No. S057156

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES EDWARD CASE, Defendant and Appellant.	(Sacramento County Superior Court No. 93F05175)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Sacramento

HONORABLE JACK SAPUNOR, JUDGE

MICHAEL J. HERSEK
State Public Defender

ROBIN KALLMAN
State Bar No. 118639
Senior Deputy State Public Defender

1111 Broadway, Suite 1000
Oakland, California 94607
Telephone: (510) 267-3300

Attorneys for Appellant

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INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in his opening brief. In particular, appellant does not present a reply to Arguments VIII and IX. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise. The following abbreviations are used herein: "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief. As in the opening brief, citations to the record are abbreviated as follows: "CT" is used to refer to the clerk's transcript on appeal, "Aug CT" is used to refer to the augmented clerk's transcript and "RT" is used to refer to the reporter's transcript. "Exh." is used to refer to exhibits introduced at trial. For each citation, the volume number precedes, and the page number follows, the transcript designation, e.g. 1 CT 1-3, is the first volume to the clerk's transcript at pages 1-3.

I

APPELLANT'S STATEMENT WAS *MIRANDA*-VIOLATIVE, INVOLUNTARY, AND OBTAINED BY DELIBERATELY IGNORING APPELLANT'S INVOCATION OF THE RIGHT TO REMAIN SILENT, AND THE ADMISSION INTO EVIDENCE OF THE STATEMENT AND THE EVIDENCE ACQUIRED AS A RESULT OF THE STATEMENT WAS PREJUDICIAL ERROR

A. Introduction

Appellant had just been arrested and transported to the police station when he was interrogated by homicide detectives Reed and Edwards. The essential facts of the interrogation are these: detective Reed told appellant that he and Edwards were investigating the double robbery-murder that had occurred the previous night, that a lady had given them some bloody clothes and told them where she had gotten them, and that as a result, they had come to talk to appellant. Reed advised appellant of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 and then asked, "having those rights in mind, will you talk to me now?" Appellant responded, "No, not about a robbery-murder. Jesus Christ." (Exh. 5 [videotape of interrogation]; Aug CT of 11/10/09 Appendix A, pp. 1-2 [transcription of videotape].[2]) Nevertheless, the officers continued with the interrogation, initially asking several pretextual questions regarding appellant's living situation, but quickly turning to questions concerning appellant's whereabouts and actions on the night of the robbery murder. As a result of

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[2] As stated in the opening brief, the transcription in the record indicates that appellant's answer was "(Unintelligible) robbery-murder. Jesus Christ" (Aug CT of 11/10/09 Appendix A, pp. 1-2), but on the videotape of the interrogation (Exh. 5), appellant's answer is easily heard, and Detective Reed, the trial court and the prosecutor all recognized that it was as stated here. (1 RT 1155 [prosecutor], 1226-1227 [Detective Reed], 1232 [prosecutor]; 11 RT 4067 [trial court]; see AOB 56-57, fn. 15.)

Reed's persistent questioning after appellant clearly stated he did not want to talk about a robbery-murder, appellant made admissions that were introduced against him as alleged rebuttal evidence, and police discovered Sue Burlingame, Stacey Billingsley and Greg Billingsley, who testified against appellant at trial.

As set forth in the opening brief, appellant's statement was inadmissible because it was obtained in violation of *Miranda* (AOB 66-79) and was the product of psychological coercion and thus involuntary (AOB 79-83); the testimony of Burlingame and the Billingsleys should have been suppressed because it was derived from a police strategy of deliberately ignoring appellant's invocation of his right to remain silent in order to circumvent *Miranda* (AOB 68-70, 84-92) and would not have inevitably been discovered (AOB 92-96); and the unconstitutional admission of appellant's statement was not harmless beyond a reasonable doubt (AOB 96-120).

Respondent agrees that appellant invoked his right to remain silent under *Miranda*, but contends that the continued police questioning was outside the scope of appellant's invocation. (RB 59-63.) Respondent also implies, but does not directly argue, that appellant waived his right to remain silent (RB 62), and asserts that appellant's statement was voluntary (RB 64-67). In addition, while disputing that the testimony of Burlingame and the Billingsleys should have been suppressed, respondent contends that the officers did not deliberately violate appellant's invocation of his right to remain silent (RB 68-71), and that the evidence would have been inevitably discovered (RB 71-73). Notably, other than asserting there was no deliberate *Miranda* violation, respondent offers no answer to appellant's claim that this Court should craft a remedy excluding from a suspect's trial

evidence that is derived from a calculated and deliberate police strategy of ignoring the suspect's invocation of his *Miranda* rights. (See RB 71, fn. 60.) Finally, respondent contends that admission of appellant's statement was not prejudicial. (RB 73-78.) As shown below, none of respondent's contentions has merit, and they all should be rejected.

B. Whether Appellant's Invocation of the Right to Remain Silent Is Viewed as Complete or Partial, the Officers Failed to Honor It, and Appellant Did Not Implicitly or Expressly Waive His Rights

The basic legal principles governing appellant's *Miranda* claim are set forth in the opening brief. (AOB 66-68.) It bears repeating, however, that a fundamental aspect of *Miranda*'s protections against coercive interrogations is the right to cut off questioning. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 474.) A suspect who has been advised of his *Miranda* rights need only make a "simple, unambiguous statement[]" that he wants to remain silent or does not want to talk with the police to invoke his right to remain silent and the ""'right to cut off questioning."'" (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 130 S.Ct. 2250, 2260, citations omitted.) When the suspect invokes the right to remain silent, "further interrogation must cease." (*Id.* at pp. 2263-2264.)

Even in the absence of an effective invocation of rights, "the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement." (*Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2260, citation omitted.) The government bears the "heavy burden" of demonstrating waiver. (*Id.* at p. 2261, citation omitted.)

Respondent discusses whether a suspect has invoked his *Miranda*

rights and whether he has waived them as if they were one question. (See RB 57-62.) "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." (*Smith v. Illinois* (1984) 469 U.S. 91, 98.) Appellant will examine the two issues separately. Appellant's emphatic refusal to answer the interrogating officers' questions was an unambiguous, unequivocal and unconditioned invocation of the right to remain silent, and no reasonable officer would have understood it to permit continued questioning, particularly on the subject of appellant's actions on the night of the charged crime. In interrogating appellant, the officers failed to "scrupulously honor" appellant's invocation, and his statement is therefore inadmissible. (*Michigan v. Mosley* (1975) 423 U.S. 96, 104.) Further, the evidence shows that appellant neither expressly nor implicitly waived his rights. His statement was obtained in violation of *Miranda* and was inadmissible.

1. No reasonable officer would have understood appellant's refusal to talk about the crime under investigation as anything other than an unequivocal invocation of the right to remain silent

When advised of his rights and asked if he would waive them, appellant's answer, "No, not about a robbery-murder. Jesus Christ," was a clear invocation of his right not to speak with the interrogating officers. Respondent concedes that appellant unambiguously and unequivocally invoked his right to remain silent. (RB 59.) The point of contention is the scope of his invocation. In appellant's view, whether considered a complete or partial invocation, at the very outset of the interrogation, he asserted his right to remain silent as to the sole subject of the interrogation – the robbery-murder of the previous night. (AOB 68-73.) In respondent's

view, appellant's refusal to discuss the robbery-murders "amounted to a limited invocation of his right to remain silent as to the details of the crime" (RB 59) which, when considered with his statements after his invocation, did not preclude continued questioning of appellant about his whereabouts and actions on the night of that crime (RB 62-63). Respondent's position is untenable.

a. Any reasonable officer would have understood appellant's statement, "No. Not about a robbery murder. Jesus Christ," as a blanket refusal to talk about anything having to do with that crime

Respondent offers no reasonable, credible explanation of how detective Reed misunderstood the plain meaning of appellant's statement to his invitation to waive his *Miranda* rights. The standard for judging a suspect's invocation of his *Miranda* rights is an objective one, which looks to what "a reasonable officer in light of the circumstances would have understood." (*Davis v. United States* (1994) 512 U.S. 452, 458-459 [discussing the standard for an invocation of the right to counsel]; *People v. Nelson* (2012) 53 Cal.4th 367, 379 [applying the *Davis* standard to an invocation of the right to remain silent].) Appellant's adamant declaration was made at the very beginning of the interrogation, before the officers had begun asking questions. It was his answer to detective Reed's question, asked immediately after reciting the *Miranda* admonitions, "having those rights in mind, will you talk to me now?" (1 RT 1226-1227; Exh. 5.) Appellant had never previously agreed to talk, and therefore his answer could not be construed as a refusal to discuss a subset of the possible topics of interrogation. Nor did his answer itself imply any willingness to waive his right to remain silent on subjects other than the robbery-murder or to

discuss his whereabouts and actions on the night of the crime. Rather, the officers' continued questioning was a failure to heed appellant's unequivocal and unambiguous refusal to waive his right to silence. (See *People v. Martinez* 47 Cal.4th 911, 952 [finding that in *People v. Peracchi* (2001) 86 Cal.App.4th 353, officers failed to heed suspect's "clear refusal to waive his right to silence" by continuing to interrogate after suspect said "'I don't want to discuss it right now'" immediately after a *Miranda* advisement].) No reasonable officer would have viewed appellant's statement as anything other than a clear refusal to waive the right to remain silent and a full invocation of that right. Detective Reed's admitted general practice of ignoring *Miranda* invocations in order to obtain incriminating statements (see 2 RT 1254) further undercuts any suggestion that it was objectively reasonable for him to believe that appellant's statement nevertheless permitted him to continue with the interrogation.

b. Even if viewed as a partial invocation, the plain meaning of appellant's refusal to talk about the robbery-murder included the very topics that the officers continued to probe

As shown in the opening brief, even if appellant's refusal to waive his rights is viewed as a selective invocation of his right to remain silent, the interrogation was unlawful because the officers' questions concerned the very subject that appellant had refused to discuss, namely, the robbery-murders. (AOB 71-73.) Respondent contends that appellant construes the term "robbery-murder" too broadly. (RB 63.) According to respondent, asking appellant about his whereabouts on the night of the robbery-murder "is not the same as discussing the actual details of the crimes," and, because an alibi consists of evidence that the defendant was not at the scene of the

crime, asking about alibi is not asking about the crime itself. (RB 63.) Respondent's argument defies common sense.

Appellant's words are to be "understood as ordinary people would understand them." (*Connecticut v. Barrett* (1987) 479 U.S. 523, 529.) Ordinary people do not parse words in the fashion that respondent proposes. Ordinary people would understand a suspect's refusal to discuss a particular crime as a refusal to discuss anything related to that crime, including whether or not the suspect had any defenses to that crime such as alibi. Respondent's approach would require an exceedingly precise and multifaceted invocation in order to effectively cut off questioning regarding all subjects related to a particular crime. Respondent points to no support for such an approach, and in fact, the high court has made clear that no such precision is required, stating that a suspect need not "speak with the discrimination of an Oxford Don" to invoke his rights. (*Davis v. United States, supra*, 512 U.S. at p. 459.)

Detective Reed asked appellant not only where he had been on the night of the robbery-murder, but also numerous other questions about appellant's actions that night, including whom he was with, whether he was aware that the crime had occurred, what time he arrived at The Office, what time he left, who else was there, whether the bartender had rung out the till, whether he knew the bartender, which door he went through when he left, where he was parked, what kind of car he was driving, whether appellant's fingerprints would be on the cash register or in the women's bathroom, how much he had to drink, whether he would remember if he killed someone, where he went after leaving The Office, whether he went to Mary Webster's house, whether he could explain the bloody clothes and boots that Webster had turned in and whether the gun at Webster's house was his.