10 RT 2228.) Waldrop did not keep track of what happened to appellant after he was returned to his mother, but would have taken him back in a "heartbeat" if anybody had asked. (10 RT 2229-2230.) Waldrop did not maintain contact with appellant because she knew what was happening to him and "couldn't stand it." (10 RT 2230.)

Healy also testified regarding events after appellant was returned to his mother. According to Healy, Scott continued her pattern of having relationships with various men. Scott eventually became involved with Bill Garlinghouse, whom she later married. (10 RT 2214.) At the time of the marriage, Garlinghouse had three children, Ervin, Billy, and Annie. (10 RT 2214.) Scott told Healy that Garlinghouse beat appellant frequently, and would "put cigarettes out on him." (10 RT 2216.) Scott also told Healy that "Boe had told her that Bill put something up his butt and it hurt." (10 RT 2216.) When Healy asked what had been put in appellant's rectum, Scott said that it was Garlinghouse's "cock." (10 RT 2216.) Healy frequently observed bruises on appellant. On one occasion, she saw cigarette burns on his forearm. (10 RT 2217.) Scott and Garlinghouse moved frequently during their time together. Scott eventually left Garlinghouse after he hit her in the chest, causing her to have a heart attack. (10 RT 2218.)

When appellant was about 11 or 12, Scott resumed her relationship with Robert Bacon, who appellant thought was his father. (10 RT 2219.) Appellant was very angry when he learned that Bacon was not actually his father. Bacon treated appellant poorly. On one occasion, appellant opened his Christmas presents early and then taped them back up. When Bacon discovered this, he took all of the presents away from appellant. As with Garlinghouse, Scott and

Bacon moved frequently, and appellant eventually ended up being confined in a juvenile institution. (10 RT 2221.)

Ruby Garlinghouse, Bill Garlinghouse's younger sister, also testified concerning the abuse inflicted on appellant. Ruby was about 13 years old when Scott married her brother. Appellant was three or four years old at that time. Before Garlinghouse married Scott, appellant received preferential treatment. After the marriage, however, Garlinghouse became very abusive to appellant and would slap and push him for no reason. (10 RT 2234-2235.)

Ruby also saw appellant and Billy with cigarette burns on their arms. Appellant always had bruises on his face. One time, "the whole left side of his face was messed up" with a black eye, swollen lips, and a cut on his nose. (10 RT 2236-2237.) Appellant looked like "someone had slammed him into a wall." (10 RT 2237.)

Garlinghouse's abuse of appellant grew progressively worse. On one occasion, Ruby saw Garlinghouse beat appellant as hard as he could with a large board. (10 RT 2239.) Appellant defiantly told Garlinghouse, "Hit me again, it doesn't hurt." (10 RT 2240.) Garlinghouse put appellant on the couch and told him, "So help me God, if you move, I will kill you." (10 RT 2240.) Ruby told Scott that she could put appellant in her car, and would take appellant away from the house. Scott responded that she wanted to call her mother. Somebody else came to pick appellant up, and Ruby drove away with the other children. (10 RT 2240-2241.) Garlinghouse's children would often blame appellant for any misdeeds they had committed so that Garlinghouse would direct his wrath at appellant instead of them. (10 RT 2241.)

Garlinghouse's daughter, Elizabeth Boyer, also testified about Garlinghouse's abuse of appellant and his own children. Garlinghouse would often use a belt, but sometimes made the children pick a switch off of a tree which he would use to beat them. The children had to be careful because if

they picked a switch that was too small, he would pick one much larger. (10 RT 2249-2251.) Appellant was singled out for particularly brutal punishment, and would often suffer bruises or black eyes from the abuse. (10 RT 2252-2253.)

Garlinghouse sexually abused Boyer and also killed their pets. On one occasion, Garlinghouse shot the family cat after it ate some meat on the counter. Another time, Garlinghouse shot their puppy after it cried from his beating. "After he killed any of the animals, he would have the boys bury it." (10 RT 2256-2257.)[5/]

Billy Garlinghouse also described the abusive atmosphere at the family home, and noted that appellant was subjected to particular abuse. Garlinghouse would beat the children with a switch until they stopped crying. He and appellant were burned with cigarettes. Billy and appellant attempted to protect each other from Garlinghouse, only to receive a beating themselves for such efforts. (10 RT 2266-2267.) Garlinghouse would burn Billy's face with a cigarette when he wet his bed. Garlinghouse always threw away any presents or letters from Robert Bacon. (10 RT 2269-2270.) After Garlinghouse struck Scott and gave her a heart attack, he gathered up his own children and left appellant behind. (10 RT 2272.)

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5. Appellant successfully prevented the prosecution from presenting evidence of his own cruelty to animals. (3 CT 878-881.)

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING IRRELEVANT EVIDENCE FOR WHICH NO ADEQUATE FOUNDATION HAD BEEN LAID

Appellant asserts that the trial court abused its discretion by refusing to admit a note found in his athletic bag which contained Deborah's name and address. Appellant believes this note showed that Deborah had given him her personal information, thereby corroborating his claim that she had consensual vaginal and anal intercourse with him less than five minutes after the two met for the first time. (AOB 32-33.)

The trial court properly excluded the note because appellant had not laid an adequate foundation to demonstrate the preliminary fact that Deborah had provided the information on the note. The trial court further found that even if appellant introduced evidence to show Deborah had provided such information, it did not lead to the inference that she had engaged in consensual sex unless appellant presented evidence showing *why* she had provided the information.

A. Appellant's Offer Of Proof And The Trial Court's Ruling

The note appellant sought to introduce was located in an athletic bag found in one of the spare bedrooms at the Nut Tree residence. The note was written by appellant, and had Deborah's name and work address, and a phone number. (8 RT 1565.) The prosecutor made an offer of proof that the phone number on the note was not linked to Deborah. (8 RT 1565-1566.)

The court found two impediments to the note's admissibility. First, there was no foundational evidence that Deborah was the source of the information on the note. The court noted that although Charlie denied being the source of

this information, the evidence established that appellant had been in the Sammons's family home and could have obtained that information himself. The court also found it unlikely that Deborah would have dictated such information to appellant, and would have been more likely to write the personal information herself and then give it to appellant. Most importantly, the court found that it would have been highly unlikely that a purportedly friendly exchange of information would be followed in close proximity by "a vicious attack on a defenseless woman." (8 RT 1565-1568.)

The court concluded that the defense had "not established a sufficient foundation to conclude other than by pure speculation that the victim is the volunteer source of the information on the note." (8 RT 1568.) The court noted, however, that appellant had "access to evidence to establish where that information came from," and that if he chose to "testify as to the source of the information on the paper and why it was given to him" the ruling could be revisited (8 RT 1568.)

The court further found that even if an adequate foundation were laid to show that Deborah had provided the information, "without an explanation as to *why* that information was" given to appellant, it was not "reasonable to conclude that the presence of the note in his bag shows that any sexual contact between them was consensual." (8 RT 1569, emphasis added.)

B. The Trial Court Did Not Abuse Its Discretion In Excluding The Evidence Based On Appellant's Failure To Proffer Any Evidence Demonstrating That Deborah Had Provided The Information On The Note

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) In *People v. Lucas* (1995) 12 Cal.4th 415, this Court described the standard for determining whether an adequate foundation had been laid to admit evidence. The Court stated:

> Of course, only relevant evidence is admissible. (Evid. Code, § 350.) Sometimes the relevance of evidence depends on the existence of a preliminary fact. (Evid. Code § 403, subd. (a); 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1718, p. 1677; see, e.g., *People v. Collins* (1975) 44 Cal.App.3d 617 [identity of person who made threatening telephone call to witness is preliminary fact proponent of offered testimony has burden of establishing before fact of telephone call is relevant].) The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury." (3 Witkin, Cal. Evidence, *supra*, § 1716, p. 1675; see Evid. Code, § 403, subd. (a); *People v. Simon* (1986) 184 Cal.App.3d 125, 131.) The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. (*Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 178; see also *People v. Rowland* (1992) 4 Cal.4th 238, 264 [admission of evidence challenged on relevancy grounds reviewed for abuse of discretion].)

(*People v. Lucas*, *supra*, 12 Cal.4th 415, 466, accord, *People v. Guerra* (2006) 37 Cal.4th 1067, 1120.)

C. Discussion

Here, the note could only be deemed relevant to appellant's consensual sex defense if appellant was able to make a foundational showing that Deborah had provided the information on the note. The trial court correctly concluded, however, that the note was inadmissible because appellant made no foundational showing as to *who* provided this information, or *why* such information was provided. (8 RT 1568.) Appellant challenges the foregoing ruling, claiming that when analyzing whether to exclude the note, the trial court conflated criteria regarding the weight of the offer of proof, with criteria regarding its admissibility. (AOB 37.) According to appellant, the *inference* that Deborah had given him her personal information was supported by the following: (1) he had never met Deborah before the night of the murder; (2) he asserted to the police that he had consensual sex with Deborah; (3) Charlie

denied that he had provided the information; and (4) the note was found in his luggage in the Sammons's home. (AOB 37.)

The foregoing offer of proof was inadequate to establish the requisite foundational showing that Deborah had provided him with her personal information. First, it was undisputed that Charlie had told appellant that he would "like to have [Deborah] out of the picture." (7 RT 1491-1492.) Charlie so testified, and appellant himself likewise admitted that Charlie had talked to him about killing Deborah. (1 CT 112-114.) It was also undisputed that appellant had been staying in the Sammons's family residence, thereby giving him access to Deborah's personal information. (7 RT 1491-1492.) Therefore, evidence that appellant had never met Deborah, and that the note was found in his luggage, in no way gave rise to the inference that Deborah — rather than somebody else — had provided him the information. On the contrary, the more logical inference was that the information on the note had been obtained in preparation for effectuating Deborah's murder.

Furthermore, even crediting Charlie's implausible denial that he had provided the information, it would hardly follow that Deborah had been its source. Rather, it remained far more likely that appellant obtained the information on his own while staying at the Sammons's residence. (8 RT 1568-1569.)

Finally, appellant's self-serving claim of consensual sex also fails to support the inference that Deborah provided the information on the note. Although appellant told the police that he began having sex with Deborah less than five minutes after meeting her in her estranged husband's residence, he made no reference to her ever providing him such information in the fleeting minutes either before or after the sexual encounter. Thus, even though appellant now claims the note significantly corroborated his consensual sex

defense, he apparently did not consider it critical information when he was attempting to exonerate himself during the police interview.

Moreover, given the speed with which alleged events transpired, Deborah would almost certainly not have had sufficient time to: (1) provide the information on the note; (2) have anal intercourse, vaginal intercourse, and oral sex; and (3) get dressed before Charlie reappeared. Under these circumstances, the trial court did not abuse its discretion in finding that appellant had not laid an adequate foundation demonstrating the preliminary fact that Deborah had provided the information on the note, or that had she done so, that such a fact would support the further inferences that appellant and Deborah had consensual sex. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 466.)

Nevertheless, appellant relies on *People v. Torres* (1964) 61 Cal.2d 264, and *People v. Carter* (1957) 48 Cal.2d 737, in support of his claim that the trial court improperly excluded evidence of a collateral fact which would have strengthened his consensual sex defense. In *Torres*, the defendant was charged with the sale of Heroin approximately fifteen months after the date of the alleged crime. The defendant presented alibi evidence that on the night in question, he had been at a movie with his family members, and that it had been raining on that night. To support this defense, a meteorologist testified that it had indeed been raining on the night in question, but was precluded from testifying that it had not rained on any other night during the one-week period when that particular movie had been shown. (*Id.* at pp. 265-266.)

The *Torres* Court found it prejudicial error to exclude such evidence because it would have considerably strengthened the credibility of defendant's alibi defense which was being marshaled some 15 months after the date of the alleged crime. In so holding, the Court stated:

> [I]f the accused could connect his activities with some collateral matter which in the normal course of events would be remembered and the date of which could be firmly established by independent testimony of *incontrovertible* scientific facts, his testimony would be susceptible to more positive belief. Furthermore, a collateral fact is relevant when it tends in some manner to make the essential facts in issue more certain. (Citations.) Certainly here such facts were relevant since they went to the very basis of his sole defense—that of alibi. In the instant case defendant sought to establish that he saw a particular motion picture at a particular theater; that he saw it on a rainy evening; that there was but one rainy evening while the picture was showing at that theater and thus, that he saw it on that evening. If he could establish these facts convincingly the jury undoubtedly would have given greater weight to his testimony. Hence defendant's offer was not immaterial, and it was error to deny him the opportunity to develop his alibi.

(*People v. Torres*, *supra*, 61 Cal.2d 264, 266-267, emphasis added.)

In *People v. Carter*, *supra*, 48 Cal.2d 737, the prosecutor relied on the defendant's suicide attempt as evidence of consciousness of guilt for the charged murder. To rebut this inference, the defendant sought to introduce testimony from the physician who treated him following the suicide attempt. According to the offer of proof, the physician would testify that the defendant believed he was going to die, and that he asked the defendant if he wished to clear his conscience. The defendant responded that he wished to do so, and mentioned passing some bad checks, but made no reference to killing the murder victim. This court found it was error to exclude such evidence because "it provided an explanation for defendant's attempted suicide other than that offered by the prosecution." (*Id.* at p. 748.)

The Court further found that even though the proffered evidence was repetitive of defendant's testimony at trial, the

> testimony was not cumulative in respect to its evidentiary weight. The jury would be more inclined to believe an explanation given immediately after the attempted suicide, when defendant thought he was going to die, than the same explanation given at a time when hope of life had returned and the opportunity for fabrication intervened.

(*People v. Carter*, *supra*, 48 Cal.2d at pp. 748-749.) The Court therefore concluded that "because the probative value of the excluded testimony was greater than that of the other evidence introduced on the same issue, it was error to prohibit the testimony." (*Id.* at p. 749.)

Torres and *Carter* do not assist appellant, as they both involved the improper exclusion of objectively verifiable corroborative evidence, or corroborative evidence coming from a neutral third party, rather than evidence founded upon speculative inferences as is the case here. Thus, in *Torres*, the defendant's alibi defense that he was at a particular movie on a rainy night would have been strengthened considerably through *objective* scientific evidence demonstrating that the night of the alleged crime was the only night that it rained during the showing of that movie. As noted by the Court, under these circumstances, proof regarding a collateral fact was essential to the defense. (*People v. Torres*, *supra*, 61 Cal.2d 264, 266-267.)

Similarly, in *Carter*, the proffered corroborative evidence came from a neutral third party who would have supported the defendants' own self-serving testimony, thereby strengthening the credibility of the defense testimony on that topic. (*People v. Carter*, *supra*, 48 Cal.2d at pp. 748-749.)

In this case, however, appellant's proffered evidence was based upon "pure speculation." (8 RT 1568.) Appellant proffered no *evidence* whatsoever that Deborah gave him her personal information. Instead, appellant essentially asked the trial court to assume that Deborah must have provided him with this information since Charlie denied giving him the information. The trial court rejected these proposed inferences, noting that Charlie's credibility was dubious

at best, and that appellant could have easily obtained this information during the two days in which he lived in the Sammons's family residence. Therefore, unlike *Torres* and *Carter*, where the defendant proffered either objectively verifiable evidence, or testimony from neutral third party witnesses, appellant's offer of proof was entirely founded on tautology and conjecture.

Indeed, *Carter* and *Torres* highlight the missing evidentiary link in this case: a witness to testify regarding the event at issue. Here, the trial court here explicitly stated that if appellant, or some other witness, testified that Deborah had given him the personal information, it would revisit its ruling. (8 RT 1568.) Appellant, however, never testified to any exchange of such information. Nor did he call any other witness to testify to such an exchange. Accordingly, under these circumstances, the trial court did not abuse its discretion in finding that appellant's offer of proof was insufficient to admit the note in question.

Appellant's final argument is that the exclusion of the note violated his due process right to present a defense. (AOB 40-41.) In making this argument, appellant acknowledges that under this Court's holdings, an evidentiary error does not rise to the level of a constitutional violation unless it amounts to a complete preclusion of defense evidence. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428 ["excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to a defense"]; accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 999; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Appellant nonetheless argues that "to confine an erroneous and unconstitutional denial of the right to present a defense only to those cases where evidence of the defense has been completely precluded is inconsistent with the Sixth Amendment grounds on which the right stands." (AOB 42.)

Appellant cites *Skipper v. South Carolina* (1986) 476 U.S. 1, in support of his assertion that "the erroneous exclusion of a discrete piece of evidence

corroborative of the defendant's credibility can rise to the level of a Sixth Amendment violation . . . ." (AOB 42.) In *Skipper*, the capital defendant sought to have jail staff testify regarding his good behavior during his pre-trial incarceration. The trial court precluded such testimony on the basis that it was irrelevant. (*Id.* at p. 6.) On appeal, the defendant argued that exclusion of the evidence at his penalty phase violated his Eighth Amendment right to a reliable verdict. In response, the State argued that the proposed testimony from jail staff would have been merely cumulative of the defendant's own testimony that he would behave himself while incarcerated. (*Id.* at p. 7.) The Supreme Court rejected the claim, stating:

> We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses — and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges — would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

(*Skipper v. South Carolina, supra*, 476 U.S. 1, 7-8; see also *Olden v. Kentucky* (1988) 488 U.S. 227, 230-233 [reversible error to preclude impeachment of prosecution witness by showing his romantic relationship with the victim]; *Crane v. Kentucky* (1986) 476 U.S. 683, 688 [defendant improperly precluded

from introducing evidence regarding the circumstances of his confession which reflected upon its voluntariness and credibility].)

Seizing on the foregoing passage, appellant opines that the note excluded in this case would have corroborated his consensual sex defense, just as testimony from jailers would have corroborated the *Skipper* defendant's testimony. (AOB 43.) Appellant claims that here, as in *Skipper*, the "preclusion of a discrete piece of evidence that had a strong tendency to corroborate the central claim of the defense" rose to the level of a constitutional violation. (AOB 43.) Appellant's reliance on *Skipper* is misplaced. In *Skipper*, disinterested third party testimony regarding the defendant's behavior necessarily corroborated the defendant's own self-serving testimony about his behavior while incarcerated. In this case, the proffered note carried no such evidentiary weight because there was *no evidence* as to *who* provided the information, or *why* such information was provided. Appellant was explicitly given the opportunity to make the requisite foundational showing by offering such *evidence*, but declined to avail himself of that opportunity. Thus, appellant could have corroborated his consensual sex defense had he established the requisite evidentiary foundation, but chose not to do so. Accordingly, this case bears no resemblance to the situation in *Skipper* where the defendant was improperly precluded from corroborating his own admissible testimony. Therefore, the exclusion of the evidence did not violate appellant's Eighth Amendment right to a reliable verdict. (See *People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22; *People v. Tuilaepa* (1994) 512 U.S. 967, 973.)

The remainder of appellant's argument is devoted to the question of prejudice resulting from the allegedly improper exclusion of the note. According to appellant, the prosecution's case rested upon three "props:" (1) Charlie's testimony; (2) Martin L'Esperance's testimony and; (3) his own statement to the police. (AOB 44.) In attacking the strength of the prosecution

case, appellant naturally argues that Charlie had the motive, physical means, and the opportunity to murder his estranged wife. Appellant further emphasizes the inherently incredible nature of Charlie's testimony in which Charlie painted himself as the helpless husband who haplessly discovered his wife being murdered by a near stranger. (AOB 44.)

As appellant acknowledges, however, the prosecutor never endorsed the implausible portions of Charlie's testimony which were seemingly designed to minimize his involvement in the murder. On the contrary, the prosecutor specifically argued that Charlie's jealous rage over Deborah's departure spawned the murder plot, and that Charlie was just as guilty of the murder as appellant himself. (9 RT 1945.) Indeed, the prosecutor's theory in that regard was fortified by appellant's own statement in which he admitted Charlie had discussed the idea of murdering Deborah, and that Charlie thought he (appellant) might do it for him. (1 CT 113-115.) The prosecutor's theory found further support in Howard Wilkerson's testimony that Charlie had discussed his desire to either murder Deborah himself, or *hire* someone to do so. (9 RT 1886.)[6] Accordingly, even though Charlie's credibility was highly suspect, his description of appellant committing the actual murder was wholly consistent with other testimony regarding his desire to hire somebody to murder Deborah.

Appellant's attack on Martin L'Esperance — the second "prop" of the prosecution case—is also unpersuasive. Appellant assails Martin's testimony on the basis that he was a "thief," alcoholic, and drug addict. (AOB 45.) Appellant further emphasizes Martin's admission that his addictions "carried with them a heightened capacity for '[l]ying, manipulating, stealing, whatever

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6. Appellant's statement of facts omits the portion of Howard Wilkerson's testimony regarding Charlie's statement that he wanted to *hire* someone to murder Deborah. (AOB 18; 9 RT 1886.)

it takes.'" (AOB 45; 7 RT 1418, 1441.) Appellant also believes Martin personally benefitted from his testimony, and sarcastically suggests that Martin's "probation officer unaccountably felt some unprompted impulse of beneficence to save Martin from a prison sentence." (AOB 45.) Appellant further suggests that Martin's testimony regarding appellant's confession to the murder must have been fabricated because it "was interlarded with lurid details such as appellant's recommendation of the intoxicating thrill of murder." (AOB 45; 7 RT 1420.)

First, Martin's candor regarding the behavior associated with his substance abuse undoubtedly enhanced his credibility, rather than detracted from it. As a matter of common sense, jail house informants are not stellar law-abiding citizens and necessarily have a criminal record. The jury undoubtedly understood the maxim that "crimes in hell do not have angels for witnesses."

Second, contrary to appellant's suggestion, the record establishes that Martin received no benefit for his testimony because the plea deal in a subsequent case had already been struck at the time he provided information to the authorities. (7 RT 1423-1424.) Given the nature of Martin's testimony, defense counsel most certainly would have impeached Martin's testimony with testimony from Martin's probation officer if the probation officer had urged leniency as a result of Martin's cooperation with the authorities. Instead, Martin testified without contradiction that the only consequence of his testifying was that he missed a day of work. (7 RT 1442.)

Martin further explained that he was motivated to testify because he thought Charlie was being wrongly prosecuted for a murder committed by appellant. Martin added that although he was a crook, he had daughters and wanted to do the right thing, stating:

> I didn't set out to testify against Bacon. I set out to do what was right. I mean, the guy told me he killed a girl. He stabbed her to death. If that was my sister or my mom or my daughter, I

> wouldn't want him out there, you know. It could be anyone in this room that something like that happens to. I don't know if he's guilty or not, but I know what he told me.

(7 RT 1464-1465.)

Third, Martin's description of appellant's expressions of the sadistic pleasure he derived from murder and necrophilia, fortified, rather than undermined, his credibility. Deborah's hideously brutalized and beaten body provided objective and incontrovertible evidence that her murderer was indeed a sadistic monster. Such a monster would be exactly the type of person who would experience an intoxicating "high" from the act of murder, who would demonstrate a perverse pleasure in raping dead bodies, and who would brag that he "had fucked the bitch in the ass." (7 RT 1420-1422.)

Thus, the foregoing "lurid" details "interlarded" in Martin's testimony were entirely consistent with the vicious nature of the crime appellant committed, and in no way detracted from his credibility as appellant claims. Furthermore, Martin's credibility was enhanced by his familiarity with factual details regarding the crime. Thus, Martin testified about how appellant had described meeting Charlie's and Deborah's daughter because of the daughter's friendship with his stepmother. (7 RT 1421.) Martin's testimony on that point was corroborated by Charlie's testimony regarding the circumstances how he had come to meet appellant. (7 RT 1489-1490.) Martin further testified that the murder occurred in a back bedroom, and that the victim had been placed in a trunk. (7 RT 1419-1426.)

Indeed, Martin's testimony was so credible that defense counsel stopped trying to prove that appellant had not made the statements attributed to him, and sought instead to show that any such statements were mere "puffery." Counsel asked Martin if it was common practice for inmates to exaggerate their crimes in order to try to be a "big shot." (7 RT 1455.) That line of questioning implicitly conceded that Martin had been sufficiently credible that counsel

considered it important to provide an explanation other than appellant's guilt for his having made the statements in question, and defeats appellant's current attack on the strength of Martin's testimony.

Finally, the last "prop" in the prosecution case — appellant's statement to the police — provided equally strong evidence of his guilt. Appellant observes that because both the prosecution and defense relied on the statement to prove their respective positions, the statement was "the center of the factual dispute between the prosecution and the defense. Either appellant committed the murder, or he was only an accessory to murder." (AOB 46.) Appellant contends that his consensual sex defense was crucial to a determination of his guilt because "if the sex were consensual, it would defy any natural probability that appellant committed the murder." (AOB 46.) Based on this premise, appellant contends that the exclusion of the note was prejudicial because it provided "strong, objective corroboration" for "inferring a consensual relationship." (AOB 49.)

The note did no such thing. First, as recognized by the trial court, because the note was written by appellant rather than Deborah, there is no basis for supposing that Deborah was the source of the information the note contained. (8 RT 1565-1568.) Indeed, according to the prosecutor's offer of proof, the phone number on the note was not linked to Deborah, thereby further undermining the notion that Deborah had provided the information.[7] (8 RT 1565.)

Second, even assuming that Deborah was the source of the information, such an assumed fact had little to no logical tendency to prove that Deborah immediately had sex with appellant in her estranged husband's own bedroom.

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7. Appellant's description of the offer of proof omits the prosecutor's counter proffer that the phone number on the note was not linked to Deborah. (AOB 33-34.)

In fact, such behavior would have been exceedingly unlikely since the defense adduced substantial evidence of Charlie's overt jealousy which included death threats and having his neighbors spy on Deborah's movements and activities. The plausibility of appellant's consensual sex defense was further undermined by appellant's statement to the police in which he admitted that Charlie had asked him to kill Deborah. Thus, appellant knew that Charlie was in a homicidal rage, yet still decided to have sex with the person inspiring such rage right in Charlie's own bedroom. Accordingly, appellant's consensual sex defense suffered not just from the implausible scenario that Deborah had consensual anal sex within minutes of meeting him, but also from the absurd notion that such a life-endangering act would have occurred right under the nose of her obsessively jealous, estranged husband.

Third, the evidentiary force of the note would also have been severely undermined by appellant's failure to mention anything about the note during the police interview, and by the fact that the phone number on the note was not linked to Deborah. Just as Charlie sought to minimize his culpability in Deborah's murder, appellant's consensual sex defense was a blatant attempt to explain away the highly incriminating evidence of his semen inside Deborah. Accordingly, had Deborah actually provided the information, appellant would have undoubtedly mentioned that fact in an attempt to bolster his consent defense he proffered during the interview. Instead, when trying to convince the police that the sex was consensual, appellant stated that Deborah did not "struggle," and that the two just "wound up in the bedroom." (1 CT 114.)

Appellant's failure to mention the note would most certainly have been exploited by the prosecutor, who would also have emphasized that the phone number on the note was not linked to Deborah, and that the note was far more consistent with appellant having acted as Charlie's hit man, rather than appellant's farfetched tale of consensual sex. Under these circumstances,

appellant cannot meet his burden of proving that it was reasonably likely he would have been acquitted of the rape and murder charges, but for the exclusion of the note. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION

Appellant claims the trial court abused its discretion in denying his motion to partially suppress his confession. Appellant first asserts that he unambiguously invoked his right to counsel, thereby mandating a cessation of questioning under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Appellant further argues that even if his request for counsel were ambiguous, Detective Grate actively dissuaded him from invoking his right to counsel. Appellant's final argument is that *Dickerson v. United States* (2000) 530 U.S. 428, impliedly overruled *Davis v. United States* (1994) 512 U.S. 452, and that consequently, "an ambiguous invocation [must now] be clarified before interrogation [may] proceed." (AOB 51-52.)

Appellant is wrong on all counts. Appellant's reference to counsel was ambiguous and Detective Grate did not try to dissuade appellant from invoking his *Miranda* rights. Nor, contrary to appellant's contention, does *Dickerson v. United States*, *supra*, 530 U.S. 428, require the police to clarify ambiguous invocations of counsel.

A. The Police Interview

As discussed previously, Detective Grate commenced the interview by giving appellant muffins and cigarettes, as well as chatting about appellant's job at a skydiving business. (1 CT 57-62.) Grate then told appellant that the police believed Charlie was responsible for Deborah's murder, and that appellant may have been a witness because Deborah was murdered during the time period

when appellant was staying at the house. (1 CT 68.) Grate set forth a scenario in which Charlie killed Deborah in a fit of rage over her leaving him, while appellant was just an innocent bystander. (1 CT 69.) Grate further confronted appellant with the possibility that there would be physical evidence connecting him to the crime scene, and opined that Charlie might have used appellant's parole status to force appellant to become an accessory after the fact. (1 CT 71-75.)

After the interview had continued for about 40 minutes, appellant acknowledged that the police were going to find his "semen samples" because he had "fucked her." (1 CT 75, 82.) When Grate told appellant that he had been in the "wrong place at the wrong time," the following exchange occurred:

"A(ppellant): Yeah, I think it'd probably be a good idea . . . for me to get an attorney

"G(rate): Alright. It's up to you.

"A(ppellant): ___ tell me . . .

"G(rate): Hmmm?

"A(ppellent): Listen, what?

"G(rate): It's up to you if you, you know, if you want an attorney, I mean I'm giving you the opportunity to talk.

"A(ppellant): Well . . .

"G(rate): You know . . . ___

"A(ppellant): . . . that's what you're gonna say.

"G(rate): Huh?

"A(ppellant): That's what you're gonna say. I mean *talk to me*, okay?

"G(rate): Hmm?

"A(ppellant): *Talk to me.*

"G(rate): Talk to you?

"A(ppellant): *Talk to me.*

"G(rate): Well, it don't look good right now.

"A(ppellant): Well I, I realize that.

"G(rate): You know, I don't know your side of the story. *You know, once you say an attorney, you know that's basically king's x, we can't talk. You know, unless you want to. I can't like I said, you knew you could, you know, anytime you wanted to stop talking, you could.* But, you know, the fact that you told me your semen's gonna be found in her, and then she's dead that same night your, your there, that don't look good at all. And then you decide not to talk, I can only assume the worst. You know? You've got a story to tell. And I'm, and I mean your semen's in her and your blood, her blood's on your shoes. That ain't too cool. If, you know, if you did her, you know, had sex with her, and then Charlie flames out on it, you're back out painting the patio or something when it's over, and she's still there and she gets in an argument, and he and he does her, you know, then that's a different set of circumstances. But I don't know that. I don't know that. I really don't know, I don't know you well enough to say that's what happened. The only person that knows you is you.

"A(ppellant): The old two-way mirror, huh?

"G(rate): Yeah.

"A(ppellant): Anybody behind it?

"G: No. There's nobody behind it. There's only me and Mike here. So, they don't bring a bunch of people in on overtime on Saturday. Wouldn't really matter if it was. I mean what, what we're here for is much more serious. But there isn't anybody back there.

"A(ppellant): I didn't see it.

(1 CT 85-87, emphasis added.) After the foregoing exchange, appellant continued the interview with the police and confessed to being an accessory after the fact. (1 CT 87-119.)

B. The Trial Court's Ruling On Appellant's Motion To Suppress

After a hearing on appellant's motion to suppress, the trial court found appellant's reference to counsel ambiguous based on: (1) the conditional

language used in the request; (2) the timing of the reference and; (3) appellant's affirmative requests to continue the interview. (N RT 132-135.) First, the trial court found that appellant's language---"it'd probably be a good idea"–was conditional in nature and constituted a "statement about the propriety of getting an attorney" "in a general sense," rather than a request for "assistance in the questioning process that was going on." (N RT 134-135.) The court determined that appellant's statement was "no more unequivocal a request for an attorney during questioning than what was said in the *Davis*[8] case, "Maybe I should talk to an attorney." (N RT 134.)

Second, the court found it significant that appellant's reference "came after about 40 minutes of questioning," in which appellant had made "statements that related directly to the facts of the case." (N RT 135.) The court considered the reference in that context to be "more ambiguous than if it had been made right on the heels of the *Miranda* advisement." (N RT 135.)

Lastly, the court observed that

> just as in the *Davis* case, the detective in this case followed up with the admonition that if the defendant wants an attorney, they can't talk. And I think it's very important to note that the videotaped statement reveals that after the statement about the attorney, *the defendant urged Detective Grate to talk to him.* I think this is inconsistent with the defendant actually requesting an attorney to assist him in dealing with custodial investigation by law enforcement. Therefore, looking at the totality of the circumstances presented, I would conclude that the statement in its entirety was taken in compliance with the *Miranda* decision as most recently interpreted by the United States Supreme Court and the California Supreme Court.

(N RT 135-136, emphasis added.)

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8. *Davis v. United States* (1994) 512 U.S. 452.

C. Standard Of Review

The standard of review for a claimed *Miranda* violation is well established. The reviewing court accepts the trial court's resolution of disputed facts and inferences, and its credibility evaluations, if supported by substantial evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128; *People v. Wash* (1993) 6 Cal.4th 215, 235.) From the undisputed facts and those properly found by the trial court, the reviewing court independently determines whether the challenged statement was illegally obtained. In doing so, it will "give great weight to the considered conclusions" of the trial court. (*People v. Wash*, *supra*, 6 Cal.4th at p. 236, internal quotation marks omitted.)

D. General Principles Regarding Alleged *Miranda* Violations

As the United States Supreme Court explained in *Davis v. United States* (1994) 512 U.S. 452, the right to counsel established in *Miranda*, and refined in *Edwards v. Arizona* (1981) 451 U.S. 477,

> is sufficiently important to suspects in criminal investigations . . . that it requires the special protection of the knowing and intelligent waiver standard. If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.

(*Davis*, *supra*, 512 U.S. at p. 458, (citations and internal quotation and edit marks omitted).)

According to *Davis*,

> "[T]he suspect must unambiguously request counsel . . . . [A] statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be

> a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect."

(*Davis*, *supra*, 512 U.S. at p. 459, citations and internal quotation marks omitted). Thus, "[A] reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel . . . do[es] not require the cessation of questioning." (*Ibid.*)

Applying the foregoing principles, the *Davis* Court considered whether the defendant had made an unequivocal request for counsel. In analyzing this question, the Court noted that "[a]bout an hour and a half into the interview, [the suspect] said, 'Maybe I should talk to a lawyer.'" (*Davis*, *supra*, 512 U.S. at p. 455.) After the investigators explained that they would not continue if the suspect was asking for an attorney, the suspect stated that he was not asking for an attorney. (*Ibid.*) The Court saw "no reason to disturb" the lower courts' conclusion that the suspect had not requested counsel, and refused to "create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue." (*Davis*, *supra*, 512 U.S. at p. 462.)

This is true regardless of whether the questioning was designed to clarify the request for counsel. Although it may be "good police practice" to clarify an ambiguous or equivocal statement, the court "decline[d] to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." (*Davis*, *supra*, 512 U.S. at p. 461-462.)

In *People v. Crittenden* (1994) 9 Cal.4th 83, this Court relied upon *Davis* to find that the defendant's statement — "Did you say I could have a lawyer?" — did not constitute an unequivocal invocation of his right to counsel. (*Id.* at pp. 124, 130-131.) In so holding, the *Crittenden* Court observed that when the

police repeated the *Miranda* advisement after the defendant's reference to an attorney, the defendant declined to respond. The Court found that

> viewed in context, defendant's statement simply indicated defendant wished to ascertain whether he had heard the officer correctly. Upon being informed that he had heard correctly, defendant did not make a statement "that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police" (Citations), but merely remained silent. We conclude that, in view of the entire record — including defendant's statements and his disruptive conduct as a whole during and immediately following the arrest (which apparently contributed to his failure to hear completely the officer's initial advisements), the interrogatory nature of defendant's reference to an attorney, the officer's immediate repetition of the advice that had been given, and defendant's failure to respond thereto — there was substantial evidence to support the trial court's determination that defendant's statement did not constitute an invocation of his right to counsel.

(*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 130-131.)

This Court reached a similar conclusion in *People v. Stitely* (2005) 35 Cal.4th 514. In *Stitely*, the defendant was interviewed by Detective Coffey regarding his suspected involvement in the murder of Carol, a woman with whom he had been seen leaving a bar. After the defendant admitted giving Carol a ride from the bar, Detective Coffey suggested that the two had fought, at which point the following dialogue ensued:

> DEFENDANT: "Okay. I'll tell you. *I think it's about time for me to stop talking.*" (Italics added.)
>
> COFFEY: "You can stop talking. You can stop talking."
>
> DEFENDANT: "Okay."
>
> COFFEY: "It's up to you. Nobody ever forces you to talk. I told you that. I read you all that (untranslatable)."

DEFENDANT: "Well, I mean (untranslatable) God damn accused of something that I didn't do. I'm telling you the truth. And you're not believe [sic] me. You're not believing me. I'm telling you the truth."

COFFEY: "Richard, the only problem is, I can prove otherwise. The only reason I--listen to me."

DEFENDANT: "The only thing you can prove is I took her out of that bar, man. That's all I did. That's the only thing I've done."

(*People v. Stitely*, *supra*, 35 Cal.4th 514 at p. 534.) The *Stitely* Court found that under the rationale of *Davis*, the defendant's statement—"I think it's about time for me to stop talking"—was ambiguous and did not constitute an unequivocal invocation of his right to silence, but instead was simply an expression of "frustration." (*Id.* at p. 535.) In so finding, the *Stitely* Court also emphasized that Detective Coffey had "twice reminded defendant of his right to 'stop talking,'" a "cautious approach" which gave the "defendant a chance to clarify whether questioning should proceed—something defendant concedes the officer was not constitutionally required to do." (*Ibid.*) The *Stitely* Court observed that "instead of exercising the right to silence that Detective Coffey purposefully 'reinforced,' defendant protested his innocence and continuing talking about the crime. Under the circumstances, nothing prevented Coffey from continuing the exchange." (*Id.* at p. 536.)

E. Appellant Did Not Unambiguously Request Counsel

In this case, appellant's statement — "Yeah, I think it'd probably be a good idea . . . for me to get an attorney" — did not constitute an unequivocal request for an attorney which mandated an immediate cessation of questioning. Rather, his statement closely resembled those deemed ambiguous in *Davis*, *Crittenden* and *Stitely*. (*Davis v. United States*, *supra*, 512 U.S. at p. 459 ["maybe I should talk to a lawyer"]; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 130-131 ["Did you say I could have a lawyer?"]; *People v. Stitely*, *supra*,

35 Cal.4th 514 at p. 534 ["I think it's about time for me to stop talking"]; accord, *People v. Clark* (1993) 5 Cal.4th 950, 989 [defendant's statement, "what can an attorney do for me," was not necessarily a request for one]; *People v. Thompson* (1990) 50 Cal.3d 134, 165-166 [context of interview showed that defendant's references to counsel during interrogation were not an invocation of his right to counsel]; *People v. Jennings* (1988) 46 Cal.3d 963, 977 [frustrated suspect's statement, "that's it, I shut up,"not invocation of right to remain silent]; *People v. Silva* (1988) 45 Cal.3d 604, 629-630 [suspect's statement that he did not "want to talk about that," was not an invocation of the right to silence, but merely indicated unwillingness to discuss a certain subject]; *People v. Ashmus* (1991) 54 Cal.3d 93, 968 [the defendant's continued conversation with the police after statement, "I ain't saying no more,"demonstrated that he was not invoking Fifth Amendment rights]; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 23-24 [the defendant's question whether "he could call a lawyer or his mom,"not an unequivocal request for counsel]; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153 ["There wouldn't be [an attorney] running around here now, would there? . . . I just don't know what to do," not an unambiguous request for counsel].)

Like the circumstances in *Davis*, *Stitely*, and *Crittenden*, appellant's ambiguous comment was followed by multiple reminders of his right to counsel, after which he freely continued the interview with the police. Although appellant admits that the invocation in *Stitely* bore a "striking resemblance" to the statements made in this case, appellant claims *Stitely* is distinguishable on two grounds: (1) the defendant in *Stitely* was invoking his right to silence, rather than his right to counsel and; (2) the defendant in *Stitely* was not under arrest when he made the ambiguous invocation. (AOB 58-60.) Neither distinction renders the case inapposite.

The *Miranda* rule is intended to protect both the right to silence *and* the right to counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436, 465-466; *People v. Davis* (2005) 36 Cal.4th 510, 554 ["*Miranda* . . . protect[s] a defendant's . . . rights to counsel and to remain silent"].) Thus, as a matter of common sense, the *Davis* standard for determining whether either of those rights had been invoked would be the same. Accordingly, the *Stitely* Court relied upon *Davis* when determining whether the defendant's invocation of his right to remain silent was ambiguous, even though *Davis* involved an invocation of the right to counsel. (*People v. Stitely*, *supra*, 35 Cal.4th 514, 534.) Consistent with *Stitely*, the federal courts have also recognized that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent. (*United States v. Mills* (7th Cir. 1996) 122 F.3d 346, 350-351; *Medina v. Singletary* (11th Cir. 1995) 59 F.3d 1095, 1100-1101; *United States v. Johnson* (8th Cir. 1995), 56 F.3d 947, 955.) Consequently, the fact that *Stitely* involved an invocation of the right to remain silent, rather than an invocation of the right to counsel, is immaterial.[9]

Nor can *Stitely* be distinguished on the basis that the defendant was not under formal arrest at the time of the ambiguous invocation. It is established that *Miranda* warnings are only required in the face of "custodial interrogation." (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 444-445, 473-474; *People v. Mickey* (1991) 54 Cal.3d 612, 648.) Thus, regardless of whether the

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9. Respondent is mindful that the consequences of invoking the right to counsel are more prophylactic than those of invoking the right to silence. Thus, once a defendant invokes his right to counsel, he may not be questioned further *on any subject* without counsel present. (*Edwards v. Arizona* (1981) 451 U.S. 477, 482.) In contrast, a defendant who has invoked his right to silence, may continue to be questioned regarding matters other than the topic precipitating the initial invocation. (*Michigan v. Mosley* (1975) 423 U.S. 96, 104.) That distinction, however, has no bearing on the threshold question of whether an invocation has actually occurred.

Stitely defendant had been formally arrested, the Court had necessarily determined that he was undergoing custodial interrogation at the time of the alleged invocation. Therefore, since both the *Stitely* defendant and appellant were undergoing custodial interrogation entailing the same restraint, the lack of a formal arrest does not change the underlying analysis of whether an actual invocation had occurred.

Appellant next attacks the trial court's rationale for finding his statement to be ambiguous. As stated earlier, the trial court found appellant's statement to be ambiguous for the following reasons: (1) it closely resembled the language deemed ambiguous in *Davis*; (2) the reference to counsel took place approximately 40 minutes into the interview in which appellant had "responded to questions and in fact had made some statements that related directly to the facts of the case" thereby rendering it more ambiguous than if it "had been made right on the heels of the *Miranda* advisement" (N RT 135); (3) appellant explicitly asked Grate to continue speaking with him after appellant made his reference to counsel; and (4) appellant's use of the conditional "it'd,"the contraction for "it would," suggested a lack of "immediacy" in the request, and instead constituted a reference to the "propriety of getting an attorney, in a general sense," rather than a request for counsel during the interview itself. (N RT 133.) (See e.g., *People v. Clark* (1992) 3 Cal.4th 41, 120 [defendant's indication that he desired to have an attorney present at some future point was not an invocation of the right to counsel requiring the cessation of interrogation].).

Appellant, however, contends that his statement — "Yeah, I think it'd probably be a good idea for me to get an attorney" — cannot be equated with "Maybe I should talk to a lawyer," the statement found ambiguous in *Davis*. Appellant seeks to take himself outside *Davis* by arguing that his use of the conditional "would" did not imply that he would like an attorney at some future

undetermined time. Instead, appellant contends that he was simply expressing his wishes in a polite manner, rather than making a more peremptory statement such as, "I want an attorney." (AOB 56.)

This proposed interpretation should be rejected because Grate responded to appellant's ambiguous statement by emphasizing several times that it was up to appellant whether he wished to have counsel. (1 CT 85-86.) In doing so, Detective Grate went above and beyond his legal duties by attempting to clarify whether appellant was in fact seeking counsel at that time. (*Davis v. United States*, *supra*, 512 U.S. at p. 459 [police need not clarify whether an ambiguous statement was actually a request for counsel].) Appellant's response to Grate's reminders was to tell Grate, "Talk to me," no fewer than three times, thereby demonstrating that he was not seeking counsel at that time. (1 CT 85-87.)

Although appellant's brief does not mention or discuss his explicit requests to continue the interview, appellant now seeks to preclude any consideration of statements he made following the reference to counsel. He relies on *Smith v. Illinois* (1984) 469 U.S. 91, 93, for the twin propositions that an "accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself," and that the use of the conditional "would" does not render a statement ambiguous or necessarily imply a lack of immediacy to the request. (AOB 55-57.)

In *Smith*, the police began reading the defendant his *Miranda* rights. When Smith was informed of his right to remain silent, he said he had been told to get a lawyer lest he be "railroaded." (*Smith v. Illinois*, *supra*, 469 U.S. 91, 93.) After the officer advised Smith of his right to have counsel present during questioning, Smith's response was "Uh, yeah, I'd like to do that." (*Ibid.*) Despite Smith's response, the officer continued the *Miranda* advice and then said "Do you wish to talk with me without a lawyer being present?" (*Ibid.*) Smith, plainly ambivalent, said, "Yeah and no, uh, I don't know what's what,

really." (*Ibid.*) The officer then misstated the law by telling Smith, "You either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to." (*Ibid.*) Smith responded, "All right. I'll talk to you then." (*Ibid.*) Smith subsequently made several inconsistent but incriminating statements, and again requested counsel. At that point, the questioning was terminated. (*Id.* at pp. 93-94.)

The United States Supreme Court held that because Smith's initial invocation of his right to counsel was clear and unambiguous, the lower courts had erred by relying upon Smith's subsequent statements "to cast retrospective doubt on the clarity of the initial request itself." (*Smith v. Illinois*, *supra*, 469 U.S. 91, 93.) The Court concluded that

> [w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

(*Smith v. Illinois*, *supra*, 469 U.S. at p. 98.)

Smith bears no resemblance to the circumstances of this case. Unlike the instant case, the defendant in *Smith* unambiguously requested counsel *immediately* upon being informed of his right to such, stating: "I'd like to do that." (*Smith v. Illinois*, *supra*, 469 U.S. at p. 93.) Furthermore, Smith's invocation of counsel was not only made immediately on the heels of the advisement, but was also preceded by an earlier statement in which Smith had mentioned the advisability of having a lawyer in order to avoid being "railroaded." (*Ibid.*) Thus, under those circumstances, there was nothing ambiguous about Smith's statement.

Furthermore, contrary to appellant's claim, the language used in Smith's invocation, "I'd like that," cannot be equated with appellant's use of the conditional, "It'd probably be a good idea for me to get an attorney." Although Smith and appellant each used a contraction for "would" somewhere in their utterances, there was nothing about the context of Smith's statement that implied a lack of immediacy, especially given his prior reference to the advisability of getting an attorney. In contrast, appellant's reference to counsel took place 40 minutes into the interview in which appellant had unequivocally waived his *Miranda* rights and displayed a willingness to speak to the police.

In addition, appellant's use of the word "probably" when referring to the concept of counsel, further suggested a lack of certainty and immediacy. Consequently, Detective Grate was fully entitled to continue the interview because of the ambiguous nature of the comment, and went above and beyond the call of duty by thrice reminding appellant that it was up to him whether he wished to continue the interview. (1 CT 85-87.) (*Davis v. United States* [police need not clarify whether an ambiguous statement was actually a request for counsel].) In response, appellant affirmatively implored Detective Grate to continue the interview by repeatedly stating, "Talk to me." (1 CT 86-87.) Thus, unlike in *Smith*, where the police ignored the defendant's reference to counsel and affirmatively misled the defendant regarding his constitutional rights, Detective Grate here zealously protected appellant's constitutional rights by reiterating appellant's right to counsel. Accordingly, *Smith* is wholly inapposite to this case where appellant made an ambiguous reference to counsel followed by an affirmative request to continue speaking to the police. Consequently, appellant's assertion that he unambiguously invoked his right to counsel should be rejected.[10/]

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10. Appellant also contends that when viewed in context, his reference to counsel was unambiguous because the discussion prior to the reference

F. Detective Grate Did Not Dissuade Appellate From Obtaining Counsel

Appellant next asserts that even if the trial court correctly found that he made an ambiguous reference to counsel, the statements made thereafter should be suppressed because Detective Grate actively dissuaded him from invoking his right to counsel. (AOB 74.) The record does not support this assertion. Instead, it reflects that after appellant mused that "it'd probably be a good idea" for him to get an attorney, Grate said, "Alright, it's up to you." (1 CT 85.) Immediately after saying it was up to appellant whether he wanted an attorney, Grate then *reiterated* appellant's right to counsel by stating: "It's up to you if you, you know, if you want an attorney, I mean I'm, I'm giving you an opportunity to talk." (1 CT 85-86.) After the two foregoing reminders, Grate gave yet another reminder, stating, "Once you say an attorney, you know that's basically King's X, we can't talk. You know, unless you want to." (1 CT 85-87.)

Appellant asserts that Grate's statement that he was giving him "an opportunity to talk" was "argument and dissuasion designed to prevent an ambiguous invocation of counsel from becoming a clear one." (AOB 75.) In advancing this contention, appellant acknowledges that Grate's statement was similar to that found permissible in *Stitely*, where Detective Coffey said, "Nobody ever forces you to talk. I told you that." (*People v. Stitely*, *supra*, 35 Cal.4th 514, 534.) The *Stitely* Court rejected the defendant's assertion that the

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concerned the "legal" question of whether he was an accessory after the fact, or a murderer. (AOB 74.) The "legal" discussion regarding appellant's potential criminal liability has no logical bearing on the issue of whether appellant's reference to counsel was ambiguous. Given the nature of police interviews, a discussion between the suspect and the police almost invariably involves "legal" matters concerning the nature of the suspect's involvement in a crime. Consequently, the discussion regarding appellant's potential criminal liability did not convert an ambiguous comment into an unequivocal invocation.

statement constituted badgering, concluding that the detective had done nothing more than remind the defendant that talking was optional. (*Id.* at p. 536.)

Nevertheless, appellant claims that Grate's statement to him is distinguishable in that it was followed by the reminder that Grate was giving him "an opportunity to talk." Appellant contends that the foregoing statement constituted impermissible badgering because it was not "responsive to a reference to counsel, and it implied that resort to an attorney was a waste of opportunity." (AOB 75-76.) Grate's statement did no such thing. In quick succession, Grate informed appellant *three* times that it was up to him whether he wanted an attorney. After telling appellant for the second time that he could decide whether he wanted an attorney, Grate merely told appellant that he was giving him an *opportunity* to talk, and did not tell him that he *should* talk. Here, as in *Stitely*, a reminder of a defendant's constitutional rights cannot reasonably be construed as impermissible badgering. Accordingly, appellant's claim should be rejected.

G. The Supreme Court's Decision in *Dickerson v. United States* (2000) 530 U.S. 428, Did Not Overrule *Davis v. United States* (1994) 512 U.S. 452

Appellant's final contention is that *Dickerson v. United States* (2000) 530 U.S. 428, impliedly overruled *Davis v. United States* (1994) 512 U.S. 452, and that consequently, "an ambiguous invocation [must now] be clarified before interrogation [may] proceed." (AOB 51-52.) According to appellant, the *Davis* opinion, which held that ambiguous invocations of counsel need not be clarified, was based on the premise that the *Miranda* decision was a prophylactic rule designed to implement Fifth Amendment safeguards, rather than being required by the Fifth Amendment itself. (*Davis v. United States*, *supra*, 512 U.S. 452, 458 [*Miranda* rule is not required by "the Fifth Amendment's prohibition on coerced confessions, but is instead justified only

by reference to its prophylactic purpose"].) Under appellant's interpretation of *Davis*, "[t]he needs of law enforcement prevail in the balance over the right of the accused to counsel, because that right is derivative and merely prophylactic, instead of constitutional." (AOB 81.)

Appellant then argues that the *Dickerson* opinion, which held that *Miranda* was constitutionally based and could not be overruled by an Act of Congress, changed the underlying premise of *Davis*. (*Dickerson v. United States*, *supra*, 530 U.S. 428, 441.) Appellant believes that since *Miranda* is constitutionally based, the balance of interests between the accused and law enforcement must be changed in favor of the accused, and that the accused must, therefore, receive greater protection by requiring law enforcement to clarify any ambiguous invocations of counsel. (AOB 81.)

This contention is foreclosed by *People v. Storm* (2002) 28 Cal.4th 1007, which concluded that *Dickerson* did not affect the validity of prior *Miranda* case law. There, the defendant argued that *Dickerson* undermined any previous exceptions to the rule in *Edwards*, which held that statements made to the police after the invocation of *Miranda* rights are deemed involuntary so long as the defendant was continuously in police custody. (*Id.* at p. 1024, fn. 7.) The *Storm* Court found that *Miranda*'s constitutional underpinnings did not affect pre-*Dickerson* case law interpreting *Miranda*. In so holding, the *Storm* Court stated:

> [N]othing in *Dickerson* indicates that *Edwards* must apply to one who has not been in continuous custody. Indeed, as the *Dickerson* majority noted, the fact that judicial decisions have both expanded and contracted the *Miranda* rule over the succeeding decades "illustrate[s] the principle — not that *Miranda* is not a constitutional rule — but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision." (*Dickerson*, *supra*, at p. 441, italics added.)

(*People v. Storm*, *supra*, 28 Cal.4th at p. 1024, fn. 7; accord, *People v. Demetrulias* (2006) 39 Cal.4th 1, 29-30 [*Dickerson* did not alter analysis for determining whether a defendant could be impeached with statements taken in violation of *Miranda*].) Thus, contrary to appellant's claim, *Dickerson* did not affect the established methods for adjudicating alleged *Miranda* violations.

Moreover, even if *Dickerson* required ambiguous invocations to be clarified as appellant now contends, Detective Grate complied with appellant's proposed requirement by thrice reminding appellant that it was up to him whether he wished to have counsel. (1 CT 85-87.) Detective Grate's multiple reminders of appellant's right to counsel gave appellant ample opportunity to clarify his position and definitively invoke his right to counsel if that were his preferred course. Despite being given the clear opportunity to exercise his right to counsel, appellant chose not to do so and instead actively sought to continue the interview. Therefore, even if ambiguous invocations required clarification, appellant cannot show any violation of his proposed constitutional requirement. Accordingly, his claim fails.

H. Any Possible Error In Admitting The Statement Was Harmless

Appellant's final assertion is that the admission of his statement to the police was prejudicial error. Although appellant acknowledges that his defense was predicated upon his statements to the police, he claims that the statement was critical to the prosecution, but not to the defense. (AOB 83 ["Thus, while the un-suppressible portion of the statement to Grate was a necessary adjunct to the defense case, the suppressible portion was not"].) Appellant is mistaken.

The record of appellant's interview with police reflects that before making a reference to counsel, appellant initially stated that he had never met Deborah, after which he later admitted that his "semen samples" would be found in her because the two had engaged in consensual intercourse. (1 CT

82.) Thus, at the point when appellant made a reference to counsel, he had provided no explanation as to how he had ended up having consensual intercourse with a woman whom he initially claimed not to know, and who just happened to have been stabbed, bludgeoned, and strangled immediately after they met. Nor had appellant provided any explanation as to how Deborah's blood got on his tennis shoes. Therefore, even if appellant's statement had been suppressed, the prosecution would have been able to conclusively prove that: (1) appellant had lied when he claimed not to have known Deborah; (2) Deborah's blood was on appellant's shoes; and (3) appellant's semen was found in the viciously beaten body of Deborah.

It is thus apparent that in order to provide even the flimsiest defense, appellant needed to explain how Deborah ended up being viciously murdered right after they had sex, and how her blood just happened to end up on his shoes. Without any explanation for those incriminating circumstances, the jury would have had no choice but to conclude that appellant had raped and murdered Deborah. Accordingly, absent his statement to police, the only way appellant could have attempted to explain away the foregoing evidence would have been to testify at trial, an exceedingly risky adventure given his criminal history and demonstrated pattern of mendacity. Furthermore, had appellant testified, he would have remained subject to impeachment with his statements even if they were taken in violation of *Miranda*. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 29-30.) Consequently, the record does not support appellant's contention that the statement was critical to the prosecution, but not to the defense.

Appellant further contends that the statements in the interview prejudiced his defense because they "betokened a callous insensitivity to . . . the murder of an innocent woman." (AOB 85.) While it is indisputable that appellant was indeed callously insensitive, his repulsive behavior was readily

apparent from the very beginning of the interview. Indeed, the transcript of the police interview shows that upon being informed that Deborah had been murdered, appellant did not express even the slightest tinge of horror or sympathy, but simply said, "No way." (1 CT 68.) Referring to the murder, appellant later asked, "How was she done?" (1 CT 81.) Appellant then admitted that he had "fucked" her. (1 CT 82.)

Appellant's sociopathic response to the news of Deborah's death was echoed in his statements to Martin L'Esperance, in which he discussed fucking "the bitch in the ass," and described the "high" he felt when committing murder and necrophilia. (7 RT 1420-1422.) Consequently, even if appellant's statements had been suppressed, the prosecutor had ample evidence from which to argue that appellant was a sadistic, unrepentant sociopath. Under these circumstances, appellant cannot meet his burden of establishing a reasonable likelihood that he would have been acquitted of murder and rape, had his statement to the police been suppressed. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III.

THE TRIAL COURT DID NOT ERR BY GIVING CALJIC NO. 2.06

Appellant asserts that CALJIC No. 2.06, a consciousness of guilt instruction, should not have been given where the facts at issue in the instruction are necessarily determined by the question of guilt itself. Appellant states, "For the jury to have inferred consciousness of guilt for murder *from* the suppression of evidence, it would have had to have found first that appellant suppressed the evidence *because* he committed murder — a circularity that the instruction is not supposed to aim at." (AOB 86, emphasis in original.) First, there is no "circularity" in the instruction given in this case because appellant *admitted* committing the acts underlying the instruction — burning Deborah's

undergarments, as well as disposing of her body and car — *because* he was seeking to hide his involvement in that offense. Given appellant's admission that he attempted to suppress evidence in order to conceal his admitted criminal activity, he cannot now complain that the instruction led to an improper inference of consciousness of guilt. Furthermore, even if appellant had not admitted suppressing evidence to hide his criminal activity, appellant's claim is foreclosed by this Court's repeated decisions upholding the propriety of consciousness of guilt instructions.

A. The Instruction

Based on evidence that appellant burned Deborah's clothing in the fireplace and disposed of her body in the slough, the jury was given CALJIC No. 2.06, a consciousness of guilt instruction regarding the suppression of evidence. (8 RT 1672.) As given to the jury, CALJIC No. 2.06 provided:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying or by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(9 RT 1916.)

B. Consciousness Of Guilt Instructions

Prior to a jury being instructed that they can draw a particular inference, evidence must appear in the record which, if believed by the jury, supports the suggested inference. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law." (*Ibid.*) Thus, CALJIC No. 2.06 is appropriately given if there is evidence from which a jury could

infer that the defendant sought to suppress or destroy evidence in anticipation of trial. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1235 [CALJIC No. 2.06 appropriate where the defendant refused to participate in a lineup] .)

As appellant acknowledges, this Court has repeatedly declared that "the cautionary nature of the [consciousness of guilt] instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Boyette* (2002) 29 Cal.4th 381, 438; accord, *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; *People v. Arias* (1996) 13 Cal.4th 92, 141 [CALJIC No. 2.03]; *People v. Clark* (1993) 5 Cal.4th 950, 1022 [CALJIC Nos. 2.03 & 2.06]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1235-1236 [CALJIC No. 2.06]; *People v. Ashmus* (1991) 54 Cal.3d 932, 976-978 [CALJIC No. 2.03]; *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [CALJIC No. 2.03].) Furthermore, an "[i]nstruction on an entirely permissive inference is invalid as a matter of due process only if there is no rational way the jury could draw the permitted inference." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1244.) Accordingly, such instructions do "not improperly endorse the prosecution's theory or lessen its burden of proof." (*People v. Boyette*, *supra*, 29 Cal.4th at p. 439.)

C. Analysis

In this case, appellant admitted trying to suppress evidence in order to hide his participation in criminal activity. During his statement to the police appellant said that in order to hide his involvement in this crime, he had washed his bloody clothing, bitten down his fingernails until they bled, burned Deborah's clothing, and helped dispose of Deborah's body. (1 CT 104-119.) Given those admissions, appellant's conduct fell squarely within the rationale of this Court's decisions affirming the propriety of consciousness of guilt (hereafter COG) instructions which ask the jury whether the defendant suppressed evidence to hide his involvement in criminal activity.

Furthermore, it is immaterial whether those admissions related to appellant's accessory after the fact defense, or to the substantive offense of murder because a "reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'" (*People v. Crandell* (1988) 46 Cal.3d 833, 871; see *People v. Holt* (1997) 15 Cal.4th 619, 678; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579.) Thus, because appellant admitted that he suppressed evidence to hide his involvement in criminal activity, regardless of whether it was "the specific offense charged," the inferences were appropriate. (*People v. Crandell*, *supra*, 46 Cal.3d 833, 871.)

Appellant, however, relies on federal case law in an effort to avoid the binding effect of this Court's decisions upholding CALJIC No. 2.06. Appellant cites *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, in support of his claim that COG instructions improperly employ circular reasoning. The *Littlefield* court held:

> We believe an instruction on consciousness of guilt should not be given when, as in this case, the jury could find the exculpatory statement at issue to be false only if it already believed evidence directly establishing the defendant's guilt. The only basis for determining that appellant's statement that he had heard of only one of the seven allegedly fictitious companies was false is the handwriting evidence that appellant had, in fact, signed documents pertaining to all seven. It is the direct evidence of appellant's guilt—the handwriting testimony— that allows the jury to draw an inference of consciousness of guilt from the appellant's statement. In effect, the jurors were told that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt. This is both circular and confusing.

(*United States v. Littlefield*, *supra*, 840 F.2d at p. 149.)

The *Littlefield* court further held that to draw an inference of consciousness of guilt from an allegedly false or misleading statement, "it either must involve a matter collateral to the facts establishing guilt, or should be so

incredible that its very implausibility suggests that it was created to conceal guilt." (*United States v. Littlefield*, *supra*, 840 F.2d at p. 149.)

Relying on the *Littlefield* rationale, appellant argues that COG instructions are only appropriate where "suppression of evidence encompasses collateral, circumstantial facts in the case, and does not embrace coextensively the central fact of guilt vel non, as it did in this case where it was erroneously given." (AOB 87.) Appellant believes that the flight (CALJIC No. 2.52)[11/] and motive (CALJIC No. 2.51)[12/] instructions demonstrate that an inference instruction is improper when the inference can "only be resolved by a resolution of the ultimate question of guilt itself." (AOB 88.)

Relying upon *People v. Rhodes* (1989) 209 Cal.App.3d 1471, appellant asserts that "flight instructions are inappropriate when the only evidence of flight in question is the perpetrator's dispatch from the scene of the crime and when the identity of the perpetrator is the factual issue to be resolved." (AOB 87.) *Rhodes* is not good law. In *People v. Moon* (2005) 37 Cal.4th 1, this Court held that the propriety of a flight instruction does not depend on whether a defendant concedes his identity. (*Id.* at pp. 27-28.) The Court stated: "We have previously rejected the notion that the flight instruction is improper when an accused concedes the issue of identity and merely contests his mental state at the time of the crime." (*Id.* at p. 28; accord, *People v. Smithey* (1999) 20

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11. CALJIC No. 2.52 provides: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but it is a fact which, if proved, may be considered by you in the light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

12. CAlJIC No. 2.51 provides: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence."

Cal.4th 936, 983; *People v. Bolin* (1998) 18 Cal.4th 297, 327; *People v. Ray* (1996) 13 Cal.4th 313, 345-346; *People v. Visciotti* (1992) 2 Cal.4th 1, 60-61; *People v. Nicolaus* (1991) 54 Cal.3d 551, 578-580.) The foregoing authorities thus establish that the flight instruction is appropriate even when the defendant's evasive behavior — flight — goes directly to the substantive question of guilt, and does not concern a collateral fact.

Appellant's reliance on case law interpreting motive and entrapment instructions is equally misplaced. Citing *People v. Martinez* (1984) 157 Cal.App.3d 660, appellant argues that "instruction on motive is improper where, by raising a defense of entrapment, the central issue becomes whether 'the commission of the alleged criminal act was induced by the conduct of law enforcement agents.'" (AOB 88.) In such instances, appellant believes that a motive instruction is inappropriate because it "begs the question of guilt vel non through the presence of an induced or independent motive of the perpetrator." (AOB 88.)

Martinez is inapposite and has no relevance to the propriety of the COG instructions given in this case. Under the law of entrapment, the *objective* test is whether the conduct of law enforcement agents was "likely to induce a normally law-abiding person to commit the offense." (*People v. Martinez, supra*, 157 Cal.App.3d at p. 665.) Consequently, a defendant's subjective motive to commit the crime is entirely irrelevant. (See *People v. Barraza* (1979) 23 Cal.3d 675, 689-690; *People v. Graves* (2001) 93 Cal.App.4th 1171, ["the test for entrapment does not focus on the subjective predisposition of the particular defendant; instead, it focuses on the police conduct and is objective"].) Accordingly a motive instruction is inappropriate since the proper focus is "upon the nature and extent of the police activity," and not on the defendant's subjective motivation to commit the crime. (*People v. Martinez, supra*, 157 Cal.App.3d at p. 668.) It is apparent, therefore, that case law on

entrapment and flight instructions does not support appellant's claim that COG instructions cannot relate to the substantive question of guilt.

On the contrary, California courts consistently approve the use of CALJIC No. 2.06 when the defendant had refused to provide physical evidence that could tend to establish the substantive issue of guilt. (See, e.g., *People v. Clark* (1993) 5 Cal.4th 950, 1022 & fn. 37 [refusal to provide handwriting exemplar]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1235-1236 [refusal to participate in a lineup]; *People v. Sudduth* (1966) 65 Cal.2d 543, 545-548 & fn. 5 [refusal to take a sobriety test]; *People v. Tai* (1995) 37 Cal.App.4th 990, 996-998 [refusal to give handwriting exemplar]; *People v. Huston* (1989) 210 Cal.App.3d 192, 218 [refusal to participate in a lineup]; *People v. Roach* (1980) 108 Cal.App.3d 891, 893 [refusal to give a urine sample].) These authorities demonstrate that a determination of whether the suppressed evidence in such cases is adverse to the defendant cannot be made independent of evaluating the defendant's guilt. Accordingly, this Court should reject appellant's premise that COG instructions may not be applied to the substantive issue of guilt, and must be limited to "collateral, circumstantial facts in the case." (AOB 87.)

Appellant's last salvo against CALJIC No. 2.06 is that it unfairly benefitted the prosecution because the inference of guilt at issue "is easily understood as a suggestion by the court that the corroborative inference in support of the prosecution's case was to be preferred to the exculpatory inference that raises a reasonable doubt in favor of the defense." (AOB 90.) Appellant's contention has been repeatedly rejected by this Court. (*People v. Boyette* (2002) 29 Cal.4th 381, 439 [consciousness of guilt instructions do "not improperly endorse the prosecution's theory or lessen its burden of proof"]; *People v. Kipp* (1998) 18 Cal.4th 349, 375 [CALJIC No. 2.03]; *People v. Arias*

(1996) 13 Cal.4th 92, 141-142 [CALJIC No. 2.03]; *People v. Kelly* (1992) 1 Cal.4th 495, 531-532 [CALJIC No. 2.03]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224 [same].) Accordingly, the instruction did not violate appellant's Eighth Amendment or Due Process rights. (See *People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22; *People v. Tuilaepa* (1994) 512 U.S. 967, 973.)

Finally, even if it were error to give the instruction, appellant cannot demonstrate any prejudice because the instruction

> made clear to the jury that certain types of behavior on a defendant's part could indicate a consciousness of guilt, while also making clear that such activity was not of itself sufficient to prove his guilt, and allowed the jury to determine the weight and significance assigned to such behavior . . . (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1235 [CALJIC No. 2.06 is of benefit to defense and not improper]; *People v. Kelly* (1992) 1 Cal.4th 495, 531 532 [same with respect to CALJIC No. 2.03].)

(*People v. Jackson* (1996) 13 Cal.4th 1164, 1224, emphasis added.)

Here, CALJIC No. 2.06 was inapplicable by its very terms unless the jury believed appellant's statements that he had attempted to suppress evidence to hide his involvement in criminal activity. (1 CT 102-117.) (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1172 [COG instruction not prejudicial because the instruction only applied if the jury believed the statement was wilfully false and misleading].) Therefore, the instruction fully informed the jury not to draw any adverse inferences unless it initially found the predicate facts supporting such inferences. In conclusion, because appellant can establish neither error nor prejudice, his claim should be rejected.

IV.

CALJIC NO. 2.03 WAS SUPPORTED BY THE EVIDENCE

Relying upon his previous argument concerning CALJIC No. 2.06, appellant further contends that CALJIC No. 2.03 was also improperly given.

Respondent disagrees.

At trial, the jury was instructed with CALJIC No. 2.03, an instruction concerning a defendant's false or misleading statements. As given, CALJIC No. 2.03 stated:

> If you find that before this trial [the] defendant made a willfully false or deliberately misleading statement concerning the crime for which [he] is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(9 RT 1916.)

The trial court found the instruction was warranted not by appellant's description of the acts he committed in his statement to the police, but rather by "his expression of surprise that Mrs. Sammons had been killed, when, by his own later admission, he in fact knew she had been." (8 RT 1671.) Appellant acknowledges that this is a "collateral corroborative fact, and does not create the problem of logical circularity that existed for CALJIC No. 2.06 in this case." (AOB 92.) Although appellant acknowledges the theoretical propriety of the instruction to that evidence, he believes that "there was nothing in the instruction that would confine the application of the instruction within its correct boundaries." (AOB 92.) Based on that premise, appellant argues that the instruction was ambiguous, and that accordingly, the question is whether the "jury was likely to have resolved the ambiguity on the side of error." (AOB 92.)

The pertinent inquiry is whether there is a reasonable likelihood the jury misunderstood the applicable law based on the specific language of the challenged instruction and the remaining instructions in their entirety. (*People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Jenkins* (1994) 29 Cal.App.4th 287, 297.) The reviewing court must assume the jurors were intelligent persons

and capable of understanding and correlating all jury admonitions and instructions which were given. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) An instructional error does not require reversal of the judgment unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (Cal. Const., art. VI, § 13; *People v. Breverman* (1998) 19 Cal.4th 142, 149; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

In this case, nothing in the instruction was misleading or ambiguous. As with CALJIC No. 2.06, the jury was simply told that it could consider whether appellant made certain statements, and if so, whether those statements indicated a consciousness of guilt. The instruction further cautioned that even if appellant made a misleading statement, "such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination." (9 RT 1916.)

Here, it was uncontroverted that appellant initially expressed surprise upon hearing about Deborah's murder, even though he later admitted being an accessory after the fact to the murder. Appellant, however, believes the instruction was improperly applied to the primary issue of whether appellant's statement in general was inculpatory or exculpatory, and was not limited to the collateral fact of whether he expressed surprise. (AOB 92-93.) Even if the instruction were utilized in the challenged manner, there was nothing improper about that usage since, as discussed earlier, the instruction could properly apply to the substantive issue of guilt. (See, e.g., *People v. Clark, supra*, 5 Cal.4th at p. 1022 & fn. 37 [refusal to provide handwriting exemplar]; *People v. Johnson, supra*, 3 Cal.4th at pp. 1235-1236 [refusal to participate in a lineup]; *People v. Sudduth* (1966) 65 Cal.2d 543, 545-548 & fn. 5 [refusal to take a sobriety test]; *People v. Tai* (1995) 37 Cal.App.4th 990, 996-998 [refusal to give handwriting exemplar]; *People v. Huston* (1989) 210 Cal.App.3d 192, 218

[refusal to participate in a lineup]; *People v. Roach* (1980) 108 Cal.App.3d 891, 893 [refusal to give a urine sample].)

Furthermore, we note that neither the prosecution nor the defense emphasized any of the COG instructions during closing argument. Instead, the prosecutor briefly noted appellant's admissions that he was involved in burning Deborah's undergarments, had washed his bloody clothing, bitten his fingernails to get rid of blood evidence, and driven her body into the slough, but did not relate the foregoing evidence to the COG instructions. (9 RT 1955.) Thus, given the paucity of argument on the subject, appellant has no basis for concluding that the jury focused on the instruction, or that the instruction adversely affected the outcome of the case. Accordingly, since appellant can establish neither error nor prejudice, his claim fails.

V.

CALJIC NOS. 2.03 AND 2.06 ARE NOT ARGUMENTATIVE PINPOINT INSTRUCTIONS

Appellant's final contention is that CALJIC Nos. 2.03 and 2.06 are "argumentative, pinpoint instructions that suggest to the jury an endorsement of the prosecution's version of the case, whether or not the factual issues in these instructions coincide with the ultimate factual determination in the case." (AOB 93.) Case law refutes this claim.

In *People v. Kelly* (1992) 1 Cal.4th 495, this Court rejected the identical argument, stating:

> CALJIC No. 2.03 . . . does not merely pinpoint evidence the jury may consider. It tells the jury it may consider the evidence but it is not sufficient by itself to prove guilt. [Citation.]. . . . If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence.

(*People v. Kelly, supra*, 1 Cal.4th 495, 531-532; accord, *People v. Arias* (1996) 13 Cal.4th 92, 142 [rejecting the argument that CALJIC No. 2.03 is an improper "pinpoint" instruction]; *People v. Medina* (1995) 11 Cal.4th 694, 762 [same]; *People v. Cash* (2002) 28 Cal.4th 703, 740 [CALJIC No. 2.06 is not improperly argumentative]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03 and 2.06 are not argumentative and do not lessen the prosecution's burden of proof].) Accordingly, the foregoing authorities mandate rejection of appellant's claim.

VI.

THE INSTRUCTION REGARDING THE RELATIONSHIP BETWEEN COUNTS 1 AND 4 WAS NOT AMBIGUOUS AND DID NOT CONFINE THE ORDER OF SUBSTANTIVE DELIBERATIONS

Appellant asserts that a special instruction given by the trial court improperly limited the order of deliberations of the charged offenses and precluded a proper consideration of his accessory after the fact defense. Appellant's claim is also meritless because the special instruction given mirrored CALJIC No. 8.75, an instruction repeatedly upheld by this Court.

A. The Instructions

At trial, the court gave CALJIC No. 17.02, which admonished the jury that "[e]ach count charges a distinct crime. You must decide each count separately." (9 RT 1934.)

Immediately after receiving the foregoing instruction, the jury was given CALJIC No. 8.75, the acquittal-first instruction designed for lesser included offenses. As given to the jury, CALJIC 8.75 provided in relevant part:

> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first-degree murder as charged in Count 1, and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime . . . Murder

> in the second degree is a lesser crime to that of murder in the first degree. Thus, you are to determine whether the defendant is guilty or not guilty of murder in the first degree or any lesser crime thereto. *In doing so, you have the discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it.* You may find it productive to consider and reach tentative conclusions on *all charged and lesser crimes* before reaching any final verdicts.

(9 RT 1935, emphasis added.)

After the foregoing instruction, the trial court instructed the jury on how to complete the verdict forms regarding those counts. (9 RT 1935.) The court then gave the special instruction regarding the alternative charge of being an accessory after the fact.[13] The special instruction stated:

> The defendant is accused in Count 1 of having committed the crime of murder and in Count 4 of having committed the crime of accessory after the fact of murder. The defendant cannot be convicted as both a principal and as an accessory to the same crime. In order to find the defendant guilty of the crime charged in Count 4, accessory after the fact to murder, you must first unanimously find the defendant not guilty of the crime charged in Count 1, murder of the first degree, and not guilty of the lesser offense of murder of the second degree. If you unanimously find the defendant guilty of murder of the first degree or the lesser offense of murder in the second degree, you should not render a verdict on Count 4, accessory after the fact of murder.

(9 RT 1936, emphasis added.)

B. Acquittal-First Instructions

The acquittal-first instruction is a mandatory rule of procedure. In *People v. Kurtzman* (1988) 46 Cal.3d 322, this Court concluded that

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13. It appears that the prosecutor submitted the special instruction which was then revised by the trial court. (9 RT 1756-1758.)

> the practice of requiring unanimous acquittal on the greater offense before returning a verdict on the lesser included offense represented an appropriate balancing of interests, protecting a defendant's interest in not improperly restricting the jury's deliberations, and recognizing the state's interest in having the jury grapple with the question of a defendant's guilt of the highest crime charged.

(*People v. Fields* (1996) 13 Cal.4th 289, 304.) The acquittal-first instruction does not improperly channel a conviction on the greater offense, to the exclusion of the lesser offenses. (*People v. Dennis* (1998) 17 Cal.4th 468, 537.) On the contrary, this Court has declared that the rule "serves the interests of both defendants and prosecutors" and has "encourage[d] trial courts to continue the practice of giving the so-called *Kurtzman* instruction at the outset of jury deliberations." (*People v. Fields*, *supra*, 13 Cal.4th at p. 309.)

In *People v. Johnson* (1992) 3 Cal.4th 1183, this Court considered the propriety of CALJIC No. 8.75, the acquittal-first instruction formulated after the *Kurtzman* decision. In *Johnson*, the jury was instructed that

> [y]ou must unanimously agree that the defendant is not guilty of first degree murder before you may *find the defendant guilty or not guilty* of second degree murder and [y]ou must unanimously agree that the defendant is not guilty of second degree murder before you *find him guilty or not guilty* of voluntary or involuntary manslaughter, assault with a deadly weapon or by means of force likely to produce great bodily injury, possession of a deadly weapon with intent to assault, brandishing a firearm or simple assault.

(*People v. Johnson*, *supra*, 3 Cal.4th 1183, 1237, emphasis added.)

The *Johnson* Court soundly rejected the claim that the foregoing instruction "improperly skewed the jury's deliberative process by precluding deliberation on necessarily included offenses unless and until the jury acquitted defendant of the greater offense." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1237.) In so holding, the Court found that the instruction complied with

Kurtzman because it did "not preclude the jury from considering or discussing lesser included offenses before returning a verdict on the greater offense." (*Ibid.*) Instead, it merely required the jury "to acquit defendant of the greater charge before finding him guilty or not guilty of a lesser charge." (*Ibid.*); accord, *People v. Hunter* (1989) 49 Cal.3d 957, 976 [CALJIC No. 8.75, which told the jury that it had to unanimously agree that the defendant was not guilty of second degree murder before it found him guilty of voluntary or involuntary manslaughter, did not preclude jury from considering lesser charges].)

In this case, the jury was given an expanded version of CALJIC 8.75 which went above and beyond the instruction upheld in *Johnson*. Here, CALJIC No. 8.75 explicitly told the jury that it had "the discretion to choose the order" in which it "evaluate[d] each crime and consider[ed] the evidence pertaining to it." (9 RT 1935.) The expanded version of CALJIC No. 8.75 was immediately followed by the special instruction regarding the alternative accessory after the fact charge. (9 RT 1936)

Even though the challenged special instruction was modeled after CALJIC No. 8.75, appellant contends that the instruction's use of the phrases "find defendant guilty," and "find defendant not guilty," "are all sufficiently compact to refer to either 1) the mental and deliberative process of coming to a substantive legal conclusion; or 2) the substantive conclusion itself; or 3) the administrative recordation of that conclusion in a verdict form; or 4) all of the above three at once." (AOB 97.) Based on the foregoing premise, appellant argues that proposed "meanings 1, 2, and 4," would "tend to confine the order of substantive deliberation and render the instruction improper and misleading." (AOB 97.) Appellant further claims that case law upholding the clarity of CALJIC No. 8.75, upon which the special instruction was modeled, is inapposite because the special instruction did not include 8.75's explicit statement that the jury had the discretion "to choose the order" in which it

"evaluate[d] each crime and consider[ed] the evidence pertaining to it." (9 RT 1935.)

Appellant is wrong. The special instruction in this case contained the same language as the instruction upheld in *Johnson* which lacked any explicit advisement informing the jury that it had discretion to choose the order in which it evaluated each crime. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1236.) Therefore, the lack of this explicit advisement in the special instruction does not render it distinguishable from the instruction upheld in *Johnson*.

Furthermore, as noted earlier, the special instruction and CALJIC No. 8.75 were placed next to each other in order to reinforce the concept that the instructions were related to each other and contained the same guiding principles. Thus, the trial court stated that it was giving the two instructions together specifically so that the jury would consider them as a single instruction, and would not even understand them to be separate instructions. (9 RT 1759; ["The continuity of one with the other will be there, because I won't stop, tell them I'm now reading a new instruction, it will follow right on the heels of 8.75"].)

Moreover, in order to further reinforce the jury's understanding that it was fully entitled to consider each charge separately, the trial court gave CALJIC No. 17.02 which provided that "Each count charges a distinct crime. *You must decide each count separately*. Except as otherwise stated in these instructions, the defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." (9 RT 1934.) That instruction immediately preceded CALJIC 8.75, which was immediately followed by the special instruction. (9 RT 1935.) In addition, the jury was instructed to "consider the instructions as a whole and each in light of all the others." (9 RT 1909.) Therefore, taken as a whole, the instructions all mutually reinforced the concept that there was no particular

order in which the jury must consider the various charges, and that it was to evaluate each charge separately. (*People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions"].)

Nevertheless, appellant complains that the special instruction would not be understood as providing the same principles as CALJIC No. 8.75 because the jurors would understand the logical difference between first degree murder and the lesser included offense of second degree murder, but would not similarly understand the difference between the crimes of murder and being an accessory to murder. Appellant believes that the transition between murder and accessory to murder was "obviously more complex and different in quality, requiring a set of elements collateral to those required for murder." (AOB 99.) This complexity was purportedly exacerbated by the verdict forms. Appellant asserts that the "question-by-question approach" of the verdict forms provided "a road map to substantive deliberations," and had a "clearly coercive effect on the *order*" of the deliberations. (AOB 99, emphasis added.)

Appellant is grasping at straws. Contrary to appellant's belief, there is nothing complex about the difference between the crimes of murder and accessory to murder. The jury could easily understand whether appellant was guilty of committing the actual murder, or whether he just helped hide the body after Charlie committed the murder. Neither of those concepts was difficult to comprehend. Nor did the verdict forms alter the meaning of the jury instructions which clearly informed the jury that it had to "decide each count separately." (9 RT 1934.) As a matter of common sense, the verdict forms necessarily began with the greatest crime of murder in its various forms. The alternative accessory charge was then placed immediately after the forms describing the murder charges. Only after the alternative accessory charge, did the forms refer to the rape and sodomy charges. (4 CT 1144-1155.) Thus, the verdict forms clearly presented the concept that the accessory charge was

considered an alternative to the murder charge. Nothing in the logical progression of the offenses listed in the verdict form dictated the order in which the offenses were to be *considered*. On the contrary, CALJIC No. 8.75 explicitly told the jury that it could be "productive to *consider* and reach tentative conclusions on *all charged and lesser crimes* before reaching any final verdicts. (9 RT 1935.) Thus, because the instructions directed the jury to "consider" all charges before making a final conclusion, appellant cannot demonstrate that the manner in which the verdict form was formulated improperly affected the order of deliberations.

Finally, nothing in either the prosecutor's or defense counsel's argument ever suggested that the jury was required to evaluate the various charges in any particular order. (*People v. Prettyman* (1996) 14 Cal.4th 248, 272-273 [counsel's arguments considered when determining how a jury interpreted its instructions]; accord, *People v. Avena* (1996) 13 Cal.4th 394, 417; *People v. Arias* (1996) 13 Cal.4th 92, 171; *People v. Garceau* (1993) 6 Cal.4th 140, 189; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.) Thus, based on counsel's argument, as well as the language and order of the instructions themselves, the jury was fully aware that it was not required to deliberate in any particular order.

Appellant's final claim is that the special instruction improperly lightened the prosecution's burden of proof and violated the Eighth Amendment's "mandate of heightened reliability in a capital case." (AOB 104.) Because the special instruction given in this case essentially mirrored the instruction upheld by this Court in *Johnson*, appellant cannot meet his burden of showing that it lightened the prosecutor's burden of proof, or violated his right to a reliable verdict. (See *People v. Johnson*, *supra*, 3 Cal.4th at p. 1236; *People* v. *Avila* (2006) 38 Cal.4th 491, 527, fn. 22 [rejection on the merits of

underlying constitutional claim mandates rejection of claimed Eighth Amendment violation].)

VII.

THE TRIAL COURT DID NOT ERR BY DECLINING TO GIVE JUSTICE KENNARD'S PROPOSED CAUTIONARY INSTRUCTION

Appellant asserts that the trial court erred by refusing to give a special cautionary instruction on accomplice testimony like that set forth in Justice Kennard's concurring opinion in *People v. Guiuan* (1998) 18 Cal.4th 558. Respondent disagrees. Because the jury was instructed in accordance with the majority opinion in *Guiuan*, appellant can establish neither error nor prejudice.

A. Background

At trial, appellant did not want the jury instructed with CALJIC No. 3.18, the standard cautionary instruction regarding accomplice testimony. Instead he argued that Justice Kennard's proposed formulation of CALJIC No. 3.18 should be given. The trial court refused to give the special instruction on the grounds that it was argumentative, but modified the standard form of CALJIC No. 3.18 to incorporate certain concepts suggested in Justice Kennard's concurring *Guiuan* opinion. (8 RT 1890-1893.) As given, the modified instruction provided:

> To the extent that Charles Sammons gives testimony that tends to incriminate the defendant, it should be viewed with caution. *You should consider the extent to which his testimony may have been influenced by the receipt of or expectation of any benefits in return for his testimony. You should also consider anything that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to any interest he may have in the outcome of the defendant's trial.* This does not mean, however, that you may arbitrarily disregard that testimony. You should give the testimony the weight you

think it deserves after examining it with care and caution and in light of all the evidence in this case.[14/]

(9 RT 1918.)

B. Applicable Law

In *People v. Guiuan* (1998) 18 Cal.4th 558, this Court issued the following critique of the then-current version of CALJIC No. 3.18:

> The present instruction admonishes the jury to view such accomplice testimony "with distrust," explaining that it should view such testimony "with care and caution" in light of all the evidence. We conclude that the phrase "care and caution" better articulates the proper approach to be taken by the jury to such evidence.

(*People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.)

This Court then suggested a revised instruction:

> Accordingly, we conclude that the jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: "To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.

(*People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.)

Justice Kennard, however, proposed a more expansive re-formulation of CALJIC 3.18, which provided as follows:

> In deciding whether to believe testimony given by an accomplice, you should use greater care and caution than you do when deciding whether to believe testimony given by an ordinary witness. Because an accomplice is also subject to prosecution for

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14. The italicized portions of the instruction reflect the modifications made at appellant's request. (8 RT 1892-1894.)

> the same offense, an accomplice's testimony may be strongly influenced by the hope or expectation that the prosecution will reward testimony that supports the prosecution's case by granting the accomplice immunity or leniency. For this reason, you should view with distrust accomplice testimony that supports the prosecution's case. Whether or not the accomplice testimony supports the prosecution's case, you should bear in mind the accomplice's interest in minimizing the seriousness of the crime and the significance of the accomplice's own role in its commission, the fact that the accomplice's participation in the crime may show the accomplice to be an untrustworthy person, and an accomplice's particular ability, because of inside knowledge about the details of the crime, to construct plausible falsehoods about it. In giving you this warning about accomplice testimony, I do not mean to suggest that you must or should disbelieve the accomplice testimony that you heard at this trial. Rather, you should give the accomplice testimony whatever weight you decide it deserves after considering all the evidence in the case.

(*People v. Guiuan*, *supra*, 18 Cal.4th at p. 576.)

C. Discussion

In this case, the trial court modified the standard version of CALJIC No. 3.18 by specifically directing the jury to consider whether Charlie had any expectation of benefits which might induce him to provide false testimony. Thus, rather than simply directing the jury to consider Charlie's testimony with "care and caution" as the standard instruction provides, the instruction in this case specifically directed the jury to consider whether Charlie's testimony was influenced by the hope for favorable treatment. (9 RT 1918 ["You should consider the extent to which his testimony may have been influenced by the receipt of or expectation of any benefits in return for his testimony. You should also consider anything that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to any interest he may have in the outcome of the defendant's trial"].) This modification to the standard instruction was then emphasized by defense counsel who repeatedly

exhorted the jury to disbelieve Charlie's testimony on the basis that he was hoping to receive lenient treatment for himself by falsely implicating appellant in the murder. Thus, defense counsel stated:

> One of the first things he told us, if you'll recall, in response to some of my questions is what he wanted you to do, you the jury in this case. He wanted you to believe him, even though no deals had been made, as he told us, between he and the District Attorney and the prosecuting authorities here. He wanted you to believe him because he felt in his mind that if he could get this matter behind him in a good way, that they would let him go. Remember that? They'd let him just walk out of here. Sure. The District Attorney didn't give him any indication of that, but that's what he was thinking. "I'm going to do such a good job here, they're going to believe me and I'm gone." After all, he didn't have a thing to do with it.

(9 RT 1978-1979.)

Despite the modification to the standard instruction, as well as counsel's repeated exhortations to disbelieve Charlie's testimony, appellant thinks Justice Kennard's proposed instruction was mandated because Charlie was a "volunteering accomplice" who later pleaded guilty to first degree murder after the trial in this case. (AOB 116.) Appellant argues that the lack of a plea deal at the time of Charlie's testimony allowed the prosecutor to truthfully argue that Charlie had not received any promises or benefits in exchange for his testimony. He further observes that the lack of a plea deal at the time of trial prohibited him from effectively impeaching Charlie's credibility with the specific benefits received from a plea bargain. (AOB 116-117.)

As acknowledged by appellant, however, Charlie specifically testified on direct and cross-examination that he "hope[d]" for some kind of benefit as a result of his testimony. (7 RT 1485, 1512.) Moreover, the prosecutor also fully acknowledged in his opening statement that Charlie was undoubtedly "hopeful of getting some sort of deal,"and would "likely . . . attempt to minimize his own involvement in the death of his wife." (6 RT 1098-1099.)

The prosecutor reiterated the same concepts in his closing argument, stating:

> Most of Mr. McKenna's argument was spent trying to convince you that Charles Sammons is a bad guy and spent trying to convince you that the People's case rests upon Charles Sammons. It does not. And this is not a situation in which I stood up in my . . . opening statement weeks ago and told you Charles Sammons is going to be the star witness for the People, and he's going to make the case. No, I stood up and I told you he's going to minimize his own involvement, *he's going to lie to you because he wants a deal.* But I presented him to you, as I told you in my first argument, because he was there and you should decide."

(9 RT 2023, emphasis added.)

Despite the parties' frank acknowledgment of Charlie's hopes for leniency, as well as his interest in minimizing his culpability, appellant argues that the jurors' lack of experience with the criminal justice system would cause them not to fully appreciate "that a volunteering accomplice can indeed still retain a strong hope or expectation of leniency even in the absence of any promises." (AOB 118-119.) Appellant asserts that the language in the instruction directing the jury to "consider the extent to which" Charlie's "testimony may have been influenced by the receipt or any expectation of benefits in return for his testimony" was "ambiguous." (AOB 117-118.)

Appellant argues that the foregoing language should have been replaced by Justice Kennard's formulation of the same concept: "Because Mr. Sammons is also subject to prosecution for the same offense, his testimony may be strongly influenced by the hope or expectation that the prosecution will reward testimony that supports the prosecution's case by granting immunity or leniency." (AOB 117.) According to appellant, Justice Kennard's formulation clearly embraced "the *future* prospect of unpromised benefits," in contrast to the revised instruction which only "ambiguously" referred to expectations of future leniency in exchange for past promises. (AOB 117, emphasis added.) Appellant further argues that the instruction should have told the jurors to view

Charlie's testimony with "distrust," rather than "care and caution,"a proposition explicitly rejected by the *Guiuan* majority. (AOB 123; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 569 ["we conclude that the phrase 'care and caution' better articulates the proper approach to be taken by the jury to such evidence"].)

Appellant's linguistic gymnastics should be rejected. The jury was fully aware that Charlie had not yet been tried for his complicity in his wife's murder. The jury was also aware that Charlie hoped for leniency in the future, a point repeatedly driven home by both the prosecutor and defense counsel in closing argument. The instruction given, as well as counsels' argument, clearly acquainted the jury with the prospect that, even though no actual plea deal had yet been struck, Charlie's testimony may well have been influenced by his desire for or expectation of future benefits. Nothing in those common sense propositions required any further elucidation in the instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions"].) Nor, we respectfully submit, did the proposed instruction convey these same points with any greater clarity. Under these circumstances, appellant cannot demonstrate a reasonable likelihood that he would have received a more favorable result had the requested instructional language been given, or that the instruction which was given, violated his Sixth and Eighth Amendment rights. (*People v. Watson* (1956) 46 Cal.2d 818; see also *People v. Avila* (2006) 38 Cal.4th 479, 527, fn. 22.) Because appellant can establish neither error nor prejudice, his claim fails.

VIII.

SUFFICIENT EVIDENCE SUPPORTED THE GIVING OF CALJIC NO. 2.01 AND THE INSTRUCTION DID NOT LIGHTEN THE PROSECUTION'S BURDEN OF PROOF

Appellant claims that CALJIC No. 2.01, the circumstantial evidence instruction, should not have been given. First, he asserts there was an insufficient factual basis to give CALJIC No. 2.01 because the primary evidence against him was direct, rather than circumstantial. (AOB 128.) Second, appellant further argues that the wording of CALJIC No. 2.01, which refers to "reasonable interpretations" of evidence, prejudiced him because "the outcome of the guilt case depended upon whether the jury found appellant's version of events in his statement to be reasonable when in fact it was legally sufficient for these statements only to be *believable*." (AOB 129, emphasis in original.)

First, the claim regarding the sufficiency of the evidence supporting a circumstantial evidence instruction is waived because appellant did not object to the instruction (8 RT 1659-1660), and affirmatively requested CALJIC No. 2.02, a different circumstantial evidence instruction solely involving a defendant's mental state or intent. (9 RT 1748.) Second, appellant's claim regarding a lack of circumstantial evidence to support the instruction was flatly refuted by defense counsel who repeatedly argued that this case was "largely" based on "circumstantial evidence." (9 RT 1962, 1963.) Trial counsel's argument was fully supported by the record since both the prosecution and defense cases were substantially based on circumstantial evidence. Finally, appellant's second claim regarding the wording of CALJIC No. 2.01 is foreclosed by this Court's decisions finding that CALJIC No. 2.01's reference to reasonable interpretations of the evidence does not dilute the prosecution's burden of proof or mislead the jury.

A. Invited Error

Where a defendant makes a tactical decision to have the jury instructed with the same instruction he now criticizes, this claim constitutes invited error and cannot be raised on appeal. (*People v. Wader* (1993) 5 Cal.4th 610, 657-658; *People v. Medina* (1995) 11 Cal.4th 694, 763.)

Here, the record reflects that defense counsel affirmatively requested CALJIC No. 2.02, a circumstantial evidence instruction regarding a defendant's intent. (9 RT 1748.)[15/] The record further reflects that defense counsel did not object to CALJIC No. 2.01, a more inclusive circumstantial evidence

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15. CALJIC No. 2.02 provides:

The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count [s] _____, _____, _____ and _____], [or] [the crime[s] of _____, _____, _____, which [is a] [are] lesser crime[s]],] [or] [find the allegation _____ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (CT 154, 156.)]3/ The Use Note to CALJIC No. 2.02 provides:

CALJIC 2.01 and CALJIC 2.02 should never be given together. This is because CALJIC 2.01 is inclusive of all issues, including mental state and/or specific intent, whereas CALJIC 2.02 is limited to just mental state and/or specific intent. Therefore, they are alternative instructions. If the only circumstantial evidence relates to specific intent or mental state, CALJIC 2.02 should be given. If the circumstantial evidence relates to other matters, or relates to other matters as well as specific intent or mental state, CALJIC 2.01

instruction encompassing all issues, rather than just intent. (8 RT 1660.)[16/] Given appellant's affirmative request for a circumstantial evidence instruction, any error is invited and bars this claim on appeal.

B. The Instructions

The jury was first instructed on the definition of circumstantial evidence as follows:

> Circumstantial evidence is evidence that if found to be true proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other. However, *a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion.*

(9 RT 1910, emphasis added.)

C. Applicable Law

Under CALJIC No. 2.00, "[d]irect evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact. Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn." (*People v. Jeffries* (2000) 83 Cal.App.4th 15, 22.) CALJIC No. 2.01 need only

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16. Appellant's tactical desire to have CALJIC No. 2.01 is further reflected by the fact that he requested that instruction to be given during the penalty phase. (11 RT 2334-2335.)

be given in cases where circumstantial evidence is "substantially relied on for proof of guilt. [Citations.] The reason for this rule is found in the danger of misleading and confusing the jury where the inculpatory evidence consists wholly or largely of direct evidence of the crime." (*People v. Wright* (1990) 52 Cal.3d 367, 405-406; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 86.)

In *People v. Wilson* (1992) 3 Cal.4th 926, the prosecutor argued that the two bullet wounds to the victim's head constituted circumstantial evidence of the defendant's intent to kill the victim. (*Id.* at pp. 937-938.) The defendant challenged the last paragraph of CALJIC No. 2.01, which provides: "If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (*Id.* at p. 942.) The defendant argued that the foregoing language "negates the presumption of innocence and the standard of proof beyond a reasonable doubt, because it allows the jury to convict merely by finding the prosecution's theory of the case 'reasonable' and the defense theory of the case 'unreasonable,' thus compelling the jury to reject a defense theory which is unreasonable but also true." (*Id.* at pp. 942-943.) This Court rejected the assertion, stating:

> It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (Citations.) Here, CALJIC No. 2.01 makes clear that circumstantial evidence is sufficient to prove guilt only if it cannot be reconciled with any other rational conclusion. The words rational and reasonable in the context of CALJIC No. 2.01 must be read in conjunction with the instruction on reasonable doubt (CALJIC No. 2.90). (Citation.) That instruction informs the jurors that in the event they harbor a reasonable doubt concerning guilt, they are required to acquit. Reasonable doubt is that state of the case where consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (§ 1096.) Therefore, a

> reasonable juror would understand that, taken in context, the relevant language of CALJIC No. 2.01 (and the corresponding language of CALJIC Nos. 8.83 and 8.83.1) must be considered in conjunction with the reasonable doubt standard. Thus, the jury properly can find the prosecution's theory as to the interpretation of the circumstantial evidence reasonable and alternate theories favorable to the defense unreasonable, within the meaning of these instructions, only if the jury is convinced beyond a reasonable doubt of the accuracy of the prosecution's theory. (Citation.) The paragraph criticized by defendant therefore does not tell the jury to reject interpretations of circumstantial evidence favorable to the defense simply because they are unusual or bizarre, [but] merely tells them to reject interpretations of circumstantial evidence that are so incredible or so devoid of logic that they can, beyond a reasonable doubt, be rejected. (*Ibid.*) Accordingly, when the instructions are viewed as a whole, the disputed language does not undermine the instructions on the presumption of innocence and the standard of proof beyond a reasonable doubt, and does not impermissibly create a mandatory conclusive presumption of guilt.

(*People v. Wilson*, *supra*, 1992) 3 Cal.4th 926, 943, emphasis added, quotation marks omitted.)

Relying on *Wilson*, the Court in *People v. Bradford* (1997) 15 Cal.4th 1229, likewise rejected the claim that CALJIC No. 2.01 undermined the requirement of proof beyond a reasonable doubt by directing the jurors "to accept an interpretation of the evidence supporting guilt as long as such an interpretation appeared reasonable and consistent." (*Id.* at p. 1346.) In so holding, this Court observed that the "plain meaning" of the instruction simply informs the jury to "'reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt.'" (*Id.* at p. 1346, quoting *People v. Jennings* (1991) 53 Cal.3d 334, 386; accord, *People v. Koontz* (2002) 27 Cal.4th 1041, 1084-1085 [CALJIC No. 2.01 does not reduce prosecution's burden of proof].)

D. Analysis

In this case, appellant first claims that CALJIC No. 2.01 should not have been given because the prosecution's case rested primarily on direct evidence consisting of Charlie's testimony, as well as his own statements to the police, and to Martin L'Esperance. (AOB 128.)[17] Although Charlie's testimony, as well as that of Martin L'Esperance, can be deemed direct testimony, appellant's statement to the police cannot be so characterized. During his interview with the police, appellant did not admit murdering Deborah, but instead claimed Charlie had done so. Thus, in evaluating appellant's statements on the tape, the jury was necessarily required to draw inferences from those statements and determine whether appellant had lied to conceal his own involvement in the murder. Because the tape-recorded statement was facially exculpatory as to the murder and rape charges, and required the jury to make inferences regarding appellant's involvement in those offenses, it constituted circumstantial rather than direct evidence.

The jury was likewise required to make inferences regarding the rape evidence, and determine whether the micro-abrasions in Deborah's vagina and rectum were the result of consensual sex or rape. Similarly, the jury was required to infer whether Charlie was the actual murderer based on evidence of his obsessively jealous behavior and threats against Deborah. Lastly, the jury was required to infer whether the tire iron found in appellant's apartment was the actual murder weapon, or whether she had been struck by Charlie's gun as appellant claimed. Consistent with the foregoing evidence, defense counsel also repeatedly argued that the evidence against appellant was "largely" circumstantial. (9 RT 1962, 1963.) Therefore, because abundant evidence

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17. In making this assertion, appellant contradicts his prior assertion in Argument VII that "without Charlie Sammons, the prosecution case was completely circumstantial." (AOB 125.)

supported the instruction, appellant's claim of an insufficient factual predicate should be rejected.

Appellant also complains that the instruction improperly lightened the prosecution's burden of proof by instructing the jury to render a finding of guilt so long as the prosecution's interpretation of the evidence was reasonable. Appellant believes his emphasis on the instruction's use of the word reasonable is particularly important because of his unusual statement to Detective Grate that he had consensual vaginal and anal intercourse with Deborah less than five minutes after meeting her for the first time. He states, "A rational juror could indeed find this claim to be credible, yet feel himself forced to reject it on the basis of CALJIC No. 2.01 as unreasonable, and thereby to reject the entire defense as unreasonable." (AOB 129.)

This claim disregards the portion of the instruction informing the jury that *a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion.*" (9 RT 1910, emphasis added.) This instruction clearly informed the jury that it was insufficient for the prosecution's theory merely to be reasonable. Instead, the instruction admonished the jury that a finding of guilt was impermissible unless the circumstantial evidence could not be reconciled with any other rational conclusion, thereby refuting appellant's claim that reasonableness was the only requirement.

Finally, appellant's attack on the instruction was specifically rejected by this court in *People v. Wilson* (1992) 3 Cal.4th 926, which held that the instruction "does not tell the jury to reject interpretations of circumstantial evidence favorable to the defense simply because they are unusual or bizarre, [but] merely tells them to reject interpretations of circumstantial evidence that are so incredible or so devoid of logic that they can, beyond a reasonable doubt,

be rejected." (*Id.* at p. 943, emphasis added; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1346; *People v. Koontz* (2002) 27 Cal.4th 1041, 1084-1085.)

Appellant seeks to distinguish *Wilson* by arguing that *Wilson* involved more circumstantial evidence than direct evidence, and that the defense evidence in *Wilson* was not strange or bizarre so as "to give force or life to the prejudicial misunderstanding of CALJIC No. 2.01." (AOB 131.) Appellant's proposed distinction is unavailing. The exact quantum of circumstantial evidence proffered in any particular case does nothing to alter the fundamental meaning of CALJIC No. 2.01 since the instruction merely refers to the concept of circumstantial evidence in general and does not pinpoint its use to particular situations. For the same reason, the specific facts in *Wilson* are equally irrelevant since the instructional language does not depend on any particular factual scenario.

Moreover, this Court has consistently rejected the same claim regarding 2.01 in a variety of contexts without regard to the factual details of the crimes. (*People v. Bradford, supra*, 15 Cal.4th at p. 1346; *People v. Millwee* (1998) 18 Cal.4th 96, 160 ["these instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other 'reasonable' interpretation can be drawn"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1084-1085 ['these instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other 'reasonable' interpretation can be drawn"]; *People v. Kipp* (1998) 18 Cal.4th 349, 374-375; *People v. Ray* (1996) 13 Cal.4th 313, 348 ["the words 'rational' and 'reasonable' in the context of [these instructions] must be read in conjunction with the instruction on reasonable doubt"].) Because the instruction conveys general concepts that are not dependent upon the specific nature of the

defendant's defense, or the quantum of evidence adduced in support thereof, appellant's attempt to distinguish *Wilson* is unavailing.

Appellant also tries to distinguish *Wilson* by arguing that it involved "interpretations" of circumstantial evidence which could be related to the reasonable doubt standard (CALJIC No. 2.90), while this case focused on the "fact" that appellant had consensual intercourse after a "brief introduction," a concept which would be "assimilated to the natural categories of 'normal' or 'bizarre' despite CALJIC No. 2.90." (AOB 130-131.) In making this argument, appellant disregards the instructional language which specifically states that "each *fact* which is essential to complete a set of circumstances necessary to establish the defendant's guilt *must be proved beyond a reasonable doubt.* In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, *each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.* (9 RT 1911, emphasis added.) The foregoing instructional language explicitly refutes appellant's claim that the facts referred to in the circumstantial evidence instruction are not related to the reasonable doubt standard. Therefore, *Wilson* cannot be distinguished on the basis that it involved interpretations of circumstantial evidence, as opposed to appellant's reliance upon a purported "fact" of consensual intercourse, a proposition explicitly rejected by this jury when it found appellant guilty of rape and sodomy.

Appellant next contends that CALJIC No. 2.01 was improper because the prosecutor's closing argument "rendered the categories of reasonable-doubt and reasonable-occurrence interchangeable." (AOB 133.) The record reflects that after discussing the reasonable doubt instruction, the prosecutor stated:

And I submit to you, ladies and gentlemen, that the People have clearly carried their burden of establishing and proving this case to you beyond a reasonable doubt. You may have noticed as you listened to these instructions, and as a practical matter, having listened to these instructions a number of times I still get confused, so I can imagine for you hearing it for the first time and not having a set of instructions to follow along, it might have been a little bit difficult to understand.

How many times did you hear the words "reasonable" and "rational" as read to you by Judge Smith? There's a reason for that. Even though these instructions seem to be at first blush a bunch of legal gobbledygook, in essence, and in reality what they are is guides to help you do exactly that, reach a reasonable conclusion, a rational conclusion based on the evidence.

And so during my remarks, some of the time I'll be referring to some of these instructions and hope that they make a little bit more sense after we talk about them a bit. During the process of selecting the jurors, during the voir dire process, Judge Smith told these jurors who were here on a particular day something about one of the tasks of a juror is, and he said something to the effect that a juror has to sort out what is credible and what's not. And if something doesn't make sense, you are to look at it carefully. That's exactly what this case is all about. Looking at the evidence, looking at the submissions to you from the prosecution and from the defense, and sorting out what makes sense and what does not.

(9 RT 1939-1940.)

The prosecutor further discussed CALJIC No. 2.01, stating:

If the circumstantial evidence is susceptible of two reasonable interpretations, two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject the interpretation which points to his guilt. If, on the other hand, and I submit to you that the other hand is what applies in this case, one interpretation of such evidence

> appears to you to be reasonable and the other unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(9 RT 1942.)

Appellant asserts that in the foregoing arguments, "credibility is equated with reasonableness, which is the vice inherent in the formulation of CALJIC No. 2.01, inviting the jurors to reject as untrue that which is nonetheless believable." (AOB 134.) This claim fails, especially in light of the record which reflects that defense counsel also focused on reasonable interpretations of evidence, and specifically argued that appellant's tale of consensual sex was reasonable. Counsel stated: "But is it not *reasonably* possible that there may have been some type of attraction that [appellant] talked about?" (9 RT 1971, emphasis added.) Defense counsel further asked the rhetorical question: "[I]s spontaneous sex, two people meeting for the first time, so totally out of question that you have to disregard the possibility of that? Could it not have happened that way?" (9 RT 1972.) Counsel then further argued that the prosecutor's theory of pre-meditated murder was *unreasonable* because appellant would not have been foolish enough to participate in a planned murder plot and then leave his semen behind. (9 RT 1973.) In short, the record demonstrates that both defense counsel and the prosecution argued that reasonable inferences from the evidence supported their respective positions. Both parties also discussed the reasonable doubt instruction at great length. (9 RT 1939, 1947, 1957, 1958, 1968, 1973, 2018, 2020.) Because counsels' arguments regarding the circumstantial evidence instruction did nothing to alter the meaning of the reasonable doubt instruction, and this court has held that circumstantial evidence instructions do not lighten the prosecution's burden of proof,

appellant's claim fails. (*People v. Stitely* (2005) 35 Cal.4th 514, 555 [CALJIC No. 2.01 did not reduce burden of proof or infringe upon defendant's right to a reliable penalty determination].)

IX.

THERE WERE NO PREJUDICIAL ERRORS REQUIRING REVERSAL OF APPELLANT'S CONVICTION

Appellant's final claim is that the cumulative effect of the alleged errors requires reversal of his convictions. Respondent disagrees.

Where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 321, 465.) "A defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.)

As stated in *People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349, when a defendant invokes the cumulative errors doctrine, "the litmus test is whether defendant received due process and a fair trial." Accordingly, any claim based on cumulative error must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*)

Here, appellant has failed to demonstrate that any possible errors could have affected the verdict. Consequently, his claim should be rejected.

X.

THIS COURT IS NOT REQUIRED TO ORDER AN ACQUITTAL ON THE CHARGE OF ACCESSORY TO MURDER

Appellant contends that since he was found guilty of the murder charge, he must be expressly acquitted on the alternative charge of being an accessory

after the fact. (AOB 136.) Appellant is mistaken. First, under *People v. Birks* (1998) 19 Cal.4th 108, defendants have no right to instructions on lesser related offenses. Consequently, appellant got more than he deserved when he was charged with the lesser related offense of being an accessory after the fact. Second, under the rationale of *People v. Mouton* (1993) 15 Cal.App.4th 1313, appellant's conviction on the murder charge did not preclude him from also being an accessory after the fact when he assisted Charlie, his co-defendant, in disposing of Deborah's body.

A. The Instruction

At trial, the jury was given the following instruction on appellant's accessory after the fact defense:

> The defendant is accused in Count 1 of having committed the crime of murder and in Count 4 of having committed the crime of accessory after the fact of murder. The defendant cannot be convicted as both a principal and as an accessory to the same crime. In order to find the defendant guilty of the crime charged in Count 4, accessory after the fact to murder, you must first unanimously find the defendant not guilty of the crime charged in Count 1, murder of the first degree, and not guilty of the lesser offense of murder of the second degree. If you unanimously find the defendant guilty of murder of the first degree or the lesser offense of murder in the second degree, you should not render a verdict on Count 4, accessory after the fact of murder.

(9 RT 1936.)

B. Applicable Law

In *People v. Birks* (1998) 19 Cal.4th 108, this Court overruled *People v. Geiger* (1984) 35 Cal.3d 510, which had held that under certain circumstances, the defendant had a right to request instructions on lesser related offenses. The *Birks* Court concluded that allowing a defendant the unilateral right to instructions on lesser related offenses interfered with prosecutorial charging discretion, was inconsistent with persuasive United States Supreme

Court authority, and unfairly benefitted the defense. (*Id.* at pp. 123-129.) Accordingly, a trial court is no longer able to instruct on lesser related offenses, absent the stipulation of both parties, or a party's failure to object to such an instruction. (*People v. Birks*, *supra*, 19 Cal.4th at p. 136, fn. 19.)

In this case, the prosecutor did charge appellant with a lesser related offense, and consequently did not object to the defense request for an accessory instruction. (9 RT 1700.) *Birks*, however, makes clear that appellant received more than he deserved by even being charged with that offense.

Furthermore, appellant's conviction of murder does not require his acquittal on the accessory offense. In *People v. Wallin* (1948) 32 Cal.2d 803, the defendant was convicted of being an accessory after the fact to a murder committed by his co-defendant, Mrs. Paz. The defendant argued that he "could not be an accessory after the fact to her crime and that therefore she was incapable of committing the offense with which defendant stands charged." (*Id.* at p. 806.) This Court disagreed, stating:

> It may be that a murderer who acts alone in concealing her crime cannot be separately charged as an accessory, but it does not follow that she cannot become liable as such if she encourages another to aid her in avoiding arrest and punishment. There are many instances in the law where a person is held to be criminally responsible for cooperating in an offense which he is incapable of committing alone

(*People v. Wallin*, *supra*, 32 Cal.2d at pp. 806-807.) Expanding upon this theme, the *Wallin* Court further observed:

> The murder was completed as soon as the child was killed, and no subsequent acts on the part of Mrs. Paz or any other person were required to be shown in order to establish the elements of that offense. Defendant's crime of being an accessory under section 32 was separate and distinct (see Pen. Code § 972), although it, of course, depended on the previous commission of the murder. He became chargeable under section 32 when he aided Mrs. Paz to conceal her crime, and *she became liable to prosecution for the identical offense by reason of section 31*

when she encouraged him to assist her in avoiding arrest and punishment.

(*People v. Wallin*, *supra*, 32 Cal.2d at p. 807, emphasis added.)

Relying upon *Wallin*, the court in *People v. Mouton* (1993) 15 Cal.App.4th 1313, overruled on other grounds in *People v. Prettyman* (1996) 14 Cal.4th 248, reached a similar conclusion. In that case, the defendant was convicted of both second degree murder and being an accessory to a felony. On appeal, the defendant asserted that he was improperly convicted of both of those offenses on the theory that a principal cannot be an accessory to the same crime. The *Mouton* court rejected this claim, finding that

> there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime. When a felony has been completed and a person knowingly and intentionally harbors, conceals or aids the escape of one of the felons, that person is guilty as an accessory to a felony under section 32, whatever his or her prior participation in the predicate felony.

(*People v. Mouton*, *supra*, 15 Cal.App.4th at p. 1324.) In so holding, the court noted that the defendant's murder conviction was based on his actions in aiding and abetting the actual shooter, while the accessory charge was based on his concealment of the murder weapon and other evidence related to the crime. The court thus concluded that under those

> circumstances, defendant's responsibility both as an accomplice to the murder and for the separate and distinct crime of acting as an accessory to a felony was neither logically inconsistent nor legally prohibited. Although defendant was technically convicted of being an accessory to his own crime, in substance he was convicted for two different sets of actions. The court, therefore, did not err in failing to instruct the jury the two offenses were mutually exclusive.

(*People v. Mouton*, *supra*, 15 Cal.App.4th at pp. 1324-1325.)

C. Analysis

Here, appellant could properly be convicted as both a principal and an accessory since each offense was supported by distinct and independent actions. Appellant acted as a principal when he murdered Deborah at Charlie's behest. He also acted as an accessory when he assisted Charlie in disposing of Deborah's body and burning Deborah's clothes. Consequently, because those two offenses were based on "two different sets of actions," his conviction on the murder offense did not require his acquittal on the accessory offense. (*People v. Mouton*, *supra*, 15 Cal.App.4th at pp. 1324-1325; but see *People v. Francis* (1982) 129 Cal.App.3d 241, 251-253 [defendant cannot be convicted of both murder and accessory to murder "absent exceptional circumstances"].)

XI.

APPELLANT'S ARIZONA MURDER CONVICTION QUALIFIED AS A SPECIAL CIRCUMSTANCE AND WAS PROPERLY CONSIDERED DURING THE PENALTY PHASE

Appellant claims that his prior Arizona murder conviction did not qualify as a special circumstance because the Arizona murder statute under which he was convicted did not have the same elements as California's murder statute. (AOB 138.) Appellant is wrong. A review of the Arizona murder statute demonstrates that appellant's prior murder conviction satisfied the elements of murder under California law. Furthermore, a review of the actual record of conviction confirms that appellant's Arizona murder would be punishable as murder under California law.

Section 190.2, subdivision (a)(2), provides that defendants who have previously been convicted of murder "may be sentenced to death." (Pen. Code, § 190.2, subd. (a)(2).) Where the prior murder occurred in a foreign jurisdiction, it will qualify as a special circumstance if the offense would have

been "punishable as first or second degree murder" under California law. (Pen. Code, § 190.2, subd. (a)(2); *People v. Andrews* (1989) 49 Cal.3d 200, 223.) In *People v. Andrews*, *supra*, 49 Cal.3d 200, the Court held that the intent of section 190.2, subdivision (a)(2), is to limit the use of foreign convictions to those which include all the elements of the offense of murder in California. (*People v. Andrews*, *supra*, 49 Cal.3d 200, 223.) The *Andrews* Court then concluded that "because it would have been *'possible* for [the defendant] to have been convicted of murder' in this state, the offense would have been 'punishable' here." (*People v. Martinez* (2003) 31 Cal.4th 673, 686, emphasis in original, quoting *People v. Andrews*, *supra*, 49 Cal.3d 200, 223.)

In *People v. Martinez*, *supra*, 31 Cal.4th 673, the defendant asserted that his prior Texas murder conviction did not qualify as a special circumstance because Texas, unlike California, did not utilize concepts of express and implied malice in its murder statute, and also did not provide for a mitigating defense to murder such as imperfect self-defense. (*Id.* at p. 681.) In order to determine whether the defendant's Texas murder conviction would have qualified as a first or second degree murder conviction under section 190.2, subdivision (a)(2), the Court compared the statutory elements needed to prove first or second degree murder in California, with those of the Texas murder statute under which the defendant was convicted.[18] (*Id.* at pp. 682-683.) The Court first observed that in California, a murder conviction can be predicated on either express or implied malice. The Court explained:

> In this state, "malice" is defined by statute as "express" if the defendant intended "unlawfully" to kill his victim, and "implied" if the killing was unprovoked or the circumstances showed "an

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18. The Court initially reviewed both the Texas statute and case law interpreting the statute. However, because Texas case law was unclear as to whether murder required a specific intent to kill, versus a general intent to do the act causing death, the Court ultimately relied on the statutory language alone. (*People v. Martinez*, *supra*, 31 Cal.4th at pp. 687-688.)

> abandoned and malignant heart." (§ 188.) . . . But the quoted portion of the California statutory definition of implied malice has given way to a definition more meaningful to juries, so that malice is now deemed implied "'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (Citations.) Such conduct amounts to second degree murder, and for purposes of applying the *Andrews* elements test, these prerequisites are the sole elements of that offense. (See CALJIC No. 8.31.)

(*People v. Martinez, supra*, 31 Cal.4th at p.684.)

The *Martinez* Court concluded that by "pleading guilty to unlawfully, intentionally, and knowingly shooting someone, the defendant . . . admitted committing an act that had the *capacity* of being punished as murder in this state. In *Andrews*'s words, it was entirely 'possible' to have convicted defendant of second degree murder in California. (Citation.)" (*People v. Martinez, supra*, 31 Cal.4th at p. 686, emphasis in original.) This was true even though the Texas statute did not explicitly refer to express or implied malice, and also did not provide the same mitigating defenses available under California law. (*People v. Martinez, supra*, 31 Cal.4th at p.685.) In so holding, the Court found that "the unavailability of such mitigating theories under Texas law" did not preclude "application of the prior murder special circumstance" because "those mitigating factors are not elements of the offense of murder but are defensive matters, which may reduce murder to manslaughter by negating malice." (*Ibid.*)

In this case, a review of Arizona's second degree murder statute demonstrates that a conviction under that statute satisfies the elements of California's murder statute. Section 13-1104, of Arizona's Revised Statutes (A.R.S., § 13-1104), provides as follows:

A person commits second degree murder if without premeditation:

1. Such person intentionally causes the death of another person;

   or

2. Knowing that his conduct will cause the death or *serious physical injury*, such person causes the death of another person; or

3. Under circumstances manifesting extreme indifference to human life, such person recklessly engages in conduct which creates a grave risk of death and thereby causes the death of another person.

(A.R.S. 13-1104, emphasis added.)

With respect to the second form of murder, the term "serious physical injury" is defined as follows:

> Serious physical injury includes physical injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

(A.R.S. 13-105(34).)

Appellant acknowledges that the first form of second degree murder qualifies as express malice murder under California law, and that the third form constitutes an implied malice murder based on a conscious disregard theory (AOB 140-141). (*People v. Martinez*, *supra*, 31 Cal.4th at p. 684; [express malice murder requires an intent to kill]; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221-1222 ["malice is implied where a killing results from an intentional act, the natural consequences of which are dangerous to human life, deliberately performed with knowledge of the danger to, and with conscious disregard for human life"].) (AOB 140.)

Appellant, however, argues that the second form of murder, which may be based on the knowing infliction of a "serious physical injury" causing

"permanent disfigurement" or "protracted impairment" of a limb or organ, would not qualify as implied malice murder under California law. (A.R.S.13-105, subd. (34).) Appellant asserts that because a disfiguring or serious injury is not necessarily a life-threatening injury, the infliction of this type of injury would not necessarily pose a risk of death such that it constituted implied malice murder under California law. (AOB 141.)

Appellant is mistaken. Arizona law defines second degree murder in a manner such that the knowing infliction of a serious injury can be equated with reckless disregard under California law. In *State v. Just* (1983 Ariz.) 138 Ariz. 534, 548, [675 P.2d 1353, 1366], the Arizona court of appeals stated that "second degree murder [may be based on] three alternative culpable mental states: intentionally, knowingly, or recklessly." (*Id.* at p. 548.) "A charge that a defendant killed another person *knowing that his conduct would cause death or serious physical injury necessarily includes an allegation that the defendant acted recklessly by being aware of and consciously disregarding a substantial and unjustifiable risk that his conduct could result in death.* See A.R.S. @ 13-105(9)(c) ." (*State v. Hurley* (2000 Ariz.App.) 197 Ariz. 400, 403, [4 P.3d 455, 458], emphasis added.) Accordingly, we submit that a defendant's knowing infliction of serious physical injury necessarily constitutes at least "a reckless disregard that his conduct could result in death." (*State v. Hurley, supra*, 197 Ariz. at p. 403.) Since appellant correctly acknowledges that the third form of murder under Arizona law — recklessness — is equivalent to implied malice murder under California law, any murder under Arizona law, including one based on the defendant's knowing infliction of death or serious physical injury, would necessarily constitute murder under California law. (*People v. Dellinger, supra*, 49 Cal.3d 1212, 1221-1222 [implied malice murder merely requires a reckless disregard for human life].)

Appellant further argues that a death resulting from the knowing infliction of a serious physical injury "would constitute a sort of felony-murder predicated upon aggravated assault, or on mayhem without the specific intent to inflict disfigurement — forms of murder that do not exist in California." (AOB 141.) Not so. As just discussed, under Arizona law, a defendant who *knowingly* inflicts a serious injury necessarily acts with "a *reckless* disregard that his conduct *could* result in death." (*State v. Hurley*, *supra*, 197 Ariz. at p. 403, emphasis added.)

Furthermore, respondent submits that one who causes death during the "knowing" infliction of a serious physical injury causing disfigurement could be subject to conviction of felony-murder based on mayhem. Under Penal Code section 189, the crime of mayhem is listed as a predicate felony for purposes of the felony-murder rule which applies to any death, whether intentional or unintentional, which occurs during the course of an enumerated felony. (Pen. Code, § 189; *People v. Dillon* (1983) 34 Cal.3d 441, 462-472, 475.) When mayhem constitutes the predicate felony under the felony-murder rule, the prosecutor must demonstrate only that the defendant specifically intended to maim the victim, even though mayhem is normally a general intent crime. (*People v. Nichols* (1970) 3 Cal.3d 150, 164.)

Arizona's murder statute satisfies that requirement since the second form of murder is predicated upon the defendant's "*knowing*" infliction of an injury causing "permanent disfigurement" or "protracted impairment" of a limb or organ." (A.R.S. 13-1104; A.R.S.13-105, subd. (34)). In Arizona, "'knowingly' means that a defendant acted with awareness of, or belief in, the existence of conduct or circumstances constituting an offense." (*State v. McKinney* (Ariz.1996) 185 Ariz. 567, 583, [917 P.2d 1214, 1230].)[19/] Thus, according

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19. During the penalty phase, the jury instructions gave a similar definition of knowingly which was defined as follows: "Knowingly means,

to the plain statutory language, the defendant must *know* that he is inflicting serious injuries in order to be liable for murder under the second form of the statute. (A.R.S. 13-1104; A.R.S.13-105, subd. (34).) Since the *knowing* infliction of a serious physical injury under Arizona law, could be equated with *intentional* maiming under California law, it would have been "entirely 'possible' to have convicted defendant of second degree murder in California" based on a felony-murder theory. (*People v. Martinez, supra*, 31 Cal.4th at p. 686; see Pen. Code, § 189; *People v. Jentry* (1977) 69 Cal.App.3d 615, 627 [mayhem is predicate felony for first degree felony-murder]; *People v. Ausbie* (2004) 123 Cal.App.4th 855, 861 [mayhem defined as the intentional and malicious infliction of an injury which "deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip"].)

Moreover, the infliction of a serious injury, as defined under the Arizona statute, may also provide the basis for implied malice murder under California law.[20] In California, implied malice murder need not be solely predicated upon conduct posing a risk of death, but may also encompass acts posing a risk of "serious injury." (See *People v. Conley* (1966) 64 Cal.2d 310, 322.) It has been stated that implied malice requires a "'conscious disregard for the safety of others'" (*People v. Watson* (1981) 30 Cal.3d 290, 301, italics added, quoting *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897), meaning an "actual awareness of the great risk of *harm* which he had created" (*Watson, supra,* at

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with respect to conduct or to a circumstance described by a statute defining an offense that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists." (11 RT 2354.)

20. The specific issue of whether a risk of serious physical injury suffices to establish implied malice murder is pending in *People v. Noel*, 128 Cal. App. 4th 1391, Petition for Review granted on July 27, 2005 2005 Cal. LEXIS 8228; 2005 Cal. Daily Op. Service 6651.

p. 301, emphasis added). A conscious disregard of "an unreasonable human risk" demonstrates an "unmitigated man-endangering-state-of-mind." (Perkins, Criminal Law (2d ed. 1969) pp. 36, 48.) Nothing in this concept requires that the defendant contemplate death likely will result by doing the act.

Thus, for example, in *People v. Conley* (1966) 64 Cal.2d 310, the Court held that a "wanton disregard for human life" is shown where a defendant, aware of a duty to act within the law, acts in a manner "that is likely to cause *serious injury* or death to another," despite such awareness. (*Id.* at p. 322, emphasis added; accord, *People v. Coddington* (2000) 23 Cal.4th 529, 592 [a defendant's "knowledge that serious bodily injury was likely to occur" "permits an inference of implied malice"]; *People v. Johnson* (1993) 6 Cal.4th 1, 47 [evidence that defendant beat victim to death by kicking her 10 to 12 times in the face and head rendered failure to instruct on intent to kill harmless beyond a reasonable doubt]; *People v. Flannel* (1979) 25 Cal.3d 668, 679 ["'If, despite such awareness, [a defendant] does an act that is *likely to cause serious injury* or death to another, he exhibits that wanton disregard for human life or antisocial motivation that constitutes malice aforethought,'" quoting *Conley*, emphasis added]; *People v. Poddar* (1974) 10 Cal.3d 750, 758, fn. 11 [in order to show "'wanton disregard for life'" it must be shown that the accused "acted in a manner likely to cause death or serious injury despite such awareness"]; see also *People v. Evers* (1992) 10 Cal.App.4th 588, 597 [implied malice is shown where defendant knew his conduct "would likely cause serious injury or death"]; *People v. Spring* (1984) 153 Cal.App.3d 1199, 1205 ["'there has to be either an intent to kill or such wanton and brutal use of the hands without provocation as to indicate that they would cause death or serious bodily injury so as to indicate an abandoned and malignant heart'"], quoting *People v. Teixeira* (1955) 136 Cal.App.2d 136, 150.)

"[M]alice may be implied from the doing of an act in wanton and willful disregard of an unreasonable human risk, i.e., the willful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death *or great bodily injury* may result." (*People v. Matta* (1976) 57 Cal.App.3d 472, 480, emphasis added.) "Phrased in everyday language, the state of mind of a person who acts with conscious disregard for life is, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.'" (*People v. Olivas* (1985) 172 Cal.App.3d 984, 987-988; see also *Watson, supra,* 30 Cal.3d at pp. 300-301 [one who drives while intoxicated "'reasonably may be held to exhibit conscious disregard of the safety of others'"].)

Based on the foregoing authorities, it is apparent that one who kills another "knowing that his conduct will cause death or serious physical injury" would be liable for prosecution for murder on an implied malice theory. (*People v. Flannel, supra,* 25 Cal.3d at p.679; accord, *People v. Conley , supra,* 64 Cal.2d at p. 322; *People v. Coddington, supra,* 23 Cal.4th at p.592; *People v. Johnson, supra,* 6 Cal.4th at p. 47;]; *People v. Poddar, supra,* 10 Cal.3d 750, 758, fn. 11.) Since the infliction of an injury sufficiently grievous to cause "permanent disfigurement" or "protracted impairment" of a limb or organ under Arizona law (AR.S.13-105(34)), would necessarily constitute "a serious injury" under California law, conduct constituting murder under Arizona law would also constitute murder under California law. (See *People v. Flannel, supra,* 25 Cal.3d at p.679.) Accordingly, a review of Arizona's murder statute, and case law interpreting that statute, demonstrates that appellant's second degree murder conviction constituted a crime that would have been punishable as murder in California, and therefore qualified as a special circumstance under section 190.2, subdivision (a)(2).

Appellant next asserts that a review of the actual record of his Arizona convictions shows that there was insufficient evidence that he committed murder under California law. (AOB 142-146.) In *Martinez*, this Court left open the question of whether the actual record of conviction may be reviewed to determine if a foreign murder conviction satisfies the requirements for murder in California. (*People v. Martinez* (2003) 31 Cal.4th 673, 685-687.) If indeed this evidence may be utilized, it further confirms that appellant committed murder under California law because the Arizona murder was committed during the course of a robbery, thereby constituting felony-murder.

In the proceedings below, appellant opted for a court trial to adjudicate the truth of the prior murder special circumstance. During the trial, the record of appellant's Arizona murder conviction, which included his guilty plea to murder, as well as the sentencing minutes, were admitted into evidence. (2 CT 438-440, 632-648.) That record reflected that appellant pleaded guilty to the second degree murder *and* robbery of John Noble, in exchange for the dismissal of first degree murder and armed robbery charges. (2 CT 438-439; 633-634, 641.)

At the Arizona plea hearing, defense counsel requested that the factual basis for the plea be taken from the grand jury transcripts, rather than from appellant himself. According to the prosecutor's summary of the grand jury evidence, appellant "decided to take the wallet of Mr. Noble," at which point "a struggle ensued" in which "Mr. Noble was beaten severely, and in the process his throat was cut with a sharp instrument, possibly a broken bottle, at the scene." (2 CT 647.) Appellant never admitted, however, that he "cut [Noble] intentionally with the bottle." (2 CT 650.) Noble bled to death as a result of being wounded in the throat and appellant was later found with Noble's wallet, which contained no money. (2 CT 651.) Before sentencing appellant, the trial court read the grand jury transcript and specifically found

that "aggravating circumstance exist[ed] because of the nature of the crime, the *use* of a deadly weapon, and the fact that the defendant left the victim while aid could have been rendered to him." (2 CT 439, emphasis added.)

The foregoing record of conviction conclusively demonstrates that appellant's Arizona murder conviction qualified as a felony-murder under California law since the victim was killed during the course of a robbery. (Pen. Code, § 189; *People v. Dillon* (1983) 34 Cal.3d 441, 462-472, 475 [first degree felony-murder is the unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during a robbery, or other enumerated felonies].) Therefore, appellant's Arizona murder conviction necessarily would have been "punishable" as felony-murder under California law. (Pen. Code, § 190.2, subdivision (a)(2).)

Seeking to avoid the implications of the felony-murder rule, appellant argues that since Arizona also has a felony-murder rule, the fact that he was convicted of second degree murder "is significant evidence that the conduct was not felony-murder/robbery . . . ." (AOB 147.) Appellant further argues that "the description of the underlying conduct by the prosecutor and defense counsel" showed that "the homicide [was] unrelated or co-incidental to the robbery," thereby negating "a finding of felony-murder." (AOB 147.) Appellant's claims lack a legal and factual basis. First, it is immaterial whether appellant was charged with felony-murder in Arizona because the relevant question under section 190.2, subdivision (a)(2), is whether the offense could have been "punishable" as felony-murder under California law, not how it was labeled, prosecuted, or actually punished in the foreign jurisdiction. (Pen. Code, § 190.2, subd. (a)(2); see *People v. Martinez* (2003) 31 Cal.4th 673, 683-685 [issue of potential mitigating defenses under California law does not alter relevant question of whether crime was "punishable" as a murder in California].) Under *Martinez*, the only question is whether it was "'possible'

to have convicted defendant of second degree murder in California. (Citation.)" (*People v. Martinez, supra*, 31 Cal.4th at p. 686.) Consequently, the lack of a felony-murder charge has no bearing on whether it was "possible" to have convicted appellant of second degree murder. (*Ibid.*)

Second, in arguing that counsels' description of the crime negates a finding of felony-murder, appellant relies solely on defense counsel's recitation of appellant's self-serving statements, and overlooks contrary evidence discussed by the prosecutor. The transcript of the hearing reflects that the prosecutor described how appellant decided to steal Noble's wallet, and then killed him during the beating, after which appellant was found with Noble's wallet. (2 CT 647.) The trial court then asked defense counsel if that was an accurate description of the Grand Jury testimony. (2 CT 648.) Defense counsel responded, "I'm not saying that is the exact statement, but it is an accurate reflection of the Grand Jury transcript." (2 CT 648.) Defense counsel then discussed appellant's statements to the police that he had begun beating Noble because Noble had kicked his pregnant dog. Defense counsel subsequently agreed that appellant had severely beaten Noble, that Noble had bled to death from being wounded in the throat, and that appellant was later found with Noble's wallet. (2 CT 648-651.) After the court read the Grand Jury transcript describing the circumstances of the homicide, it concluded that there was a factual basis for appellant's plea to second degree murder and robbery. (2 CT 651.) Consequently, there was substantial evidence in the record for the trial court in this case to conclude that appellant's Arizona crime amounted to murder under California law.

Appellant also argues at great length that the prior homicide did not constitute murder on the theory that Noble may have accidentally fallen on the broken bottle which cut his throat and caused him to bleed to death. (AOB 146.) Appellant states,

> Did appellant intentionally cut Mr. Noble's throat with a broken bottle? Did he do it unintentionally but with knowledge that the broken bottle would inflict disfigurement or serious impairment short of death? Or did Mr. Noble fall on a broken glass due to some blow inflicted by appellant which appellant knew would cause serious physical injury? In the latter two cases, appellant committed that form of second-degree murder that does not conform to the requirements of either express-malice or implied malice murder in California.

(AOB 146.)

First, this argument disregards the Arizona trial court's finding that "aggravating circumstance exist[ed] because of the nature of the crime, the *use* of a deadly weapon, and the fact that the defendant left the victim while aid could have been rendered to him." (2 CT 439, emphasis added.) Thus, when deciding to impose an aggravated term, the trial court specifically found that appellant had "use[d]" a "weapon." The finding of weapon *use* clearly precludes appellant's fantastical "accidental fall" claim.

Second, although appellant has refrained from directly stating that the record of conviction does not contain adequate evidence to support the special circumstance finding, the net effect of his claim is a challenge based on the sufficiency of the evidence. As such, the reviewing court does not ask whether it believes that the trial evidence established guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Instead, the relevant question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Ibid.*) Under the proper standard of review, an appellate court may not set aside a conviction on a claim of insufficient evidence unless it clearly appears "*that under no hypothesis whatever* is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755, emphasis added.) Therefore, the question before this Court is not whether there was conclusive proof in the record of

conviction that appellant intentionally slashed the throat of his murder victim, but only whether a "rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. 307, 318-319, emphasis added.)

Third, as discussed previously, the intentional infliction of a disfiguring injury which results in death constitutes felony-murder with mayhem as the predicate felony. (*People v. Jentry*, *supra*, 69 Cal.App.3d 615, 627 [mayhem is predicate felony for first degree felony-murder]; *People v. Ausbie*, *supra*, 123 Cal.App.4th 855, 861 [mayhem defined as the intentional and malicious infliction of an injury which "deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip"].)

Fourth, as we have observed, the infliction of a serious physical injury resulting in death is sufficient for implied malice murder. (See *People v. Flannel*, *supra*, 25 Cal.3d at p.679; *People v. Conley*, *supra,* 64 Cal.2d at p. 322; *People v. Coddington*, *supra*, 23 Cal.4th at p.592; *People v. Johnson*, *supra*, 6 Cal.4th at p. 47;]; *People v. Poddar*, *supra*, 10 Cal.3d 750, 758, fn. 11.)

Appellant's final claim is that evidence adduced at the penalty phase "is not available to this Court to redeem what should have been adjudicated at the guilt phase," because in determining whether a foreign conviction qualifies as a sentencing enhancement, "'the trier may look to the entire record of conviction but no further.'" (AOB 149, quoting *People v. Woodell* (1998) 17 Cal.4th 448, 450-451.) Respondent is not, however, relying upon penalty phase evidence in support of their claim. Instead, our argument that the special circumstance was proved beyond a reasonable doubt is based on the relevant statutory language, the case law interpreting that statute, and the record of conviction.

Furthermore, even if appellant's prior murder conviction did not qualify as a special circumstance as he contends, it was nonetheless admissible during the penalty phase as prior violent activity. Under section 190.3, factor (b), the jury may properly consider evidence of prior violent activity, regardless of whether it resulted in a conviction. (*People v. Ray* (1996) 13 Cal.4th 313, 349-350 [under 190.3, factor (b), evidence of a defendant's violent criminality committed at any time in defendant's life permitted to show defendant's propensity for violence]; *People v. Balderas* (1985) 41 Cal.3d 144, 202 [un-adjudicated violent conduct may be introduced at the penalty phase].) Consequently, even if appellant's Arizona murder would not have been punishable as murder under California law, and therefore did not qualify as a special circumstance, it nonetheless involved violent behavior and was properly admitted as aggravating evidence at the penalty phase.[21/]

XII.

APPELLANT'S CLAIM THAT THE TRIAL COURT COMMITTED PREJUDICIAL *ROBERTSON* ERROR IS BOTH FORFEITED AND MERITLESS

During the penalty phase the prosecution presented evidence that appellant, via pleas of guilty, had previously suffered convictions in Arizona for robbery and second degree murder. (10 RT 2145.) The prosecution also presented evidence of some of the facts and circumstances underlying those two convictions, including evidence that appellant seriously beat his helpless victim, John Noble, on the morning of October 26, 1982, and then killed Noble by

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21. Because appellant does not challenge the evidentiary or legal sufficiency of the lying-in-wait special circumstance, any striking of the prior murder special circumstance would not have affected appellant's eligibility for the death penalty. (Pen. Code, § 190.2, subd. (15).) Therefore, even if insufficient evidence supported the prior murder special circumstance, evidence of the murder would nonetheless have been admissible during the penalty phase as prior violent conduct. (*People v. Balderas* (1985) 41 Cal.3d 144, 202.)

stabbing him several times in the neck with a broken beer bottle. (10 RT 2140-2142, 2143-2144, 2149, 2154-2156.) The prosecution also presented evidence that before appellant entered his guilty pleas, he told the Arizona authorities multiple and differing stories regarding the events in question. For example, at one point appellant told police he had seen another man beating Noble, and that he (appellant) took the victim's wallet "to find any identification on it that might identify that person if he should come up dead, which he did." (10 RT 2166.) At another point appellant finally admitted to police that he had fought with Noble, but maintained that Noble died because he fell on a broken beer bottle. (10 RT 2167.)

At the conclusion of the penalty phase the court instructed the jury with, among other instructions, CALJIC No. 8.85, which generally explained to the jury the circumstances in aggravation and mitigation it could consider in its penalty determination. (11 RT 2351-2353.) Included in that instruction was the following:

> In determining which penalty to be imposed on the 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 crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

(11 RT 2351-2352; see Pen. Code, § 190.3, factor (b).)

One of the purposes behind a "factor (b)" circumstance in aggravation is to establish that a defendant's prior violent criminality shows the defendant's "'propensity for violence.'" (*People v. Melton* (1988) 4 Cal.3d 713, 764,

quoting *People v. Balderas* (1985) 41 Cal.3d 144, 202.) In *People v. Robertson* (1982) 33 Cal.3d 21, this Court held that before a jury may consider "other" violent-crimes evidence in aggravation it must find, beyond a reasonable doubt, that the defendant committed the criminal activity at issue. (*Id.* at p. 54.) Indeed this Court has held that the trial court has a sua sponte duty to so instruct the jury (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281), although the court is under no obligation to specify for the jury the factor (b) criminal activity it can consider (*People v. Medina* (1995) 11 Cal.4th 699, 77-771).

Appellant contends that he was the victim of *Robertson* error. (AOB 157-160.) More specifically, appellant argues that the trial court erroneously failed to instruct the jury that before it could consider *the evidence* underlying his prior Arizona robbery and second degree murder convictions as factor (b) aggravation it had to find beyond a reasonable doubt that appellant committed the acts. And, appellant continues, the trial court, through a special instruction, expressly and erroneously told the jury that it could consider the facts and circumstances underlying his prior Arizona robbery and second degree murder convictions as factor (b) aggravation simply by finding the fact of *the convictions* true beyond a reasonable doubt. (AOB (157-160.)[22/]

Appellant concludes by claiming that this instructional error undermines the reliability of his death sentence, constituting a violation of his Eighth

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22. The premise of appellant's contention (undiscussed by him) must be that the prosecution presented evidence of the conduct underlying his Arizona robbery and murder convictions that went beyond the facts necessarily established by the convictions themselves. In *People v. Ashmus* (1991) 54 Cal.3d 932, 1000, this Court stated that a reasonable-doubt instruction is not required for a jury to consider "other" violent-criminal activity as factor (b) aggravation when the defendant has already been convicted of the crime in question *except when* the prosecution seeks "to prove conduct underlying the conviction other than the facts necessarily established." (*Id.* at pp. 1000-1001 & fn. 25.) "Surely, the conviction itself does not assure sufficient probativeness as to such other facts." (*Id.* at p. 1001, fn. 25.)

Amendment right to reliability in a capital case, and otherwise requiring reversal of the penalty judgment because there exists a reasonable possibility he would have received a more favorable penalty verdict absent the error. (AOB 160-165, citations omitted.)

Appellant is not entitled to the remedy he seeks. His assignment of error is procedurally barred, and without merit. In all events, any instructional error was harmless.

A. The Review Of The Instructions And Instructional Conference Is Detailed

At the conclusion of the presentation of the penalty phase evidence the parties met to discuss instructional issues. (10 RT 2277-2325; 11 RT 2330-2343.)

At that conference, defense counsel offered no objection to the prosecutor's proposed CALJIC No. 8.86 ("Conviction Of Other Crimes—Proof Beyond a Reasonable Doubt") (11 RT 2282, 2317), which the court ultimately read to the jury as follows:

> Evidence has been introduced for the purpose of showing that the defendant, Robert Allen Bacon, has been convicted of the crimes of murder in the second degree and robbery prior to the offense of murder in the first degree of which he's been found guilty in this case.
>
> Before you may consider any of the alleged crimes as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant, Robert Allen Bacon, was in fact convicted of the prior crimes.

11 RT 2353.)

The parties also discussed CALJIC No. 8.87 ("Other Criminal Activity — Proof Beyond a Reasonable Doubt"), which concerns Penal Code section 190.3, factor (b), with the prosecutor's proposed version listing only appellant's 1995 parole violation for possession of a firearm (see 10 RT 2186-2190), not

his 1982 Arizona robbery and second degree murder. The court offered modifications to the instruction and neither party objected. (10 RT 2282-2286, 2320.) The court ultimately read this instruction to the jury:

> Evidence has been introduced for the purpose of showing that the defendant, Robert A. Bacon, has committed the following criminal act, possession of a firearm, which involved the threat of force or violence. Before a juror may consider any criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant, Robert A. Bacon, did in fact commit the criminal act. A juror may not consider any evidence of any other criminal act as an aggravating circumstance. It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal act occurred, that juror may consider that act as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(11 RT 2356.)

The parties at other points discussed the area of "double counting" and examined appellant's proposed instruction, "No Double Counting Special Circumstances." (10 RT 2297-2298.) The court stated that it understood that Penal Code section 190.3, factor (a), allowed the jury to consider as aggravation, the circumstances of the crime, including any special circumstances found true, and that in this case appellant's appellant's prior Arizona murder conviction was the basis for the prior-murder special circumstance. The court next noted that factor (c) would also allow the jury to consider the Arizona murder conviction in aggravation. However, the court next stated, it knew the jury could not look at that murder conviction and "say there are two factors in aggravation." (10 RT 2298-2299.) The court ultimately instructed the jury:

> The People have introduced evidence of a prior conviction of the defendant for second degree murder in the state of Arizona as an aggravating factor in this case. The People have also alleged the second degree murder conviction as a special circumstance in this case. This special circumstance has been found to be true. You shall

> consider any prior felony convictions and any special circumstances found to be true in determining which penalty is to be imposed on the defendant. However, if you are satisfied beyond a reasonable doubt that the defendant was convicted previously of second degree murder, you may consider that prior conviction only once in determining the number of aggravating factors in this case.

(11 RT 2359-2360.)

The parties also discussed appellant's request that the court instruct the jury with the elements of the Arizona robbery and second degree murder he had been convicted of. Defense counsel argued that *People v. Adcox* (1988) 47 Cal.3d 207, 256, stood for the proposition that "'where evidence of a prior felony conviction is admitted as an aggravating circumstance under Section 190.3, factor (c), the prosecution or defense is entitled upon request to an instruction informing the jury of the elements underlined in the prior conviction.'" (10 RT 2301-2302.) Counsel urged that by examining the actual elements of appellant's "conviction-crimes" the jury might decide not to give the convictions aggravating weight. (10 RT 2301-2303.)

The court stated that it understood that argument, and that it knew the jury had "to find beyond a reasonable doubt" that the convictions existed in order to give the convictions aggravating weight, but the court also stated that it wanted it made clear to the jury (as the prosecutor had pointed out) that the jury did not have to make a finding that the evidence underlying appellant's convictions met all of the statutory elements in order to give the convictions aggravation weight. (10 RT 2304-2306.) Defense counsel stated that he understood that, and that he was not asking the court to instruct the jury that it had to make a finding that the evidence underlying appellant's robbery and murder met all of the statutory elements in order to give his convictions for those crimes aggravating weight. (10 RT 2304-2306.) Instead defense counsel repeated his position that he believed that if the jury compared "the elements to the facts that have been presented, underlining that it gives them some

indication as to what may have happened, how it applies to the crime by definition," that that in turn could have "some effect" on "the weight the jury would give the convictions as aggravating circumstances." (10 RT 2305.) "I'm not sure of the exact wording, but there seems to be a phrase there that basically provides that the defense as mitigation — and there is some case law out there that supports this, that the defense as mitigation can show what the facts were underlining that conviction, so as to the element, how much weight they want to provide or to give to the fact of the conviction itself." (10 RT 2306.)

The court repeated its position that it wanted the jury to understand that it did not have to determine whether or not appellant was factually guilty of his prior Arizona robbery and murder in order to give the convictions for those crimes aggravating weight. The court declared: "[T]heir task is to determine whether or not there is an aggravating circumstance by virtue of finding beyond a reasonable doubt the conviction exists." (10 RT 2306-2307.) The court additionally stated, and defense counsel agreed, that the jury could consider the evidence underlying the convictions in determining the weight to give those convictions. (10 RT 2306.) "I do believe the elements are necessary and . . . they should be appraised of the fact that by looking at the elements that's something that they can utilize in determining what weight they're going to give this factor in aggravation." (10 RT 2307.)

The court ended this portion of the instructional conference by directing both parties to prepare a concluding instruction informing the jurors that while they were being given the elements of the crimes of robbery and second degree murder in Arizona, their task in determining whether or not a prior felony conviction existed was simply to determine if the conviction itself existed. (10 RT 2307-2310.) "And if the defense wants to put in language that you can consider the facts and circumstances testified to concerning the commission of the offense to the extent that they were introduced in this trial, in deciding what

weight you want to give to that factor," the defense could do so. (10 RT 2307-2308.) The court stated it would try to draft such an instruction as well. (10 RT 2322.) The court again reiterated that, with respect to the jury: "Their task is to determine whether or not the convictions are, in fact, true beyond a reasonable doubt, and any evidence that might have been presented concerning the commission of those offenses can be considered by them in determining the weight to be given to the factor if, in fact, they find beyond a reasonable doubt that those convictions are true." (10 RT 2309-2310; see also 10 RT 2322.)

After the parties took turns drafting the special instruction at issue the court ultimately determined that it preferred its draft of the special instruction best, and both the prosecutor and defense counsel expressed agreement with the instruction. (11 RT 2333.) Hence, after instructing the jury with CALJIC No. 8.86 ("Conviction of Other Crimes — Proof Beyond A Reasonable Doubt") (11 RT 2353), and instructing the jury at length on the elements of robber and second degree murder in Arizona (11 RT 2353-2356), the court gave the jury the following special instruction:

> You have been instructed on the elements of the crime of second degree murder and robbery under Arizona law. The sole purpose of these instructions is to provide you with a better understanding of the conduct which constitutes those crimes in Arizona.
>
> While you first must be satisfied beyond a reasonable doubt that the defendant was in fact convicted of those crimes before you may consider them as an aggravating circumstance, the People need only prove in these proceedings that the defendant was convicted of those crimes. However, to the extent evidence was introduced concerning the commission of those crimes, you may consider that evidence in determining the weight to which you believe such circumstance is entitled.

(11 RT 2536.)

A. Appellant's Assignment Of Instructional Error Is Not Cognizable

Appellant asserts first that the CALJIC No. 8.87 instruction given to the jury in this case was erroneously "confined" to his 1995 conduct in possessing a firearm and erroneously failed to include the charge that "the factor (b) aspect" of his 1982 Arizona robbery and murder also "required" the beyond-a-reasonable-doubt "foundation." (AOB 158.)

This claim is procedurally barred. Indeed, *People v. Lewis* (2001) 25 Cal.4th 610, is directly on point. There, as here, the defendant argued that in instructing the jury on the defendant's prior "other" violent incidents that the jury could consider in aggravation if it was convinced beyond a reasonable doubt occurred, *the trial court omitted an incident.* (*Id.* at p. 666.) This Court held:

> Respondent argues that because a trial court is under no obligation to specify for the jury the violent criminal activity that could be considered (*People v. Medina, supra*, 11 Cal.4th at pp. 770-771), it was incumbent on defense counsel to point out the omission of the Greene incident and request a more complete instruction on the subject. We agree. The instruction as given was not erroneous, only incomplete, and "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

(*People v. Lewis, supra*, 25 Cal.4th at p. 666.)

Likewise not cognizable here is appellant's claim that the special instruction (11 RT 2356) improperly permitted the jury to consider the facts and circumstances underlying his prior Arizona robbery and second degree murder convictions as factor (b) aggravation simply by finding the fact of the convictions true beyond a reasonable doubt. Preliminarily, we note that, as we will establish *post*, given the entirety of the instructions and the arguments of counsel there is no reasonable likelihood any juror interpreted the special

instruction in the manner appellant currently posits. But in any event, even if appellant's interpretation is the correct one, he cannot assign error to the instruction because the record makes clear that *defense counsel wanted the special instruction*. (10 RT 2301-2310.) Counsel not only made his own attempt at a draft of the special instruction, but expressly approved of the court's draft because it "accurately reflect[ed] what we talked about." (11 RT 2333.) Put differently, appellant invited any error. As this Court reiterated in *People v. Lewis, supra*, 25 Cal.4th at page 667:

> "[T]he concept of invited error bars defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice'" to request the instruction. (*People v. Lucero* (2000) 23 Cal.4th 692, 723; *People v. Cooper* (1991) 53 Cal.3d 771, 831.)

(*People v. Lewis, supra*, 25 Cal.4th at p. 666.)

Here, the record of the instructional conference set forth above establishes that it appeared to defense counsel that the prosecution was not going to present the facts and circumstances underlying appellant's prior Arizona robbery and second degree murder convictions as factor (b) aggravation. To solidify that state of affairs defense counsel made the deliberate tactical choice to try to limit the evidence underlying the robbery and murder convictions *to the jury's consideration of the aggravating weight to be given to the convictions themselves* (either through factor (a) of factor (c), but not both), and counsel believed the special instruction accomplished that task. Appellant, of course, currently feels that counsel was mistaken in his interpretation of the special instruction, but that doesn't make the error any less invited. Counsel made clear that he believed that if the jury looked to the evidence underlying his conduct in committing the robbery and murder, and compared that conduct against the elements of the crimes themselves, the jury could be inclined to give less aggravating weight to the convictions than it otherwise might. That counsel felt appellant was better served by this approach

(even if it meant the facts and circumstances underlying the robbery and murder did not have to be proven beyond a reasonable doubt) than appellant would have been by an approach that expressly permitted the jury to consider the prior robbery and murder facts and circumstances as factor (b) "propensity" aggravation (even if that would have meant requiring proof beyond a reasonable doubt of the evidence underlying the robbery and murder) is the type of difficult strategic call capital defense counsel must make all the time.

C. No Instructional Error Occurred

Instructional error occurs only when, in light of all the instructions the jury received (*Francis v. Franklin* (1985) 471 U.S. 307, 315 [105 S.Ct. 1965, 85 L.Ed.2d 344]; *People v. Moore* (1988) 47 Cal.3d 63, 87), there is a reasonable likelihood that the jury either did not understand, or misinterpreted the law (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4 [112 S.Ct. 475, 116 L.Ed.2d 385]; *Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526).

Contrary to appellant's contention, there is no reasonable likelihood the jury would have believed it could consider the conduct premising his Arizona robbery and murder as factor (b) aggravation without requiring proof beyond a reasonable doubt. This is because there is no reasonable likelihood the jury would have believed it could consider the evidence underlying the prior robbery and murder as factor (b) aggravation *at all.*

The CALJIC No. 8.87 factor (b) instruction given here listed only appellant's prior possession of a firearm as a criminal act involving the threat of force or violence. Given the absence of a specification of the murder and robbery the jury would have reasonably understood that it could not consider the evidence underlying those crimes as factor (b) aggravation.

This conclusion is buttressed by the special instruction's reference to the "evidence" that "was introduced concerning the commission" of the robbery and murder. Again, that instruction read:

> You have been instructed on the elements of the crime of second degree murder and robbery under Arizona law. The sole purpose of these instructions is to provide you with a better understanding of the conduct which constitutes those crimes in Arizona.
>
> While you first must be satisfied beyond a reasonable doubt that the defendant was in fact convicted of those crimes before you may consider them as an aggravating circumstance, the People need only prove in these proceedings that the defendant was convicted of those crimes. However, to the extent evidence was introduced concerning the commission of those crimes, you may consider that evidence in determining the weight to which you believe such circumstance is entitled.

(11 RT 2536.)

The jury would not have understood the foregoing as permitting it to consider the evidence surrounding the robbery and murder convictions as factor (b) aggravation but would have understood the instruction according to its terms: That it could consider the evidence "introduced concerning the commission of" the robbery and murder in "determining the weight you believe such circumstance" (i.e., conviction) "is entitled." In other words, the jury could consider the evidence underlying the robbery and murder convictions in determining what weight to give those convictions as aggravation under either factor (a) (circumstances of the present crime) or factor (c) (prior felony convictions (the purpose of which is to show recidivism (*People v. Stanley* (1995) 10 Cal.4th 764, 821) but not both (see 11 RT 2359-2360).

The arguments of counsel buttress this conclusion even further. In *People v. Williams* (1988) 44 Cal.3d 1127, 1146-1147, this Court noted that evidence which may show other crimes does not necessarily require a *Robertson* "proof beyond a reasonable doubt" instruction where the prosecution offers it for some other purpose and does not argue that it constitutes factor (b)

"other crimes." That is this case. The prosecutor never argued that the evidence underlying the murder and robbery was factor (b) evidence.

Indeed each of the prosecutor's references in penalty summation to the robbery and murder had a distinct purpose independent of and separate from factor (b).

In his first reference the prosecutor stated:

> So in essence, the mitigating evidence boils down to a plea for sympathy and a plea for mercy. I would suggest that mercy's companion is forgiveness and a necessary precedent to forgiveness is penitence, contrition. How much contrition, how much remorse has the defendant shown? How sorry was he for the death of John Noble.
>
> You will recall during the statement that Detective Dhaemers told you about yesterday that at first it was, "I had nothing to do with it, it was the second John." Then it graduated to, "Well, it was an accident." And it finally got down to, "That guy deserved it. I went off on him because he hit my dog. He hit my dog." He even admitted that he hit his dog. "Well, as I was stealing his wallet."
>
> But Mr. Bacon is unable to see the world through anyone's eyes other than Mr. Bacon's and so he felt justified in beating and taking a broken beer bottle to a throat of some man because "he hit my dog." In that statement did he show any contrition, any remorse, and penitence, any sorrow for the death of Mr. Noble? No. "He hit my dog."

(11 RT 2376.)

With the above reference to the Arizona robbery and murder the prosecutor was not arguing factor (b) aggravation but was arguing the absence of remorse as a mitigating factor in the present case, just as it had been absent in the prior murder. The prosecutor was also reiterating an earlier point that also absent from the present case was mitigation factor (h) (mental disease or defect), and that "[t]here's no evidence that he has some mental disease other than perhaps he looks at the world through the eyes of Boe Bacon without any concern for anyone else." (11 RT 2372-2373.)

The prosecutor's next reference to the prior robbery and murder evidence reads this way:

> Look at Deborah Sammons. Did Mr. Bacon look at Deborah Sammons as a whole person? He looked at her as nothing but an object to satisfy his blood lust. Yet he has temerity to ask you to give him sympathy, the sympathy he was unable to give to Mr. Noble or to Mr. Sammons.
>
> And that was not a spur of the moment killing. Keep that in mind. The killing in Arizona was done without premeditation and when he murdered Mr. Noble and rather than be revulsed by that, rather than feel horrified by that and rather than reflecting for 11 years in State prison about what a horrible thing he had done, he was excited by that prospect. You recall his comment to Mr. L'Esperance, "The best high isn't drugs, the best high is killing people."
>
> And what's the proof of the pudding? The proof of the truth of that statement is that even though he killed someone before, he not only killed again, but he plotted and planned and premeditatedly killed someone again.
>
> Can you imagine his excitement as he waited for Deborah Sammons? Can you imagine the thrill he was anticipating as he knew she was coming, as he was going to brutally and disgustingly end her life. He asks for your mercy and your sympathy.

(11 RT 2377-2378.)

In context, reasonable jurors would not have understood the foregoing reference to the Arizona murder as an argument that they should consider that murder as factor (b) aggravation, but an argument about the absence of remorse as a mitigating factor in the present case, and an argument that because the evidence showed that appellant liked to kill, the circumstances of the present crime (factor (a)) were especially aggravating.

At another point in his summation, in telling the jury to not "double count" appellant's prior convictions for robbery and murder, the prosecutor thereafter stated:

> Now, as a practical matter, since you assign the weight it really doesn't matter where you put it, but you assign moral weight to the strength of those cases to the facts and circumstances surrounding the robbery and the murder of Mr. Noble to the facts and circumstances surrounding the possession of the firearm when he was on parole. To the facts and circumstances of the lying in wait, ambush of Deborah Sammons and the rape and sodomy thereof. And then you ask yourself, how does this scale balance off with when he was younger his dad beat him and abused him.

(11 RT 2378-2379.)

Again, here the prosecutor was not arguing the Arizona robbery and murder facts as factor (b) aggravation but was trying to argue consistently with the special instruction — that the jury could consider the robbery and murder facts in determining what weight to give the robbery and murder convictions as either factor (a) or factor (c) aggravation.

The prosecutor's fourth and final penalty phase summation to the Arizona robbery and murder facts reads as follows:

> Well, you heard the defendant's way of talking, his macho attitude as displayed to Detective Grate, "I'll meet your violence with my violence." You heard the descriptions of his conduct in Arizona. Do you really think you could be around him for very long and not know what Boe Bacon is about?

(11 RT 2380.)

Context reveals that the prosecutor made this statement as part of an argument (11 RT 2379-2380) that the jury should reject any argument the defense might make that there existed a "lingering doubt" about appellant's guilt on the present case. In other words, the prosecutor was not urging the Arizona robbery and murder facts as factor (b) aggravation, but was instead arguing that the facts and circumstances of appellant's conduct helped show what appellant was "about," and in turn, knowing what he was "about" meant knowing there existed no doubt of his guilt of the crimes against Deborah Sammons.

In sum, a close review of the prosecutor's penalty summation reveals that the *only* reference he made to factor (b) aggravation concerned appellant's possession of a firearm. After telling the jury that it had to find the fact of appellant's convictions true beyond a reasonable doubt in order to consider them as aggravation (11 RT 2367-2368), the prosecutor continued:

> The other thing that you would have to find beyond a reasonable doubt is that the defendant committed other criminal conduct in order to consider that criminal conduct, and that it relates to the possession of a firearm.
>
> You recall that the parole officer, Ms. Baker came and testified to you that she went to the defendant's residence, to the room that he said is mine, in which all his stuff was, is what she said, and looked under the pillow and there was the handgun. So I would submit to you that that has been proved beyond a reasonable doubt as well, and you are entitled to consider that.
>
> You're entitled to consider that because any conduct, whether a criminal charge was brought or not in this case he was violated on his parole, rather than a charge in a trial, you're entitled to consider any criminal conduct or criminal activity which has been proved beyond whether the charge was brought in court or not.
>
> I would submit to you that the defendant's denial, Gee, I don't know how that got there is, not sufficient to raise a reasonable doubt.
>
> You also need to find that that type of conduct involves a threat of violence. I would suggest that a person on parole for murder who possesses a loaded firearm under his pillow unlawfully presents a threat of violence because of that possession.

(11 RT 2368-2369.)

The best evidence that the prosecutor did not argue *the facts and circumstances underlying* appellant's prior Arizona robbery and second degree murder *as aggravation evidence* is that that is the conclusion defense counsel drew from the prosecutor's argument:

> Now, yes, [the prosecutor] has presented to you and argued to you aggravating circumstances. He has told you that the facts and circumstances of this crime are aggravating, that the defendant's prior conviction for second degree murder and robbery in the state of Arizona are aggravating factors. And his possession of a firearm in the state of Arizona are aggravating factors. There are no other aggravating factors that you have been presented with.

(11 RT 2393-2394.)

When defense counsel referenced the evidence underlying the Arizona robbery and murder for a second and final time it was simply to argue that those facts showed no premeditation and that the murder was not a callous and vicious one. (11 RT 2396-2398.)

No instructional error occurred here. There is no reasonable likelihood the jury would have believed it could consider the conduct premising his Arizona robbery and murder as factor (b) aggravation at all.

B. Any Instructional Error Did Not Prejudice Appellant

If this Court determines that the current issue is cognizable and that *Robertson* error occurred, appellant is not due the penalty-judgment reversal he requests. There exists no reasonable possibility the error affected the death verdict. (*People v. Hardy* (1992) 2 Cal.4th 86, 204; *People v. Brown* (1988) 46 Cal.3d 432, 446-449.)[23/]

Several reasons support a harmless-error conclusion.

First, as we have already demonstrated, the prosecutor did not argue that the evidence underlying appellant's Arizona robbery and murder was factor (b)

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23. Not only does *Brown's* "reasonable possibility" test of harmless-error review apply to *Robertson* errors (*People v. Hardy, supra*, 2 Cal.4th at p. 204) but a finding of harmlessness under Brown is equivalent to a finding that the error was harmless beyond a reasonable doubt. (*People v. Ashmus, supra*, 54 Cal.3d 932, 990 ["*Brown's* 'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test . . . are the same in substance and effect"].)

aggravation that showed appellant's propensity for violence. (11 RT 2364-2385.)

Second, the record overwhelmingly reflects that the jury, had it been instructed to do so, would have found beyond a reasonable doubt that appellant did in fact commit the acts underlying the Arizona robbery and second degree murder. Put differently, robbery and murder necessarily involve the express or implied use of force or violence. (Pen. Code, § 190.3, factor (b).) Accordingly, the only question before the jury would have been whether appellant did in fact commit the criminal acts. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720; *People v. Monterroso* (2004) 34 Cal.4th 743, 792-793; *People v. Gray* (2005) 37 Cal.4th 168, 235.) The jury knew it had to find the robbery and murder convictions true beyond a reasonable doubt. And since the jury had before it the undisputed proof that appellant had in fact been convicted of the Arizona robbery and second degree murder — indeed had pleaded guilty to it — and given that in penalty summation defense counsel conceded appellant's commission of those crimes, it is inconceivable that had the jury been given a-beyond-a-reasonable-doubt instruction regarding the commission of the acts, that the jury would have returned a more favorable verdict for appellant.

Appellant contends that a correct beyond-a-reasonable-doubt instruction with respect to the robbery and second degree murder conduct would have given the jury room to view that evidence at "different' (presumably lesser) factor (b) "levels of moral culpability." (AOB 164.) This argument is conclusory and unpersuasive. The evidence established that the robbery and murder victim John Noble died from multiple, closely-shaped cuts to the side of his neck which the pathologist opined had been inflicted with a broken beer bottle at the scene of the crime. (10 RT 2140.) The evidence also reflected that appellant had robbed Noble and literally beaten him to a pulp; Noble's body was covered with cuts, bruises, and patterned injuries which matched the soles

of appellant's boots. If the jury did in fact view this evidence as factor (b) aggravation, one fails to see how a reasonable-doubt instruction would have led the jury to find anything "morally mitigating" about the conduct.

Nor, contrary to appellant's view, would a reasonable doubt instruction have required the prosecutor to prove the "most aggravated" form of Arizona second degree murder (i.e., that appellant actually intended to kill Noble) in order for the murder to qualify as a factor (b) crime. (AOB 164.) Appellant's position is patently erroneous since a mere showing of implied violence suffices to bring a crime within the purview of factor (b). (*People v. Nakahara, supra*, 30 Cal.4th at p. 720, [trial court must find, as a matter of law, "an express or implied use of force or violence"]; accord, *People v. Monterroso, supra*, 34 Cal.4th at pp. 792-793; *People v. Gray, supra*, 37 Cal.4th at p. 235.) Furthermore, this Court has established that the People are *not* required "to prove a prior murder was committed with an intent to kill" in order for the murder to qualify as factor (b) aggravation. (*People v. Gurule* (2002) 28 Cal.4th 557, 633.) A reasonable doubt instruction would not have mandated that the prosecutor prove appellant intended to kill Noble.

In any event, the evidence of appellant's intent to kill Noble was overwhelming. Again, that intent is established not only by the evidence that Noble died from multiple, closely-spaced cuts to the side of his neck which the pathologist believed had been inflicted with a bloody broken beer bottle found at the scene of the crime, but also by the evidence that appellant had severely beaten Noble. In light of the evidence regarding the closely- spaced wounds on Noble's neck, together with other evidence reflecting a savage beating, defense counsel never attempted to make the fatuous argument that Noble died from an accidental fall onto the beer bottle (as appellant had told the Arizona authorities). Trial counsel could hardly have expected to preserve his credibility by arguing that the multiple stab wounds on John Noble's neck were the result

of Noble repeatedly rising and falling on a broken beer bottle. Nor did he argue that the multiple wounds were caused in a single blow by the jagged end of the beer bottle. Because of the hideous and brutal injuries appellant inflicted upon John Noble, defense counsel wisely chose to focus on his argument that the Arizona murder was not premeditated and thus was a prior conviction that was less aggravating than it might otherwise have been. (11 RT 2396-2398.)

The bottom line here is that the prosecution presented a very strong case in aggravation apart from the evidence underlying the Arizona robbery and second degree murder. There existed the convictions for those offenses; appellant's parole violation for possessing a firearm; and the particularly heinous facts and circumstances of the capital crime. The jury also had before it the appellant's mitigation evidence establishing his abuse-filled and deprived childhood. The jury nevertheless returned a death verdict, and there exists no reasonable possibility that it would have returned a more favorable verdict for appellant had it been instructed that it could only consider the evidence underlying the Arizona robbery and second degree murder as factor (b) aggravation if it found the facts of *that conduct* (as apart from the fact of *the convictions*) proved beyond a reasonable doubt. Consequently, appellant cannot establish that the instructions given violated his right to a reliable penalty verdict. (See *People v. Avila* (2006) 38 Cal.4th 491, 527, fn.22.)

XIII.

APPELLANT WAS NOT ENTITLED TO A VOLUNTARY MANSLAUGHTER INSTRUCTION

Appellant argues that the trial court's refusal to instruct the jury on Arizona's definition of voluntary manslaughter was prejudicial error because in capital cases, "the defendant, on request, may be entitled to instructions on legal points pertinent to a factor (b) or (c) crime that betoken or manifest some lesser degree of moral culpability for that crime." (AOB 167.) Because

appellant had already been found to have committed a prior *murder* during the guilt phase, appellant was precluded from re-litigating his liability for murder in the penalty phase, and therefore was not entitled to an instruction on voluntary manslaughter.

Appellant cites *People v. Adcox* (1988) 47 Cal.3d 207, for the proposition that the trial court erred by refusing to instruct the jury on the elements of Arizona's voluntary manslaughter statute. In *Adcox*, the prosecutor submitted "documentary evidence" that defendant had been convicted of "shooting at an inhabited dwelling," and introduced the record of that conviction as an aggravating circumstance in the penalty phase. (*Id.* at p. 254.) The prosecutor requested that the jury be given a factor (c) instruction defining the elements of the defendant's prior conviction for shooting at an inhabited dwelling. The instruction on that offense stated in relevant part that "a firearm was discharged by the person at an inhabited dwelling house and . . . [t]hat such act was done maliciously and willfully." (*Id.* at p. 256.) The parties were aware, however, that the defendant had not been the actual shooter in that crime, but instead had acted as aider and abetter by driving the getaway vehicle. (*Ibid.*) *Adcox* held that the trial court had erred by only instructing the jury on the prima facie elements of the crime, without giving any clarifying instruction explaining the defendant's actual involvement in the offense. (*Ibid.*) In so holding, the Court stated:

> [W]here–as here–the parties are apprised of facts concerning the defendant's role in, or commission of, the prior offense, which are inconsistent with the standard instruction on the elements of such offense, an appropriate clarifying instruction should be sought, or stipulation obtained, to accurately characterize the nature of the aggravating prior felony conviction being placed before the jury.

(*People v. Adcox*, *supra*, 47 Cal.3d 247, 256.)

The Court thus concluded that "the giving of standard CALJIC No. 9.03.1 was misleading because, although that instruction conveyed the elements of the offense of shooting at an inhabited dwelling, it failed to distinguish defendant's arguably less culpable role as an aider-abettor ('wheel man') in the incident." (*People v. Adcox*, *supra*, 47 Cal.3d 247, 256.)

Adcox is inapposite. In this case, appellant had already been found guilty of committing a prior murder in the guilt phase, a special circumstance finding that was not required to be re-proven in the penalty phase. (See *People v. Montiel* (1993) 5 Cal.4th 877, 942 [special circumstance finding need not be re-proven in the penalty phase].) Therefore, he was certainly not entitled to manslaughter instructions after he had already been found guilty of murder.

Moreover, even if there had been no prior murder special circumstance finding during the guilt phase, it is undisputed that appellant alone viciously beat his unarmed victim who died from multiple stab wounds to his throat. (10 RT 2140.) Unlike the situation in *Adcox*, where the defendant was not the actual shooter, appellant was the sole perpetrator of a vicious killing which, by his guilty plea, he admitted was second degree murder. Therefore, since appellant was convicted as the direct perpetrator of the murder, rather than as an aider and abetter, there was nothing "misleading" about the instructions given and the *Adcox* rationale is not present in this case.

Finally, nothing in *Adcox* suggests that the penalty phase is a forum for defendants to attempt to re-write history by arguing that they committed a lesser crime than the one to which they pleaded guilty, and which has already been found to constitute a prior murder during the guilt phase. Indeed, *Adcox* did not hold or even imply, that a defendant who has pleaded guilty to one crime is then entitled to instruction on a series of lesser included offenses. Instead, the defendant is merely entitled to a clarifying instruction when the "defendant's role in, or commission of, the prior offense" is "inconsistent with the standard

instruction on the elements of such offense." *(People v. Adcox, supra*, 47 Cal.3d 247, 256.) Because appellant had already been found guilty of murder in the guilt phase, and nothing in the conduct underlying appellant's second degree murder conviction was inconsistent with the standard instruction, *Adcox* does not support appellant's request for a voluntary manslaughter instruction.

Appellant next claims that *People v. Price* (1991) 1 Cal.4th 324, "suggest[s] that [a] factor (b) instruction on the lesser included offense of voluntary manslaughter should be given on request." (AOB 167.) *Price* did no such thing. In *Price*, evidence of an *unadjudicated* homicide was introduced. The jury was given first degree and felony-murder instructions regarding the alleged unadjudicated homicide. The defendant did not request instructions on the lesser offenses of second degree murder and voluntary manslaughter. The *Price* Court held that "the trial court was under no duty to instruct on those offenses" because the "defendant did not request" that those instructions be given (*Id.* at p. 489.) The Court further held that the defendant had not been prejudiced by an inapplicable felony-murder instruction because "the jury would make its own evaluation of the aggravating force of defendant's conduct without regard to its legal label." (*Id.* at p. 490.)

Similarly here, appellant's conduct was at issue, rather than the specific legal label for his crime. Regardless of whether it was called murder or manslaughter, it was undisputed that appellant had viciously beaten an unarmed man who bled to death from injuries to his throat regardless of whether those injuries were inflicted intentionally or accidentally. Here, as in *Price*, the legal label attached to such conduct was essentially immaterial.

Citing *People v. Flanel* (1979) 25 Cal.3d 668, 680-681, appellant further argues that a voluntary manslaughter instruction was appropriate under the general rule that a trial court is required "to instruct on specific points of evidence or special theories that might be applicable to the particular case."

(AOB 167.) Appellant claims that a manslaughter instruction was warranted under this doctrine because manslaughter is merely a mitigated form of murder which requires the "jury to make not so much a factual distinction but a *normative* distinction." (AOB 169.)

Once again, this claim is precluded because appellant had already been convicted of a prior murder in the guilt phase, and the penalty phase was not the forum in which he could attempt to re-characterize the special circumstance finding as being one for manslaughter, rather than for murder.

Furthermore, assuming arguendo that the jury should have been instructed on manslaughter, appellant cannot demonstrate a reasonable likelihood that he would have received a more favorable result in the penalty phase. Even under appellant's most self-serving version of events, he beat an unarmed man to death who purportedly fell on a broken bottle, thereby causing him to bleed to death from wounds to his throat. Whether appellant wishes to call it manslaughter, rather than murder, is essentially irrelevant because the underlying facts remain the same.

Appellant's last argument is that the refusal to give a voluntary manslaughter instruction violated his Eighth Amendment right to present mitigation evidence at the penalty proceeding. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276.) The refusal to give an irrelevant *instruction*, however, did not constitute a refusal to allow the introduction of mitigating *evidence*. As a matter of common sense, an instruction on legal standards certainly does not qualify as evidence. Appellant has not cited a single shred of evidence — whether testimonial or documentary — that he was precluded from presenting during the penalty phase. Consequently, his Eighth Amendment claim fails. (*Buchanan v. Angelone, supra*, 522 U.S. 269, 276.)

XIV.

APPELLANT'S PAROLE VIOLATION CONSTITUTED PROPER FACTOR (b) EVIDENCE

Appellant contends the trial court erroneously allowed evidence of a parole violation in which a loaded handgun was found underneath his bedroom pillow. Appellant asserts that the parole violation did not qualify as aggravating evidence under section 190.3, factor (b), because the possession of a loaded handgun did not constitute an "implied threat to use force or violence." (AOB 172.) Appellant is incorrect. As a parolee, appellant was in constructive custody, thereby rendering his possession of a loaded firearm admissible under factor (b).

A. The Trial Court's Ruling

During the penalty phase, the prosecutor sought to admit evidence of the parole violation for possession of a handgun as aggravating evidence under factor (b). (10 RT 2111.) The court denied appellant's motion to exclude the evidence, stating:

> And in looking at the circumstances of the discovery of that weapon, I would conclude that the location of the weapon, which would render it readily available for use by a person laying on the bed where it apparently it was found, coupled with the defendant's quasi-custodial status as a parolee at the time and the potential consequences of him being found in possession of that firearm, leads me to the conclusion that the possession of the weapon involved the implied threat of force or violence at the time. And therefore it is admissible pursuant to Penal Code section 190.3(b).

(10 RT 2112.) In so finding, the court emphasized that appellant's custodial status "increased the likelihood or potential for violent use of that weapon" based on the potential consequences of him being found in possession of the weapon. (10 RT 2113.)

B. Applicable Law

Under Penal Code section 190.3, factor (b), a prosecutor may introduce evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, subdivision (b).) An ex-felon's possession of a firearm "is not, in every circumstance, an act committed with actual or implied force or violence." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1235 citing *People v. Dyer* (1988) 45 Cal.3d 26, 76.) It is established, however, that an *inmate's* possession of any dangerous weapon necessarily constitutes proper factor (b) evidence. Thus, in *People v. Tuilaepa* (1992) 4 Cal.4th 569, this Court stated:

> It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner. (Citations.) The trier of fact is free to consider any "innocent explanation" for defendant's possession of the item, but such inferences do not render the evidence inadmissible per se. (Citation.)

(*People v. Tuilaepa*, *supra*, 4 Cal.4th 569, 589 [inmate's possession of razor blades and battery pack presented implied threat of violence]; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [inmate's possession of razor blades properly admitted].) As stated in *People v. Ramirez* (1990) 50 Cal.3d 1158, an inmate's possession of a weapon "'is prohibited precisely because such an implement is a 'classic instrument[ ] of violence' that is 'normally used only for criminal purposes.'" (*Id.* at pp. 1186-1187 [internal citations omitted]; accord, *People v. Quartermain* (1997) 16 Cal.4th 600, 631 [ex-felon's "possession of sawed-off firearms and silencer materials carries an implied threat of violence because their obvious purpose is to harm humans"]; *People v. Garceau* (1993) 6 Cal.4th 140, 203, [defendant's illegal possession of an arsenal including a

machine gun, silencers, and handguns "clearly involved" an implied threat to use force or violence].)

As a parolee, appellant was in constructive custody. Accordingly, he was similarly situated to prisoners who were in actual custody, thereby rendering his possession of a handgun admissible under factor (b). In *People v. Lewis* (1999) 74 Cal.App.4th 662, the court summarized a parolee's custodial status as follows:

> In California, parolee status carries distinct disadvantages when compared to the situation of the law-abiding citizen. Even when released from actual confinement, a parolee is still constructively a prisoner subject to correctional authorities. (E.g., *In re Marzec* (1945) 25 Cal.2d 794, 797; *In re Taylor* (1932) 216 Cal. 113, 115; Matter of Application of Stanton (1915) 169 Cal. 607, 610; *Prison Law Office v. Koenig* (1986) 186 Cal.App.3d 560, 566-567; cf. *People v. Reyes*, *supra*, 19 Cal.4th 743, 752 [characterizing parolee as "a convicted felon still subject to the Department of Corrections"].) The United States Supreme Court has characterized parole as "an established variation on imprisonment" and a parolee as possessing "not . . . the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477, 480; accord, *Griffin v. Wisconsin*, *supra*, 483 U.S. 868, 873-875.) Our own Supreme Court holds a like opinion: "Although a parolee is no longer confined in prison his custody status is one which requires . . . restrictions which may not be imposed on members of the public generally." (*People v. Burgener*, *supra*, 41 Cal.3d 505, 531; see *People v. Reyes*, *supra*, at p. 753 ["parolees . . . are subject to limitations not applicable to ordinary citizens"].) Thus it has been held that by virtue of the parolee's status as one who remains in custodia legis of correctional authorities, "standard concepts of arrest and probable cause have little relevance," and a parolee's "apprehension, although outwardly resembling arrest," is simply a return from constructive to actual custody, regardless of whether the apprehension is effected by police or parole officers. (*People v. Giles* (1965) 233 Cal.App.2d 643, 647; *People v. Hernandez* (1964) 229 Cal.App.2d 143, 148; *People v. Denne* (1956) 141 Cal.App.2d 499, 507-510; cf. Pen. Code, § 3056 ["Prisoners on

> parole shall remain under the legal custody of the department [of corrections] and shall be subject at any time to be taken back within the . . . prison"]; *United States v. Polito* (2d Cir. 1978) 583 F.2d 48, 55.)

(*People v. Lewis*, *supra*, 74 Cal.App.4th 662, 669-670; accord, *People v. Jefferson* (1999) 21 Cal.4th 86, 95 ["all parolees remain in the constructive custody of the Department of Corrections and may be incarcerated for violating the terms and conditions of parole"].)

C. Analysis

In this case, appellant does not dispute that he was in constructive custody as a parolee. (AOB 173.) Nevertheless, he believes that he should not be subject to case law holding that defendants who possess weapons in custodial settings come within factor (b). Citing *People v. Holloway* (2004) 33 Cal.4th 96, appellant asserts that constructive custody "is not identical with actual custody, and it is not treated as actual custody for all purposes." (AOB 173.) *Holloway*, however, did not address any issue concerning the differences, if any, between actual and constructive custody. Instead, *Holloway* simply held that a suspect is not in custody for purposes of *Miranda* simply by virtue of being a parolee. (*Id.* at pp. 120-121.) It shed no light on the issue to be considered here: whether appellant's status as a parolee created an elevated threat of implied violence arising from his possession of a loaded, concealed handgun.

Appellant next posits that the custodial weapon rule exists because of "patent and obvious" security concerns that exist in a custodial setting, but that are not present in a parole context. (AOB 174.) Accordingly, he concludes that "possession of a weapon by a parolee is no different in any regard than the possession of a weapon by a convicted felon who has successfully completed parole." (AOB 174.) Appellant further observes that unlike the circumstances

in *People v. Quartermain* (1997) 16 Cal.4th 600, 631 and *People v. Garceau* (1993) 6 Cal.4th 140, 203, where the defendants possessed arsenals of weapons, he merely possessed a single handgun stored under his pillow in a manner to suggest self-defense, rather than a threat of violence. (AOB 173.)

Appellant's reasoning is faulty. As a parolee, appellant was subject to a search condition which is precisely how the loaded handgun was discovered. (10 RT 2187-2188.) Just as weapons possessed by inmates pose a significant threat to the safety of prison staff who must search and interact with inmates, weapons possessed by parolees pose an equal, if not greater, threat to parole officials who must also search and interact with parolees outside the closed confines of a secure prison setting. Because a parolee is subject to forced and unwelcome interaction with parole officials on a regular basis, a parolee in possession of a weapon poses a far greater threat than does an ex-felon in possession of a weapon who is not subject to the same type of forced interaction with law enforcement on a routine basis Therefore, a parolee's possession of a weapon cannot, contrary to appellant's claim, be equated with an ex-felon's possession of a weapon; rather, a parolee's weapon possession shares attributes with, and is more akin to, a prisoner's possession of a weapon.

Furthermore, the nature of the weapon found in this case — a *loaded* handgun — made it particularly dangerous for law enforcement personnel searching appellant's residence because it was capable of inflicting death or significant bodily injury with the mere pull of a trigger. Indeed, a handgun is inherently more lethal than razor blades (*Tuilaepa*; *Martinez*), and can be used from a distance without any need for close contact with the potential victim. Moreover, as a convicted murderer who had savagely beaten and stabbed his victim to death, appellant was an especially dangerous parolee who had already proved himself to be capable of extraordinary brutality and violence. Thus, under these circumstances, appellant's loaded hand gun was a "classic

instrument of violence," the "obvious purpose" of which was to "harm humans." (*People v. Garceau*, *supra*, 6 Cal.4th 140, 203; *People v. Ramirez*, *supra*, 50 Cal.3d 1158, 1186-1187.) As such, evidence of his possession of such a weapon was properly admitted under factor (b).

Nevertheless, appellant argues that the court erred by instructing the jury that "evidence has been introduced for the purpose of showing that . . . [appellant] . . . committed the following criminal act: possession of a firearm, which involved the threat of force or violence." (11 RT 2356.) Appellant states, "To tell the jurors that a nonviolent felony in fact is violent as a matter of law effectively injects an element of bias and caprice into the sentencing decision," thereby constituting an Eighth Amendment violation under *Tuilaepa v. California* (1994) 512 U.S. 967, 973.) (AOB 175.)

Case law refutes this claim. As discussed previously, this Court has repeatedly held that the "question whether the acts occurred is certainly a factual matter for the jury, but the characterization of those acts as involving an *express or implied* use of force or violence" is "a legal matter properly decided by the court." (*People v. Nakahara* (2003) 30 Cal.4th 705, 720, emphasis added; accord, *People v. Monterroso* (2004) 34 Cal.4th 743, 792-793; *People v. Gray* (2005) 37 Cal.4th 168, 235.)

Once the trial court has made the initial legal determination that the alleged offense involved implied or actual violence, each juror was then required to determine whether he was satisfied beyond a reasonable doubt that the incident had actually taken place before he could consider that evidence as an aggravating factor. (*People v. Millwee* (1998) 18 Cal.4th 96, 161, fn. 30.) The jury was then free to consider any evidence demonstrating that the incident had not been proved, or that there was an innocent explanation for the conduct. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.)

In this case, there was nothing arbitrary or capricious about the trial court's initial determination that a parolee in possession of a loaded handgun under his pillow involved an implied threat of force or violence. (*United States v. Tuilaepa* (1994) 512 U.S. 967, 973 [State required to ensure that penalty phase "is neutral and principled so as to guard against bias or caprice in the sentencing decision"].) This ruling is particularly well-founded where, as here, the parolee is a convicted murderer who has shown himself capable of great violence. Appellant could have attempted to rebut the implication of violence by presenting an "'innocent explanation' for [his] possession of the item," but did not do so. (*People v. Tuilaepa*, *supra*, 4 Cal.4th 569, 589 [inmate's possession of razor blades and battery pack presented implied threat of violence].) Given appellant's history of violence, as well as the inherently lethal nature of the weapon found, there was nothing arbitrary or capricious in utilizing this evidence during the penalty phase. (See *United States v. Tuilaepa*, *supra*, 512 U.S. 967, 973.)

XV.

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS DID NOT PREJUDICE APPELLANT AT THE PENALTY PHASE

Appellant asserts that the trial court's refusal to suppress his statements to the police as being taken in violation of *Miranda* prejudiced him because the prosecutor relied upon those statements when arguing that he should receive the death penalty. (AOB 176-177.) Because appellant did not make an unequivocal request for counsel, the statements were properly admitted. Consequently, appellant cannot show any improper prejudice at the penalty phase.

As discussed in Argument II, appellant's statement — "Yeah, I think it'd probably be a good idea . . . for me to get an attorney"— did not constitute an unequivocal request for an attorney which mandated an immediate cessation

of questioning. Rather, his statement closely resembled those deemed ambiguous in *Davis*, *Crittenden* and *Stitely*. (*Davis v. United States*, *supra*, 512 U.S. at p. 459 ["maybe I should talk to a lawyer"]; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 130-131 ["Did you say I could have a lawyer?"]; *People v. Stitely*, *supra*, 35 Cal.4th 514 at p. 534 ["I think it's about time for me to stop talking"]; accord, *People v. Clark* (1993) 5 Cal.4th 950, 989 [defendant's statement, "what can an attorney do for me," was not necessarily a request for one]; *People v. Thompson* (1990) 50 Cal.3d 134, 165-166 [context of interview showed that defendant's references to counsel during interrogation were not an invocation of his right to counsel]; *People v. Jennings* (1988) 46 Cal.3d 963, 977 [frustrated suspect's statement, "that's it, I shut up,"not invocation of right to remain silent]; *People v. Silva* (1988) 45 Cal.3d 604, 629-630 [suspect's statement that he did not "want to talk about that," was not an invocation of the right to silence, but merely indicated unwillingness to discuss a certain subject]; *People v. Ashmus* (1991) 54 Cal.3d 93, 968 [the defendant's continued conversation with the police after statement, "I ain't saying no more,"demonstrated that he was not invoking Fifth Amendment rights]; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 23-24 [the defendant's question whether "he could call a lawyer or his mom,"not an unequivocal request for counsel]; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153 ["There wouldn't be [an attorney] running around here now, would there? . . . I just don't know what to do," not an unambiguous request for counsel].)

Like the circumstances in *Davis*, *Stitely*, and *Crittenden*, appellant's ambiguous comment was followed by multiple reminders of his right to counsel. (1 CT 85-86.) Appellant, however, did not choose to exercise his right to counsel when reminded three times of his right to do so. Rather, he affirmatively implored Detective Grate to continue the interview by repeatedly stating, "Talk to me." (1 CT 85-87.) Under these circumstances, appellant

cannot establish that the statements made after his ambiguous reference to counsel, were improperly admitted into evidence.

Nor did the prosecutor improperly rely on those statements during the penalty phase. It is established that Fifth Amendment protections, including the *Miranda* rule, apply to both the guilt and penalty phase of a trial. (*Estelle v. Smith* (1981) 451 U.S. 454, 462-463; see also *People v. Huggins* (2006) 38 Cal.4th 175, 254; *People v. Wash* (1993) 6 Cal.4th 215, 241, fn. 6.)

During the penalty phase, the defense argued that appellant should not receive the death penalty because of maternal neglect, as well as the horrible abuse appellant suffered at the hands of his stepfather. (11 RT 2394-2402.) The prosecutor countered that the aggravated nature of the current crime, as well as his past murder, outweighed the mitigating factor of appellant's abuse-filled childhood. In discussing the circumstances of the Arizona murder, the prosecutor emphasized appellant's callous attitude towards the victim, and his lack of any remorse, stating:

> So in essence, the mitigating evidence boils down to a plea for sympathy and a plea for mercy. I would suggest that mercy's companion is forgiveness and a necessary precedent to forgiveness is penitence, contrition. How much contrition, how much remorse has the defendant shown? How sorry was he for the death of John Noble? You will recall during the statement that Detective Dhaemers told you about yesterday that at first it was, "I had nothing to do with it, it was the second John." Then it graduated to, "Well, it was an accident." And it finally got down to, "That guy deserved it. I went off on him because he hit my dog. He hit my dog." He even admitted that he hit his dog. "Well, as I was stealing his wallet." But Mr. Bacon is unable to see the world through anyone's eyes other than Mr. Bacon's and so he felt justified in beating and taking a broken beer bottle to a throat of some man because "he hit my dog." In that statement did he show any contrition, any remorse, any penitence, any sorrow for the death of Mr. Noble? No. "He hit my dog."

(11 RT 2376.)

The prosecutor then emphasized that appellant exhibited the same unfeeling attitude towards Deborah, and made the following argument:

> And what was his attitude toward the murder of Deborah Sammons. It was even worse. To Detective Grate, he did not say, "I'm sorry for what I did." And perhaps even worse is that in his story to Detective Grate, his ultimate story, he indicated to Detective Grate that he hadn't actually killed this woman, but he had had this marvelously great relationship, very brief period of time, though it was, with her. He liked her. He had this attraction to her. Even when he is lying to Detective Grate, he is still unable to project any feeling of compassion towards Deborah Sammons. He doesn't say, "I didn't do it. But when Charlie Sammons brought me back in there, I felt so sorry for that poor woman. This is the woman that I had some feeling for, I felt bad for her, it was horrible what happened to her." No. What did he say? What did he say to Detective Grate? "What did she look like?" "I didn't want to screw her." He was unable to show any compassion, even in his lies, he's unable to show any compassion for anyone else.

(11 RT 2377.)

The prosecutor further commented that appellant did not simply lack remorse for his vicious crimes, he positively relished them.

> Look at Deborah Sammons. Did Mr. Bacon look at Deborah Sammons as a whole person? He looked at her as nothing but an object to satisfy his blood lust. Yet he has the temerity to ask you to give him sympathy, the sympathy he was unwilling to give to Mr. Noble or to Mrs. Sammons. And that was not a spur of the moment killing. Keep that in mind. The killing in Arizona was done without premeditation when he murdered Mr. Noble and rather than feel revulsed by that, rather than feel horrified by that and rather than reflecting for 11 years in State prison about what a horrible thing he had done, he was excited by that prospect. You recall his comment to Mr. L'Esperance, "The best high isn't drugs, the best high is killing people."

(11 RT 2377-2378.)

Appellant argues that the prosecutor "might possibly" have been able to make the same argument without his statements to Grate, but that "its force would [have] been severely diminished." (AOB 177.) The foregoing record refutes this claim. The evidence concerning appellant's murder of John Noble, as well as his comments on the intoxicating effect of murder, were completely independent of appellant's statement to Grate. Not only did appellant speak about the intoxicating effects of murder, he also bragged to L'Esperance that he had "fucked the bitch in the ass." (7 RT 1420.)

In addition, appellant exhibited the same depraved attitude in his statements to Detective Grate *before* the reference to counsel. Thus, appellant's videotaped statement reflects that upon being informed of Deborah's murder, appellant simply stated, "No way," but said nothing to indicate he was horrified or distressed to hear this news. (1 CT 68.) Instead, appellant later asked, "How was she done?" (1 CT 81.) That irrefutable statement, standing alone, provided ample support for the prosecutor's description of appellant's barbaric nature. Furthermore, after "learning" that Deborah had been murdered, appellant acknowledged that he had "fucked her." (1 CT 75, 82.) It is apparent, therefore, that even if the statements were excluded after appellant's reference to counsel, there was abundant other admissible evidence from which one could conclude that appellant was an unrepentant, sadistic sociopath. Given this context, as well as the utterly vicious nature of the crime itself, appellant cannot establish any reasonable likelihood that he would have been sentenced to life imprisonment absent his statements to Grate. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, appellant's claim fails.

XVI.

APPELLANT'S CONSENT DEFENSE DID NOT PROVIDE RESIDUAL DOUBT

In argument I, appellant claimed the trial court prejudicially erred by refusing to admit a note he wrote which contained Deborah's name and work address, as well as a phone number which was not connected to Deborah. Appellant argued that the excluded evidence objectively corroborated his consent defense which would have disproved his involvement in Deborah's murder. Appellant now asserts that even if the trial court's ruling was not prejudicial in the guilt phase, the exclusion of the note prejudiced him in the penalty phase by hampering his ability to "present the mitigating defense of lingering or residual doubt." (AOB 178.) Appellant is wrong. The note was properly excluded for lack of a foundational showing that Deborah provided the information. Furthermore, because defense counsel never attempted to establish residual doubt by claiming consensual sex, he cannot demonstrate that the exclusion of the note prejudiced him at the penalty phase.

As discussed in Argument I, the trial court properly excluded the note based on appellant's failure to provide any foundational *evidence* showing as to *who* provided the information on the note, or *why* such information was provided. (8 RT 1568.) Although given the opportunity to make such a foundational showing, appellant declined to do so and essentially asked the trial court to assume that Deborah must have provided him with this information since Charlie denied giving him the information. The trial court rejected these proposed inferences, noting that Charlie's credibility was dubious at best, and that appellant could have easily obtained this information during the two days in which he lived in the Sammons's family residence. Consequently, the trial court did not abuse its discretion in excluding the note. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1120.)

Furthermore, appellant could not have been prejudiced by the exclusion of the note because defense counsel did not rely on a consensual sex defense when arguing that lingering doubt existed. At trial, the court gave the following instruction on the concept of lingering doubt:

> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt. Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate.

(11 RT 2357.)

This Court has established that a "defendant may assert his possible innocence to the jury as a factor in mitigation under section 190.3, factors (a) and (k). (Citations.) But there is no requirement, under either state or federal law, that the court specifically instruct the jury to consider any residual doubt of defendant's guilt. (Citations.)" (*People v. Sanchez* (1995) 12 Cal.4th 1, 77; accord, *Penry v. Lynaugh* (1989) 492 U.S. 302, 320 [lingering or residual doubt as to guilt is not a constitutionally mandated mitigating factor]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1240.)

In this case, defense counsel argued that residual doubt existed because Charlie, the aggrieved husband, had the strongest motive to murder Deborah. Defense counsel further pointed to evidence that Charlie's gun had tested positive for the presence of blood, and that he had bloody shoes, thereby implying that Charlie had beaten Deborah with the gun while he murdered her. (11 RT 2395-2396.) In making his residual doubt argument, defense counsel made absolutely no reference, oblique or otherwise, to the notion that Deborah

had engaged in consensual anal sex with appellant minutes after meeting him in her estranged husband's home. (11 RT 2386-2406.)

Given the patent absurdity of that claim, counsel undoubtedly did not wish to offend the jury's common sense by proffering such a canard as a basis for residual doubt. Furthermore, even if the note had been admitted by the trial court, there is no reason to conclude that defense counsel would have altered his strategic decision not to rely on a consensual sex defense when arguing residual doubt. With or without the note, the claim was wildly implausible. Simply put, no reasonable jury would believe that Deborah would have had consensual sex with a complete stranger right in her jealous husband's bedroom. Nor, if appellant's statement to police were to be believed, would a jury think that appellant would have chosen to have consensual sex with Deborah after her madly jealous husband had just asked him to kill her. Because of the inherent weakness of the consensual sex defense, counsel wisely focused solely on Charlie's motive for the murder when arguing residual doubt. Accordingly, because in the first place, and counsel never raised a consensual sex defense when arguing residual doubt, appellant cannot show that the exclusion of the note adversely affected the penalty determination. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

XVII.

THE TRIAL COURT'S REFUSAL TO GIVE JUSTICE KENNARD'S CAUTIONARY INSTRUCTION DID NOT AFFECT THE PENALTY DETERMINATION

In Argument VII, appellant asserted that the failure to give the cautionary instruction formulated by Justice Kennard in *People v. Guiuan* (1998) 18 Cal.4th 558, prejudiced him in the guilt phase by not providing a proper framework for the jury to view Charlie's testimony. (AOB 179.) Expanding upon this theme, appellant claims that the lack of such an instruction

during the penalty phase impeded his ability to argue lingering doubt by impugning Charlie's credibility on the basis that he was an accomplice seeking leniency. (AOB 179-180.) Appellant is wrong. The instruction was properly denied during the guilt phase. Moreover, counsel never requested the instruction in the penalty phase and did not seek to discredit Charlie's credibility on the basis that he was an accomplice seeking leniency.

The trial court correctly denied the requested instruction during the guilt phase, and instead modified the standard accomplice instruction by specifically directing the jury to consider whether Charlie had any expectation of benefits which might induce him to provide false testimony. Thus, rather than simply directing the jury to consider Charlie's testimony with "care and caution" as the standard instruction provides, the instruction in this case specifically directed the jury to consider whether Charlie's testimony was influenced by the hope for favorable treatment. (9 RT 1918 ["You should consider the extent to which his testimony may have been influenced by the receipt of or expectation of any benefits in return for his testimony. You should also consider anything that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to any interest he may have in the outcome of the defendant's trial"].)

This modification to the standard instruction was then emphasized by defense counsel who repeatedly exhorted the jury to disbelieve Charlie's testimony on the basis that he was hoping to receive lenient treatment for himself by falsely implicating appellant in the murder. (9 RT 1978-1979.) The prosecutor likewise acknowledged that Charlie hoped for lenient treatment and would attempt to minimize his culpability. (6 RT 1098-1099; 9 RT 2023.) Thus, based on the instruction given, as well as counsels' arguments regarding Charlie's motive to lie, the jury was fully aware of its duty to view Charlie's testimony with the appropriate degree of skepticism.

Furthermore, defense counsel never sought a *Guiuan* instruction in the penalty phase, and did not attempt to discredit Charlie's credibility on the basis that he was an accomplice seeking leniency. Instead, defense counsel argued that appellant should not receive a death sentence because the jury may have had a lingering doubt about appellant's role in the murder because Charlie had the greatest motive to kill Deborah. Defense counsel stated:

> Did Charles Sammons' testimony and the credibility of it and his role and responsibility create in you in your hearts some residual or lingering doubt? So the concept of rage, a rage killing, who had the rage and motive, Mr. Sammons or Mr. Bacon, that may have caused some lingering or residual doubt? Was it the blood spattered all over the white shoes of Mr. Sammons, who by his own testimony doesn't even own a pair of white Nikes? Something that may cause you a residual or lingering doubt. We saw photographs of the crowbar again, a crowbar that had the absence of any physical evidence or anything of significant evidentiary value, but again, according to a pathologist, was a nice fit. Is it a crowbar or blood presumptively found in the barrel of Charles Sammons' registered gun in the bathroom of his house that may cause you to have some residual or lingering doubt regarding Mr. Bacon's role in this crime. If it's not there, then you disregard it. But if it is there, ladies and gentlemen, it is a factor in mitigation for you to consider, to weigh and carefully evaluate.

(11 RT 2395-2396.) It is apparent from the foregoing that defense counsel never even discussed the idea that Charlie should be disbelieved because he was an accomplice seeking leniency. Rather, defense counsel focused on Charlie's personal motive for the murder, as well as forensic evidence supporting the defense theory that Charlie had beaten Deborah with his gun as he murdered her. Since defense counsel never attacked Charlie's credibility on the grounds set forth in the *Guiuan* instruction, appellant cannot show that the refusal to give Justice Kennard's instruction affected the penalty determination. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

XVIII.

CALIFORNIA'S DEATH PENALTY IS CONSTITUTIONAL AND PROVIDES A MEANINGFUL DISTINCTION BETWEEN CAPITAL AND NON-CAPITAL MURDERS

Appellant asserts that the broad scope of the special circumstances in section 190.2 virtually renders "every murderer death-eligible." (AOB 180-181.) Based on this premise, appellant then argues that section 190.2 violates the Eighth Amendment's proscription against cruel and unusual punishment by failing to "distinguish meaningfully between 'the few cases in which the death penalty is imposed from the many in which it is not.' [Citation]." (AOB 180.) This Court has concluded otherwise. (*People v. Boyer* (2006) 38 Cal.4th 412, 483; *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Ayala* (2000) 23 Cal.4th 225, 303; *People v. Frye* (1998) 18 Cal.4th 894, 1028-1029.)

XIX.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE JURY FIND THAT A VERDICT OF DEATH IS APPROPRIATE BEYOND A REASONABLE DOUBT

Appellant argues that because the imposition of the death penalty requires a heightened standard of reliability, the decision to impose a finding of death must be based upon proof beyond a reasonable doubt. (AOB 181.) This Court's recent decisions in *People v. Chatman* (2006) 38 Cal.4th 344, 409, and *People v. Young* (2005) 34 Cal.4th 1149, 1233, foreclose this contention.

XX.

THERE IS NO CONSTITUTIONAL REQUIREMENT OF JUROR UNANIMITY AS TO AGGRAVATING FACTORS

Appellant claims that the "Sixth, Eighth, and Fourteenth Amendments require, *a fortiori*, jury unanimity on those factors warranting the death

penalty." (AOB 182.) This Court has repeatedly rejected this claim. As stated in *People v. Davis* (2005) 36 Cal.4th 510, the decision whether to impose the death penalty is essentially a "'normative' one in which the jury 'applies its own moral standards to the aggravating and mitigating evidence.' (Citation.)" (*Id.* at p. 572.) Consequently, "imposing the strict requirements of . . . jury unanimity . . . would be unsuited to capital sentencing." (*Ibid.*) accord, *People v. Carter* (2005) 36 Cal.4th 1215, 1280 [jury not required to agree unanimously as to aggravating circumstances]; *People v. Frye* (1998) 18 Cal.4th 894 [same]; *People v. Bolin* (1998) 18 Cal.4th 297, 345-346 [same].)

XXI.

THE LACK OF INTERCASE PROPORTIONALITY DOES NOT RENDER CALIFORNIA'S DEATH PENALTY LAW UNCONSTITUTIONAL

Appellant claims that "the lack of proportionality review in California's death penalty scheme violates the Eighth Amendment in allowing the imposition of the death penalty in an arbitrary and capricious manner." (AOB 182.) Not so. (*People v. Carter* (2005) 36 Cal.4th 1215, 1278; *People v. Frye* (1998) 18 Cal.4th 894 [intercase proportionality review is not required]; *People v. Carpenter* (1997) 15 Cal.4th 312, 421 [proportionality review of defendant's death sentence is not required]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 80 ["appellate proportionality review" is not required].)

XXII.

THERE WAS NO CUMULATIVE ERROR

Appellant's final claim is that "if individual penalty phase errors . . . did not generate sufficient prejudice to require reversal . . . the combined prejudice from the various errors did." (AOB 183.) Since appellant has not established that any errors occurred, he "was not denied his federal constitutional rights to

a fair trial and to a reliable penalty verdict." (*People v. Kipp* (1998) 18 Cal.4th 349, 383.) Accordingly, his claim fails.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 15, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 49350 words.

Dated: February 15, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Bacon*** **CAPITAL CASE**

No.: **S079179**

I declare:

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 February 16, 2007, I served the attached **RESPONDENT'S BRIEF** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 February 16, 2007, at San Francisco, California.

EVANGELINE A. WILLIAMS
Declarant

Signature

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