IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>vs.<br>ROBERT ALLEN BACON,<br>Defendant and Appellant. | CAPITAL CASE<br>S079179<br>Solano No. F-C42606 |



Appeal From the Judgment of the Superior Court,

State of California, County of Solano

The Hon. R. Michael Smith, Judge

# APPELLANT'S REPLY BRIEF

Mark D. Greenberg
Attorney at Law
SBN 99726
PMB No. 429
484 Lake Park Avenue
Oakland, CA 94610
510 452 3126

Attorney for Appellant

## TABLE OF CONTENTS


APPELLANT'S REPLY BRIEF 1

A.
REPLY TO RESPONDENT'S FACTUAL ASSERTIONS IN REGARD TO THE CHARGED MURDER
1

ARGUMENT IN REPLY 7

GUILT PHASE ERRORS
7

I.
REPLY CONCERNING THE TRIAL COURT'S REFUSAL TO ALLOW INTO EVIDENCE THE NOTE RELEVANT AS CORROBORATION OF APPELLANT'S CLAIM OF CONSENSUAL SEX
7

II.
REPLY CONCERNING *MIRANDA/EDWARDS* VIOLATION
13

III., IV., V.
REPLY CONCERNING CONSCIOUSNES OF GUILT INSTRUCTIONS
25

VI.
REPLY CONCERNING THE "ACQUITTAL-FIRST" INSTRUCTIONS
27

VII.
REPLY CONCERNING THE REQUESTED CAUTIONARY INSTRUCTION ON ACCOMPLICE TESTIMONY
30

**VIII.**
**REPLY CONCERNING CALJIC No. 2.01** 34

**IX.**
**CUMULATIVE ERROR** 37

**X.**
**REPLY CONCERNING THE NEED TO ORDER AN ACQUITTAL FOR THE CRIME OF ACCESSORY** 37

**XI.**
**REPLY CONCERNING INSUFFICIENT EVIDENCE OF THE PRIOR MURDER CONVICTION** 38

1) The Elements Test 40
2) Felony-murder/mayhem 47
3) Knowing Infliction of Serious Injury as implied Malice under California Law 49
4) The Evidence Submitted to Prove the Prior Conviction 49
5) Penalty Phase Evidence 57

**PENALTY PHASE ERRORS** 58

**XII.**
**REPLY REGARDING TRIAL COURT'S INSTRUCTIONS THAT CONFOUNDED THE FOUNDATIONAL REQUIREMENTS FOR FACTOR (b) AND FACTOR (c) EVIDENCE, THEREBY LIGHTENING THE PROSECUTOR'S BURDEN IN REGARD TO FACTOR (b)** 58

XIII.
REPLY CONCERNING INSTRUCTION ON VOLUNTARY MANSLAUGHTER
70

XIV.
REPLY CONCERNIING PAROLE VIOLATION AS FACTOR (b) EVIDENCE
73

XV.
REPLY CONCERNING FAILURE TO PARTIALLY SUPPRESS APPELLANT'S STATEMENT
75

XVI., XVII.
REPLY CONCERNING THE ERRONEOUS ADMISSION OF THE NOTE AND REFUSAL OF SPECIAL ACCOMPLICE INSTRUCTION
76

XVIII.-XXI.
REPLY CONCERNING SYSTEMIC ERRORS
77

XXII.
REPLY CONCERNING COMBINED PENALTY PHASE ERROR
77

CONCLUSION 78

CERTIFICATION OF WORD-COUNT 79

## TABLE OF AUTHORITIES

**Cases**


*Apprendi* v *New Jersey* (2000) 530 U.S. 466 57

*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2nd 450 25

*Boyde* v. *California* (1990) 494 U.S. 370 73

*Brown* v. *Payton* (2005) 544 U.S. 133 73

*Chapman* v. *California* (1967) 386 U.S. 18 12,24,70,72,76

*Crane* v. *Kentucky* (1986) 476 U.S. 683 11

*Davis* v. *United States* (1994) 512 U.S. 452 14,21,23

*Dickerson* v. *United States* (2000) 530 U.S. 428 23

*Evitts v. Lucey* (1985) 469 U.S. 387 49

*In re Catherine H.* (2002) 102 Cal.App.4th 1284 52

*In re J.W.* (2002) 29 Cal.4th 200 61

*Mims* v. *State* (Ala.1991) 591 So.2nd 120 11

*Miranda* v. *Arizona* (1966) 384 U.S. 436 20,22

*Mississippi* v. *Minnick* (1990) 498 U.S. 146 22

*Nogart* v. *Upjohn Co.* (1999) 21 Cal.4th 383 35

*Olden* v. *Kentucky* (1988) 488 U.S. 227 11

*People* v. *Adamson* (1946) 27 Cal.2nd 478 7

*People* v. *Adcox* (1988) 47 Cal.3rd 207 70

*People* v. *Anderson* (1975) 15 Cal.3rd 806 41

*People* v. *Anderson* (1965) 63 Cal.2nd 351 48

*People* v. *Andrews* (1989) 49 Cal.3rd 200 50

*People* v. *Avalos* (1984) 37 Cal.3rd 216 35

*People* v. *Banuelos* (2005) 130 Cal.App.4th 601 53

*People* v. *Batey* (1989) 213 Cal.App.3rd 582 26

*People* v. *Beeman* (1984) 35 Cal.3rd 547 48

*People* v. *Birks* (1998) 19 Cal.4th 108 37

*People* v. *Bolden* (2002) 29 Cal.4th 515 72

*People* v. *Boyd* (1990) 222 Cal.App.3rd 541 26

*People* v. *Breverman* (1998) 19 Cal.4th 142 42,43

*People* v. *Brown* (1993) 6 Cal.4th 322 52

*People* v. *Brown* (1988) 46 Cal.3rd 923 70,72,76,77

*People* v. *Carter* (1957) 48 Cal.2nd 737 10

*People* v. *Castillo* (1997) 16 Cal.4th 1009 72

*People* v. *Clark* (1993) 5 Cal.4th 950 61

*People* v. *Coffman* (2004) 34 Cal.4th 1 62,72

*People* v. *Cromer* (2001) 24 Cal.4th 889 13

*People* v. *Cuff* (1898) 122 Cal. 589 10

*People* v. *Demetrulias* (2006) 39 Cal.4th 1 23

*People* v. *Fielder* (2004) 114 Cal.App.4th 1221 53

*People* v. *Francis* (1982) 129 Cal.App.3rd 241 37

*People* v. *Gammage* (1992) 2 Cal.4th 693 34

*People* v. *Gonzalez* (2005) 34 Cal.4th 1111 13

*People* v. *Gould* (1960) 54 Cal.2nd 621 36

*People* v. *Green* (1980) 27 Cal.3rd 1 57

*People* v. *Guerrero* (1988) 44 Cal.3rd 343 51

*People* v. *Guiuan* (1998) 18 Cal.4th 558 30,76

*People* v. *Holloway* (2004) 33 Cal.4th 96 74

*People* v. *Hudson* (2006) 38 Cal.4th 1002 60-61

*People* v. *Hughes* (2002) 27 Cal.4th 287 61

*People* v. *Johnson* (1993) 6 Cal.4th 1 24

*People* v. *Jones* (1999) 75 Cal.App.4th 616 54-57

*People* v. *Key* (1984) 153 Cal.App.3rd 888 61

*People* v. *Knoller* (2007) 41 Cal.4th 139 49

*People* v. *Kurtzman* (1988) 46 Cal.3rd 322 29

*People* v. *Lara* (2001) 86 Cal.App.4th 139 62

*People* v. *Lasko* (2000) 23 Cal.4th 101 43

*People* v. *Laster* (1997) 52 Cal.App.4th 1450 48

*People* v. *Lewis* (2001) 25 Cal.4th 610 59-61

*People* v. *Lopez* (1998) 19 Cal.4th 282 41,42

*People* v. *Louis* (1986) 42 Cal.3rd 969 13

*People* v. *Lucas* (1995) 12 Cal.4th 415 7

*People* v. *Magana* (1990) 218 Cal.App.3rd 951 34

*People* v. *Martinez* (2003) 31 Cal.4th 673 49,50

*People* v. *Martinez* (1984) 157 Cal.App.3rd 660 26

*People* v. *Mason* (1991) 52 Cal.3rd 909 26

*People* v. *McGee* (2006) 38 Cal.4th 682 57

*People* v. *Mejia-Lenares* (2006) 135 Cal.App.4th 1437 43

*People* v. *Mobley* (1999) 72 Cal.App.4th 761 8

*People* v. *Myers* (1993) 5 Cal.4th 1193 51

*People* v. *Neal* (2003) 31 Cal.4th 63 24

*People* v. *Nottingham* (1985) 172 Cal.App.3rd 484 61

*People* v. *Pitts* (1990) 223 Cal.App.3rd 606 26

*People* v. *Price* (1991) 1 Cal.4th 324 70

*People* v. *Putnam* (1942) 20 Cal.2nd 885 34

*People* v. *Redmond* (1969) 71 Cal.2nd 745 57

*People* v. *Reed* (1996) 13 Cal.4th 217 52

*People* v. *Rhodes* (1989) 209 Cal.App.3rd 1471 26

*People* v. *Rincon-Pineda* (1975) 14 Cal.3rd 864 72

*People* v. *Rogers* (1971) 5 Cal.3rd 129 42

*People* v. *Rodriguez* (2004) 122 Cal.App.4th 121 53

*People* v. *Rodriguez* (1998) 17 Cal.4th 253 54

*People* v. *Sears* (1965) 62 Cal.2nd 737 48

*People* v. *Seel* (2004) 34 Cal.4th 535 52

*People* v. *Sherren* (1979) 89 Cal.app.3rd 753 11

*People* v. *Slocum* (1975) 52 Cal.app.3rd 867 8

*People* v. *Smith* (Ill.1984) 466 N.E.2nd 236 15

*People* v. *Soto* (1966) 245 Cal.App.2nd 401 9-10

*People* v. *Stitely* (2005) 35 Cal.4th 514 21

*People* v. *Storm* (2002) 28 Cal.4th 1007 23

*People* v. *Tapia* (1994) 25 Cal.App.4th 984 62

*People* v. *Toro* (1989) 47 Cal.3rd 966 42

*People* v. *Torres* (1964) 61 Cal.2nd 264 10

*People* v. *Torrez* (1995) 31 Cal.App.4th 1084 8

*People* v. *Trevino* (2001) 26 Cal.4th 237 51

*People* v. *Trujillo* (2006) 40 Cal.4th 165 52

*People* v. *Ward* (2005) 36 Cal.4th 186 71-72

*People* v. *Watson* (1956) 46 Cal.2nd 818 12,24,76,77

*People* v. *Wickersham* (1982) 32 Cal.3rd 307 62

*People* v. *Wilson* (1992) 3 Cal.4th 926 35

*Sattazahn* v. *Pennsylvania* (2003) 537 U.S. 101 52

*Shepard* v. *United States* (2005) 544 U.S. 13 52

*Skipper* v. *South Carolina* (1986) 476 U.S. 1 12

*Smith* v. *Illinois* (1984) 469 U.S. 91 13,14-16

*State* v. *Chabolla-Hinjosa* (Ariz.App.1998) 965 P.2nd 94 41

*State* v. *Hurley* (Ariz.App.2000) 4 P.3rd 455 40,43-44

*State* v. *Just* (Ariz.App.1983) 675 P.2nd 1353 40

*State* v. *Magana* (Ariz.App.1994) 874 P.2nd 973 41

*State* v. *Ontiveros* (Ariz.App.2003) 81 P.3rd 330 45

*State* v. *Robles* (Ariz.App.2006) 141 P.3rd 748 41

*State* v. *Whittle* (Ariz.App.1985) 752 P.2nd 489 46

*State* v. *Woods* (Ariz.App.1991) 815 P.2nd 912 42

*Weeks* v. *Angelone* (2000) 528 U.S. 225 73

*Wilcox* v. *Ford* (1988) 206 Cal.App.3d 1170 35

**Statutes**

A.R.S., § 13-105(9)(b) 48

A.R.S., § 13-105(9)(c) 40,44

A.R.S., § 13-105(34) 40

A.R.S., § 13-202(C) 44

A.R.S., § 13-1103 43,44

A.R.S., § 13-1104 38,40,44,45,46

A.R.S., § 13-1105 45-46

Pen. Code, § 7(5) 48

Pen. Code, § 187 42

Pen. Code, § 190.2(a)(2) 50-51

Pen. Code, § 192 42

Pen. Code, § 668 51

Pen. Code, § 1127c 26

Pen. Code, § 1259 35

**Other Authorities**

*Black's Law Dictionary* (5th ed. 1979) 41

CALJIC No. 2.01 34

CALJIC No. 2.02 35

CALJIC No. 2.03 25

CALJIC No. 2.06 25

CALJIC No. 8.75 27

CALJIC No. 8.86 58-59

CALJIC No. 8.87 58

CALJIC No. 17.02 28

Plutarch, *Life of Caesar*, X, 6, in Loeb Classical Library, *Plutarch Lives*, Vol. VII, p. 467, Bernadotte Perrin, Trans 34

Mark D. Greenberg
Attorney at Law
SBN No. 99726
484 Lake Park Avenue, No. 429
Oakland, CA 94610
510-452-3126

Attorney for Appellant

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | | |
|---|---|---|
| **PEOPLE OF THE STATE OF CALIFORNIA,** | ) | |
| | ) | |
| **Plaintiff and Respondent,** | ) | **S079179** |
| | ) | |
| **vs.** | ) | **Solano No. F-C42606** |
| | ) | |
| **ROBERT ALLEN BACON,** | ) | |
| | ) | |
| **Defendant and Appellant.** | ) | |
| | ) | |
| | ) | |

# APPELLANT'S REPLY BRIEF

## A.[1] REPLY TO RESPONDENT'S FACTUAL ASSERTIONS IN REGARD TO THE CHARGED MURDER

The first ten issues of the opening brief concern errors affecting the determination of guilt for the charged murder. In the first issue, appellant provided a roadmap, as it were, to prejudice for all, or almost all, guilt phase errors in this case, with a detailed analysis of the relative strength and weakness of the prosecution and defense evidence. (See AOB, pp.44-50.) Respondent answers

[1] Since this section of the reply brief does not correspond to a numbered argument, the non-numerical designation is used.

also with a detailed response. (RB, pp. 37-43.) Since all, or almost all, the guilt phase errors conduce to prejudice in the same, or nearly the same, way, it will be useful and expeditious to place the reply to respondent's factual contentions here in its own prefatory section, which can then be referred to later in a summary fashion.

Appellant resolved the prosecution case into three props, as he designated them. Two of them, the testimony of Charlie Sammons and Martin L'Esperance, were rotten and weak; the third, appellant's statement to Grate was equivocal, and the outcome of the guilt phase depended on whether the jury resolved the equivocation in favor of the prosecution or defense. Respondent addresses these props *seriatim*.

Charlie Sammons was not the *prosecution's* prop, according to respondent, because he diverged from the prosecution's theory of the case, which was that he, Charlie, conspired in his wife's murder and had hired appellant to commit it. (RB, p. 38.) But then, *whose* prop was he? He was an eyewitness, if not to the murder itself, then to circumstantial evidence that was tantamount to establishing the murder in accord with the prosecution's theory that appellant was the perpetrator of that crime. Indeed, respondent finds himself forced into the wan endorsement of Charlie by noting that "[a]lthough his credibility was highly suspect, his description of appellant committing the actual murder was consistent with other testimony regarding his desire to hire somebody to murder Deborah." (RB, p. 38.) Of course, the concessive clause regarding Charlie's credibility need not be concessive at all, and one need only declare outright that Charlie's credibility was highly suspect and a problem for the prosecution, which had the burden to dispel all reasonable doubt as to the defendant's guilt.

Respondent overlooks the fact that the prosecution had *no* evidence to establish the lying-in-wait special circumstance without Charlie Sammons' testimony, and even in the portion in which Charlie diverged from the prosecution's case, he provided useful support for that case. He conveyed enough

through his absurd prevarications and improbabilities that the prosecutor could use *that* to help establish the prosecution theory that Charlie hired appellant to commit the murder. Respondent's claim that this came in adequately through Howard Wilkinson, who, according to respondent, testified that Charlie discussed his desire to either murder Deborah himself, or *hire* someone to do so" (RB, p. 38, italics in original) is overstated, and rests on only two sentences from Wilkinson's entire testimony: "Charles was very upset. He said he wanted to kill Debbie or have somebody kill her." (9 RT 1886.) The word "hire" is not used, and it is not even clear whether the disjunctive "or" in the second sentence refers to alternatives proposed by Charlie himself or to alternatives proposed by Wilkinson as to what Wilkinson remembered Charlie saying. In either case, the prosecution, which felt no need to clarify, was clearly relying much more on Charlie than on Wilkinson.

In defending Martin L'Esperance, respondent sounds like the doting mother who makes endless excuses for her child's inexcusable faults. Martin calls himself a thief, admits himself ready to "do whatever it takes," whether that consists of "[l]ying, manipulating, stealing . . ." (7RT 1441), and respondent marvels at the young man's candor and adduces it as EXHIBIT A of the truth and veracity of Martin L'Esperance: " . . . Martin's candor regarding the behavior associated with his substance abuse undoubtedly enhanced his credibility, rather than detracted from it." (RB, p. 39.) Thus Martin, conceding a single truth, which he cannot deny, *viz.*, that he is a liar, becomes credible for everything else he asserts. This then is the paltry candor that vouchsafes Martin L'Esperance's credibility.

Was appellant sarcastic when he described Martin's avowal that he, Martin, had =no expectation of a material reward for cooperating with authorities? (RB, p. 39 ["Appellant . . . sarcastically suggests that Martin's 'probation officer unaccountably felt some unprompted impulse of beneficence to save Martin from a prison sentence.'"].) Respondent indignantly points out that there was no

evidence that Martin received any benefit for cooperating. (RB, p. 39.) But respondent does not address the *fact* that an unrequested benefit accrued to Martin coincidentally with his cooperation in this case. (7RT 1442-1443.) One also knows from this very case that such people as Martin often expect, *and eventually receive*, benefits for cooperation even when there is no defined deal that can be used to impeach. Charlie Sammons comes readily to mind. (See AOB, pp. 105-106.)

Did appellant point out that such people as Martin understand how to market their product, and that a story with lurid details often enhances the value of the commodity, especially when that commodity is evidence so very useful for a capital prosecution? (RB, pp. 45-46.) According to respondent, however, Martin's report of appellant's boastful touting of such exotica as sadistic sexual pleasure and necrophilia was consistent with the monstrous and brazen brutality of the murder itself. Hence, Martin's report was self-validating. (RB, p. 40.) Maybe Martin's report was consistent with the brutality of the murder; but this is not to say that Martin should not take credit for this consistency, or that his story was not a fiction adorned by Martin with all the provocative details he knew would gratify an eager audience. Moreover, if appellant's imprudence was so boastful and shameless as to expose itself in front of a stranger encountered in jail, why didn't it produce more witnesses than just Martin? What special affinity entitled Martin to appellant's confidence? Did appellant intuit a fellow necrophiliac in Martin L'Esperance, who could be counted on implicitly to preserve the silence of the initiate? Or perhaps the more natural conclusion is that Martin L'Eserpance's testimony was a fabrication.

Respondent claims that appellant, unlike respondent and the jurors in this case, fails to understand that "crimes in hell do not have angels for witnesses." (RB, p. 39.) But perhaps respondent himself fails to understand this, since respondent's Martin *is* an angel. He is candid (RB, p. 39 [". . . Martin's candor . . ."]; he came forward to do his duty (RB, p. 39 [". . .he thought Charlie was being

wrongly prosecuted for murder . . ."]); and he received no material consideration for it, but only the satisfaction of doing what anyone with a mother or a sister would do (RB, p. 39 [ . . . he had daughters and wanted to do the right thing . . .]). Respondent cannot have it both ways. Is Martin a witness the prosecution encountered as it shifted and sifted in the muck and mire, or is he a citizen doing his duty? There is very little here to support the latter conclusion.

Respondent's partiality to Martin L'Esperance is certainly understandable, but is hardly tolerable as a rational matter. More rationally, respondent points to the more prosaic facts possessed by Martin that could be corroborated. (RB, p. 40.) But there is no evidence in here that these facts were not reported in the newspapers. Indeed, appellant himself could have told Martin these facts. However, the fact that appellant met Charlie's daughter through his, appellant's stepmother, or that the murder occurred in a back room and that the body was placed in the trunk of a car (RB, p. 40) are not, in this case, incriminatory facts, which appellant would be unwilling to reveal, and are not strongly validating of Martin L'Esperance's credibility. Appellant submits that Martin L'Esperance, like Charlie Sammons, is a rotten prop that holds up very little of the prosecution's case.

Finally, there was appellant's statement to the police. As pointed out in the opening brief, however, that statement, or at least a portion of it, comported with the defense theory that Charlie Sammons committed the murder and that appellant was only an accessory after the fact. This was based on the fact that in that statement, appellant not only denied having committed the murder, but revealed that he had had consensual sex with Mrs. Sammons. (AOB, pp. 46-50, 82-83.) Respondent dismisses the scenario as implausible: "[A]ppellant'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." (RB, p. 42.)

Respondent's assertions are made in the context of analyzing prejudice from the exclusion of the note as defense evidence tending to corroborate the claim of consensual sex. The force of that note will be discussed further below, when appellant enters his reply on that legal question. But for present purposes, one should point out that respondent ignores other evidence. The physical evidence shows that Mrs. Sammons' brassiere and panties had been removed. Her recovered body was fully clothed in outer garments: a dress over a blood-soaked T-shirt. (6RT 1144, 1149-1150, 1182, 1266-1267; 7RT 1371; Exs. 2(b), 8, 9; see also 8RT 1588-1590, 1606-1607.) How was the bra removed without removing the T-shirt and dress? The enigma is solved in a way that at least raises reasonable doubt by the inference that Mrs. Sammons, having had sex with appellant, dressed herself, and did so quickly leaving off her undergarments, under the pressure of having had sex "right under the nose of her obssessively jealous, estranged husband" (RB, p. 42), who, one might add, murdered her. (See AOB, p. 48, and fn. 13.) Respondent does not address this evidence.

This evidence further combines with other evidence problematic for the prosecution. The autopsy revealed no evidence of forcible sex and forced the prosecution to take the unusual step of conducting a post-mortem coloscopic exam, whose results, as interpreted by a nurse practitioner, were unimpressive in themselves and significantly impeached by an actual pathologist presented by the defense. (AOB, p. 47.) In addition to this, on the evening in question a neighbor of Sammons witnessed Mrs. Sammons car parked in front of the Nut Tree Drive house at the same time Charlie Sammons was standing outside in front of the house. (AOB, p. 47.) This established a temporal space and opportunity for the consensual sex to occur. This, combined with the negative findings on forcible sex, and with inferences to be drawn from the sartorial evidence all tended to corroborate the claim of consensual sex, which, if believed at least to the point of reasonable doubt, also established reasonable doubt as to murder.

## ARGUMENT IN REPLY

## GUILT PHASE ERRORS

### I.
### REPLY CONCERNING THE TRIAL COURT'S REFUSAL TO ALLOW INTO EVIDENCE THE NOTE RELEVANT AS CORROBORATION OF APPELLANT'S CLAIM OF CONSENSUAL SEX

Appellant contended that the trial court abused its discretion in refusing to allow into evidence a note, which was recovered from appellant's bag, which was in appellant's handwriting, and which exhibited Mrs. Sammons' name, work-address, and work-phone. Charlie Sammons testified that he had not provided this information to appellant, and the note thus tended to prove that appellant obtained this information from Mrs. Sammons herself. This, "in light of human experience" (*People* v. *Adamson* (1946) 27 Cal.2nd 478, 485), tended to prove Mrs. Sammons voluntary sexual interest in appellant, which in turn tended to corroborate his claim of consensual sex with Mrs. Sammons. The trial court, in excluding this evidence, did so on the basis of assessing the credibility and strength of the evidence in its own mind, and thereby invading the province of the jury and circumventing the court's own judicial function of assessing whether the evidence possessed a tendency, if true, to prove a material fact in the case. This circumvention was so blatant as to rise to the level of an abuse of discretion. (AOB, pp. 36-40.)

Respondent begins by citing to *People* v. *Lucas* (1995) 12 Cal.4th 415 for the proposition that a "court should exclude the proffered evidence only if the 'showing of the preliminary fact is too weak to support a favorable determination by the jury.'" (*Id.* at p. 466; see RB, p. 30.) This of course is a true principle of law, but it is, as it were, a *pre*-threshold question, and must be placed in a broader context. The broader context is the inherent relevancy of the proffered evidence overall, which is legally admissible "when no matter how weak it may be, it tends

to prove an issue before the jury . . . ." (*People* v. *Mobley* (1999) 72 Cal.App.4th 761, 793; *People* v. *Slocum* (1975) 52 Cal.app.3rd 867, 891.) Thus, if a preliminary fact is too weak to establish relevance, then it must be very weak indeed.

How weak was the evidence in this case? Not anywhere near to the degree required for exclusion as irrelevant. Stated affirmatively, the evidence was so clearly sufficient to establish relevance, both as to preliminary facts and inherent probative value, as to establish an abuse of discretion in excluding the evidence. As appellant pointed out in the opening brief, there was the indisputable fact that appellant was in private possession of a note containing contact information for Mrs. Sammons written in appellant's handwriting. Moreover, the note was in his bag left in his room at the Nut Tree Drive House where, as even respondent would concede, he encountered her. This combined with Charlie Sammons' testimony that he had not provided appellant with the information, and appellant's claim of an immediate mutual attraction and quick sexual encounter all conduced to a possible, yet legally sufficient conclusion, that Mrs. Sammons provided appellant the information on the note. That respondent and the court disbelieved appellant's claim of consensual sex or Charlie Sammons' denial of having provided the information was an improper consideration in assessing the relevance of the evidence. (*People* v. *Torrez* (1995) 31 Cal.App.4th 1084, 1092.)

Indeed, when respondent examines the specific facts surrounding the issue, he is forced into language that effectively concedes the relevancy and admissibility of the note:

> " [Appellant's] 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.' [Citation.] Charlie so testified, and appellant himself likewise admitted that Charlie had talked to him about killing Deborah. [Citation.] It was also undisputed that appellant had been

staying in the Sammons's family residence, thereby giving him access to Deborah's personal information. [Citation.] 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. [Citation.]

"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." (RB, pp. 31-32, italics added.)

Respondent may believe his inferences are "more logical," but he thereby concedes that appellant's are at least logical. He may believe that his inferences are "far more likely," but he then admits that appellant's are at least likely. He may characterize his inferences as "apparent," but in doing so he conveys to us the clear sense that they are not ineluctable. In short, respondent concedes the relevance of the evidence.

In sum, respondent's argument, like the trial court's ruling below, judges the question of admissibility improperly by the weight of the evidence rather than by its relevancy, which was, and is, not the correct standard. (*People* v. *Soto*

(1966) 245 Cal.App.2nd 401, 406 ["It is clear that the admissibility of the evidence of Halcon should be judged not by the weight to be accorded to it but by its relevancy."]." There was here enough to conclude that Mrs. Sammons provided the information written by appellant on the note, and for the court to preclude this evidence because the court did not believe that she had done so is to encroach on the province of the jurors, "who should be the sole and exclusive judges of the weight and effect of evidence." (*People* v. *Cuff* (1898) 122 Cal. 589, 591, emphasis added.) Again, the trial court's invasion of the jury's province is so clear on this record that an abuse of discretion is established.

Appellant had cited to *People* v. *Torres* (1964) 61 Cal.2nd 264 and to *People* v. *Carter* (1957) 48 Cal.2nd 737 to help illustrate how the preclusion of collateral, yet corroborative evidence could be an abuse of discretion, and indeed, a prejudicial one. (AOB, pp. 38-40.) Respondent seems to think that these cases establish his position because the corroborating facts could not be disputed. In the case of *Torres*, it was the weather reports; in the case of *Carter*, it was the testimony of a neutral third-party who corroborated the defendant's self-serving claims. (RB, p. 34.) But appellant had cited these cases to illustrate the relevance and consequence to which collateral evidence in corroboration can attain when the defense seeks to strengthen claims that can otherwise be dismissed, and can still be dismissed, as self-serving. Thus, in *Torres*, the credibility of the self-serving alibi was strengthened, but not necessarily proved, by the weather evidence excluded; in *Carter*, the self-serving statement of motive was corroborated but not necessarily proved by the precluded evidence. Thus, in the instant case, appellant's claim of consensual intercourse with Mrs. Sammons, dismissed as self-serving by respondent (RB, p. 31) is corroborated, but not necessarily proven, by the *objective* evidence of a note found in appellant's handwriting with Mrs. Sammons' personal information written on it.

If there is room in this case for a different inference in a way that there was not in *Torres* or in *Carter*, this does not undermine the clear legal relevance of the

evidence of the note in this case, nor does it, as respondent would have it, render the evidence speculative. Evidence that allows for a variety of inferences does not thereby become irrelevant; it becomes a question for the jury. (See *People* v. *Sherren* (1979) 89 Cal.app.3rd 753, 763 ["Whether appellant's absence showed a consciousness of guilt and the weight to be accorded such evidence are matters reserved for the jury."].) Evidence that cannot be precisely and incontrovertibly connected to the crime does not thereby become irrelevant. (See *Mims* v. *State* (Ala.1991) 591 So.2nd 120,124-125 ["The lack of positive identification of the revolver and the allegation of tampering go to the weight of the evidence, rather than to its admissibility."].) Here, the note can be tied through circumstantial evidence to Mrs. Sammons. The tie is not tenuous. The matter should have been submitted to the jury.

Appellant argued that the error resulted in a federal constitutional violation in denying his Sixth Amendment right to a meaningful opportunity to present a defense. Appellant took issue with this Court's jurisprudence on the scope of this right and analyzed in detail why this is incorrect, demonstrating that the United States Supreme Court, in a manifold of cases, does not take this position. (AOB, pp. 41-44.) Essentially, the provenance of right to present a defense is in the Due Process Clause of the Fourteenth Amendment, in the Compulsory Process Clause of the Sixth Amendment, and in the Confrontation Clause of this same amendment. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690.) This last source is significant because it illustrates that the improper exclusion of discrete, yet highly significant and probative, pieces of evidence can amount to the denial of the right to a meaningful opportunity to present a defense, as it did in the case of *Olden* v. *Kentucky* (1988) 488 U.S. 227, where an isolated piece of impeachment evidence against the complaining witness in a rape case was held to be unconstitutional even though the defendants were not completely foreclosed from presenting a consent defense. (*Id.*, at pp. 228-232.)

In any event, respondent does not really address the general contention as to the scope of the Sixth Amendment right to present a defense. Instead, he focuses on the facts of *Skipper* v. *South Carolina* (1986) 476 U.S. 1, which appellant discussed in detail as illustrating the mistake in this Court's jurisprudence on the right to present a defense. (AOB, pp. 35-36.) Respondent tries to distinguish *Skipper* from the instant case, contending, as he contended in discussing *Torres* and *Carter*, that the corroborative evidence in *Skipper* was objective and indisputable while here there was no evidence as to who provided the information in the note. (RB, pp. 36-37.) This type of point has been answered above. Needless to say, respondent's argument does *not* establish that appellant is wrong about the scope of the Sixth Amendment right. Respondent simply fails to address the question at all.

Finally, respondent contends that if the note had been admitted, it would not have tipped the scale in appellant's favor because it does not corroborate the claim of consensual sex. But the note was indisputably in appellant's possession; it was indisputably in his handwriting; its placement in his bag in the room he was occupying at Charlie Sammons' house established that his possession of the note was timely for purposes of this case; the note contained Mrs. Sammons' contact information; the information did not, according to Charlie Sammons, come from him. A reasonable, if not ineluctable, inference was that Mrs. Sammons provided appellant with the information contained in the note, and that sexual passion is one of the few plausible motives that would explain the lightening movement from acquaintance, to contact information, to intimacy. In the context of a prosecution case beset with serious flaws (see pp. 1-6 above), the trial court's abuse of discretion in excluding the note was prejudicial under any standard of review. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

## II.
## REPLY CONCERNING *MIRANDA/EDWARDS* VIOLATION

Appellant contended that the trial court erred in refusing to suppress that portion of the statement to Detective Grate occurring after he invoked his right to counsel. Relying primarily on *Smith* v. *Illinois* (1984) 469 U.S. 91, where the invocation of "Uh, yeah. I'd like to do that" (*id.*, at p. 93) was found in context to be clear and sufficient to invoke the right to counsel, appellant contended that his "Yeah, I think it'd probably be a good idea . . . for me to get an attorney" (1CT 85-86) was clear and sufficient in context. (AOB, pp. 52-58.)

Respondent's heading in response starts off with a mistake of law: "**THE TRIALCOURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION**" (RB p. 43), which is respondent's answer to what he sees as "[a]ppellant's claim that the trial court abused its discretion in denying his motion to partially suppress his confession." (RB, p. 43.) The standard of review is not abuse-of-discretion; the standard of review is de novo. (*People* v. *Gonzalez* (2005) 34 Cal.4th 1111, 1125.) The question raised by appellant is one of legal error, not one of abuse of discretion. That respondent can so casually, if erroneously, take for granted that the People will be accorded the broadest latitude on every conceivable issue perhaps warrants an emphatic response.

Once the trial court resolves the disputed historical facts surrounding a constitutional issue, a reviewing court exercises *de novo* review of any remaining mixed question of law and fact, which requires a determination of whether the established facts satisfy the constitutional standards in question. (*People* v. *Louis* (1986) 42 Cal.3rd 969, 984; *People* v. *Cromer* (2001) 24 Cal.4th 889, 894.) Whether or not a suspect in a custodial interrogation has invoked his Fifth Amendment right to counsel is one of these mixed questions subject to *de novo* review (*People* v. *Gonzalez*, *supra*, 34 Cal.4th at 1125), and the measure, as set

forth by the United States Supreme Court is whether the suspect has "articulate[d] 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." (*Davis* v. *United States* (1994) 512 U.S. 452, 459.) The reason deference is not accorded to a trial court's *factual* conclusion of invocation *vel non*, or other constitutional conclusions for that matter, is because of the precedential importance of these decisions on constitutional matters. (See *People* v. *Cromer*, *supra*, 24 Cal.4th at p. 900; see also *People* v. *Louis*, *supra*, 42 Cal.3rd at pp. 987-988.)

In the instant case, there are no disputed historical facts at issue. What precisely appellant said and what precisely Grate said was presented to the trial court and is before this Court on appeal. The question is whether the words and the context in which they were uttered, which is also not in dispute on the primary factual level, establishes that appellant invoked his right to counsel against the constitutional standard by which this is measured. The question is not whether the trial court's decision refusing to suppress the statement was somehow reasonable.

On the merits, respondent takes the position of course that appellant's reference to an attorney did not meet the standard of clarity required to deem that reference an invocation of the Fifth Amendment right to counsel. (RB, p. 50.) Because appellant relied heavily on the parallel of *Smith* v. *Illinois*, *supra*, respondent expends substantial effort in an attempt to establish that "*Smith* bears no resemblance to the circumstances of this case." (RB, p. 55.)

Again, in *Smith*, the defendant, when advised of his right to have a lawyer present during questioning stated, "Uh, yeah I'd like to do that." (*Smith*, *supra*, 469 U.S. at p. 93.) Again, this was found to be an invocation of the right to counsel, the clarity of which could not be impeached by any post-invocation statements that obscured retrospectively the initial request for counsel. (*Id.*, at pp. 96-97.) According to respondent, *Smith* is distinguishable because 1) Smith made a previous statement that someone had advised him to get an attorney to avoid

being railroaded; 2) his statement, "I'd like to do that" came in immediate response to the *Miranda* advisement about counsel; 3) if both Smith and appellant used the contraction for "would," appellant coupled it with the word "probably;" and finally, 4) appellant affirmatively responded, "Talk to me," after Grate warned him that an invocation of the right to counsel would foreclose appellant's "opportunity to talk." (1CT 85-86.) (RB, pp. 55-56.)

In *Smith*, the United States Supreme Court derived the facts on which it resolved the issue from the decision of the Illinois Supreme Court in *People* v. *Smith* (Ill.1984) 466 N.E.2nd 236. (See *Smith* v. *Illinois*, *supra*, 469 U.S. at pp. 92-93.) The case is still extant, and it will be helpful in replying to respondent first to set forth the full exchange at issue in that case:

> " 'Steve, I want to talk with you in reference to the armed robbery that took place at McDonald's Restaurant on the morning of the 19th. Are you familiar with this?
>
> " 'A. Yeah. My cousin Greg was.
>
> " 'Q. Okay. But before I do that I must advise you of your rights. Okay? You have the right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?
>
> " 'A. Uh. She told me to get my lawyer. She said you guys would railroad me.[2]
>
> " 'Q. Do you understand that as I gave it to you, Steve?
>
> " 'A. Yeah.
>
> " 'Q. If you do want to talk to me I must advise you that whatever you say can and will be sued against you in court. Do you understand that?

---

[2] At this juncture the Illinois Supreme Court set forth in brackets that "she" was some unidentified woman named Chico. (*People* v. *Smith*, *supra*, 466 N.E.2nd at p. 238; *Smith* v. *Illinois*, *supra*, 469 U.S. at p. 92, fn. 1.)

" 'A. Yeah.

" 'You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned . Do you understand that?

" 'A. Uh, yeah. I'd like to do that.

" 'Q. Okay. If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that.

" 'A. Okay.

" 'Q. do you wish to talk to me at this time without a lawyer being present?

" 'A. Yeah and no, uh, I don't know what's what, really.

" 'Q. Well. You either have to talk to me this time without a lawyer being present and if you do agree to talk to me with me without a lawyer being present you can stop at any time you want to.

" 'All right. I'll talk to you then.' " (*People* v. *Smith*, *supra*, 466 N.E.2nd at p. 238.)

The crucial passage in *Smith* was one unified exchange in proximate connection with the initial *Miranda* advisements. For purposes of comparison, the relevant portion of the instant interrogation is truncated, because appellant's reference to counsel was separated from the initial *Miranda* advisements, which in the instant case were as follows:

"G: Okay. Have you ever had your rights read to you before.

"B: Oh, yeah.

"G: Okay.

"G: Kind of figured that. All right. You have the right to remain silent. Anything you say may be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed free of charge to represent you before any questioning, if you wish. Do you understand each of those rights?

"B: I do.

"G: Okay. No problem talking with us?

"B: Well, I don't know why you want to talk to me.

"G: I mean it's up to you.

"B: But . . .

"G: We'll get into that.

"B: . . . if I don't think that I want to answer a question –

"G: You don't have to. Hey. There you go, man. I ain't gonna pull the words out of your mouth.

"B: Hey, man. You know, I appreciate the cigarette and the muffin and all, man.

"G: Alright. Well, starting with, what I want to talk about is where you've been the last few days.

"B: Okay." (1CT 59.)

This was followed by forty minutes of interrogation in the middle of which Grate announced expressly that "[W]e think Charlie offed his wife" (1CT 68), after which Grate sought to impress on appellant the difference between

"witnesses and suspects" (1CT 75-79), after which appellant admitted to having had sex with Mrs. Sammons. (1CT 82.) Following this, the reference to an attorney, now under dispute, occurred:

"G: What did he do, man? What the fuck did Charlie do?

"B: I don't know. I don't know. I've been asking myself that same question since we've been in this room and you told me this. What the fuck did Charlie do? Oh, my God.

"G: Ain't no doubt you're in the wrong place at the wrong time.

"B: (Positive response)

"G: With the wrong people, man.

"B: ___. Yeah, I think it'd probably be a good idea . . .

"G: Well listen, listen.

"B: . . . for me to get an attorney.

"G: Alright. It's up to you.

"B. ____ tell me . . .

"G: Hmm?

"B: Listen, what?

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

"B: Well . . .

"G: You know . . . ____

"B: . . . that's what you're gonna say.

"G: Huh?

"B: That's what you're gonna say. I mean talk to me, okay?

"G: Hmm?

"B: Talk to me.

"G: Talk to you?

"B: Talk to me.

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

"B: Well I realize that." (1CT 85-86.)

Does the exchange in the instant case "bear[] no resemblance" to the one in *Smith*? In *Smith*, where the officer advised Smith of the subject of the interrogation, Smith expressed his concern about being "railroaded." Here, where Grate did *not* advise appellant on the subject of the interrogation, appellant still expressed diffidence about answering questions. Is this at least a resemblance? In the reference to an attorney, Smith said, "Uh, yeah. I'd like to do that." Here, appellant said, "Yeah, I think it'd probably be a good idea . . . for me to get an attorney." Is there a resemblance? Finally, in the immediate aftermath of the reference to an attorney, Smith said, "Yeah and no, uh, I don't know what's what, really," while appellant said, "Talk to me," in response to Grate's "Well listen, listen." (1CT 85-86.) Are there resemblances? Clearly there are, and respondent has just as clearly overstated the matter. The question is are these resemblances legally significant so as to favor appellant's position, or legally insignificant so as to favor respondent's.

The lapse of time in this case between the initial *Miranda* warnings and the reference to an attorney is not a significant difference between the instant case and *Smith*. As suggested in the previous paragraph, appellant's diffidence about

answering questions on a subject that was not yet revealed is the functional equivalent of Smith's fear of being "railroaded" on the charge of robbery, which, as the officer announced from the outset, was the subject of the interrogation in that case. In the instant case there is no sign that this diffidence went away, and that it should emerge expressly again later in the interrogation as a reference to obtaining an attorney is completely consistent with a uniform state of mind on the part of appellant throughout the intervening interrogation.

One should further keep in mind that one of the primary purposes of the right to counsel attached to the Fifth Amendment as a prophylaxis is to assure that the force of initial advisements remains vital *throughout* a lengthy interrogation:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights . . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during questioning if the defendant so desires." (*Miranda* v. *Arizona* (1966) 384 U.S. 436, 469-470.).)

Clearly, to bestow legal significance, or mixed factual and legal significance, on a hiatus between initial advisements and a reference to the right of counsel is to undermine the Fifth Amendment right to counsel, especially in a case such as this, where the suspect clearly showed himself to be on his guard for the point at which

he might wish to protect himself against the coercive atmosphere of a custodial interrogation.

In the reference itself, respondent seems to concede that the use of "would" is not dispositive. But "would," even coupled with "probably," especially in the broader context of this interrogation, betokens merely the linguistic conventions embedded in our language itself whereby peremptory expressions are avoided even in rough or crude circumstances. (See AOB, p. 56.) Thus, in *Smith*, the defendant did not only use the word "would," but he coupled it with "like," when the direct and formally unequivocal expression would have been: "I want to do that." Thus, if this were only a question of semantic deconstruction, and not the application of constitutional principles to subserve the ends of justice and due process, one could find an ambiguity in the invocation in *Smith*. It is important to keep this in mind since the requirement of clarity in an invocation is designed to provide an easy signpost for law enforcement even at the expense of the suspect's *actual*, but ill-expressed, state of mind. (*Davis* v. *United States* (1994) 412 U.S. 452, 460-461.)

Finally, the post-reference (in respondent's view), but post-invocation (in appellant's view) exchange between appellant and Grate provide evidence for respondent's position *only if* there was an insufficiently clear invocation to begin with. In other words, respondent begs the question, and if there was an invocation, the rule of *Smith* simply bars the use of post-invocation evidence. But it is worth pointing out that in *Smith*, his post-invocation statements *directly* contradicted his invocation. Here, appellant's willingness to talk, as manifest in his post-invocation statements, was not directly inconsistent with his desire to consult with an attorney and have him present during the interrogation.

In regard to *People* v. *Stitely* (2005) 35 Cal.4$^{th}$ 514, appellant discussed that case in detail in the opening brief. Appellant demonstrated how that case was distinguishable factually from this one, and, as importantly, how the simplicity of the right to remain silent, in contrast to the complexity of the right to counsel in

the Fifth Amendment context, entails a difference in resolving the factual/legal problems attending the question of invocation for these respective rights. (See AOB, pp. 58-63.) The reason for the complexity and for the difficulties arising therefrom is that the desire to exercise the Fifth Amendment right to counsel does not necessarily entail a desire *not* to speak with authorities. (*Mississippi* v. *Minnick* (1990) 498 U.S. 146, 152, 154; *Miranda* v. *Arizona*, *supra*, 384 U.S. 436, 469-471.) It is for this reason that the potential for ambiguity inherent in almost any statement made in language should not be pressed as hard in reference to the right to counsel as it might be in regard to the right to remain silent. This is not to say that reasonable clarity is not the standard in both instances, but it is to say that what is clear in regard to the right to counsel is not necessarily the same thing as what is clear in regard to the right to remain silent.

It is true that in his opening brief that appellant suggested that the *Davis* rule did not perhaps apply to invocations of the right to remain silent (AOB, p. 60, fn. 19, and p. 63), and respondent, responsively, points out that the majority of courts that have considered the matter in fact accept *Davis* as the measure for any type of *Miranda* invocation. (RB, p. 52.) However, as suggested in the previous paragraph, the more accurate assertion is that *Davis* is the universal standard, as it were, but that the standard applies, or can apply, differently depending on which right is at issue and on whether, in context, the inherent differences between those rights are significant. Respondent, in defending *Stitely* as dispositive, does not defend the case on this level, and it cannot be defended on this level. Stitely's reference to his right to silence was ambiguous not merely because of the formal expression used, but also because the ambiguity of expression was likely to be substantive given the nature of right to remain silent. By contrast, the potential ambiguity in appellant's formal expression invoking his right to counsel is not substantiated as an ambiguity, because of the inherent nature of the right to counsel. This is not to say that other elements of context are not important (see

AOB, pp. 63-74), but these other elements conduce to the same conclusion: *Stitlely* does not control this case.

Appellant proffered alternative arguments should this Court agree with the lower court that his reference to an attorney lacked the clarity to satisfy the constitutional measure of an invocation. Appellant argued that if this was the case, then a proper invocation was forestalled by Grate's improper intervention, which was designed *not to clarify*, but to dissuade. (AOB, pp. 74-76.) Respondent takes the opposite view and denies the conclusion, again invoking *Stitely* as dispositive. The analysis set forth in the opening brief, and the remarks regarding *Stitley* set forth above require no further elaboration and answer respondent's contentions.

Similarly, appellant has little to add to his second alternative argument that *Dickerson* v. *United States* (2000) 530 U.S. 428, in making it clear that *Miranda* jurisprudence involved directly the Fifth Amendment right to remain silent and was not merely a procedural prophylactic of that right, implicitly overruled *Davis* v. *United States* (1994) 512 U.S. 452, or at least softened its rigors. (AOB, pp. 77-81.) One should note that respondent's citations to the post-*Dickerson* reaffirmations of pre-*Dickerson* jurisprudence in *People* v. *Storm* (2002) 28 Cal.4$^{th}$ 1007 and *People* v. *Demetrulias* (2006) 39 Cal.4$^{th}$ 1 (see RB, pp. 59-60) are hardly dispositive. These cases deal with different aspects of the *Miranda/Edwards*' rules. As demonstrated in the opening brief, the appearance of *Dickerson* requires a rebalancing of interests as represented by a specific rule. Not all rebalancings will yield a different result. In reference to the issue of clarity of invocation as set forth in *Davis*, the result is different, and respondent does not demonstrate why it should not be different.

One should also address respondent's contention that even under a reconstituted post-*Dickerson* rule appellant would have been found not to have invoked his right to counsel because of his post-invocation statements. Respondent, however, fails to address the effect of *Smith* v. *Illinois*, *supra*, 469

U.S. 91, which would unequivocally apply to bar consideration of ambiguities arising after the invocation. Thus, if respondent concedes the hypothesis that appellant is correct, he cannot but concede the error in refusing to suppress.

In regard to prejudice, appellant demonstrated how he could still present a defense sufficient to raise a reasonable doubt with only half the statement to the police admitted into evidence. (AOB, pp. 82-85.) Respondent counter-explains in detail how appellant needed also the second half to explain how blood got on his shoes and why he initially lied when he claimed not to know Mrs. Sammons. (RB, p. 61.) Respondent also lists as a fact to be explained by the second half of the interrogation the appearance of appellant's semen in Mrs. Sammons' body. (RB, p. 61.) This fact, however, is explained by the first half of the interrogation that would have been admitted into evidence. (1CT 82.) As to the other facts, the defense of accessory after the fact was still before the jury through a combination of the first part of the statement to Grate and through Charlie Sammons testimony, which could be accepted for the evidence of disposing of the body, but rejected for the evidence as to who committed the murder.

In any event, respondent's contentions regarding the problems even partial suppression would present to the defense is completely undermined when respondent concludes his analysis with the assertion that "[u]nder 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.2nd 818, 836.)" (RB, p. 63.) Maybe so or maybe not. But an error in failing to exclude a statement on *Miranda* grounds is a federal constitutional error subject to the standard of review of *Chapman* v. *California* (1967) 386 U.S. 18 (*People* v. *Johnson* (1993) 6 Cal.4th 1, 33 ), which requires *respondent* to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*People* v. *Neal* (2003) 31 Cal.4th 63, 86.) That respondent has shirked this burden is

certainly a convenient shorthand reply to his argument that the error was not prejudicial.

## III., IV., V.

## REPLY CONCERNING CONSCIOUSNES OF GUILT INSTRUCTIONS

In arguments III and IV, appellant contended that instructions on consciousness of guilt through suppression of evidence (CALJIC No. 2.06) and through false and misleading statements about the charged crime (CALJIC No. 2.03), should not be given when the issue of consciousness of guilt and guilt itself are identical questions logically resolved only by the jurors' assessment of the identical set of facts. Thus, to find that appellant had suppressed evidence against him or had made false and misleading statements about being only an accessory after the fact, the jurors would have had to find that he was in fact guilty of murder as charged. The circularity of reasoning is not only useless to the jurors in assessing the case, in its insidiousness it bestows an intolerable and unfair advantage to the prosecution on matters that should simply be left to argument of counsel. (AOB, pp. 86-92.) In argument V, appellant contended these same instructions should be barred as pinpoint and argumentative. (AOB, pp. 93-94.)

Appellant announced his awareness that this Court has resolved all these issues against appellant's position (AOB, pp. 87, 93), and respondent naturally invokes this authority a second time (RB, pp. 65, 68, 72-73), although he unjustly accuses appellant of relying "on federal case law in an effort to avoid the binding effect of this Court's decisions" upholding these instructions. (RB, p. 65.) Appellant invoked federal authority in an attempt to persuade this Court to change its view – something this Court is free to do without having to subordinate itself to any other court. (See *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2nd 450, 455.)

Respondent does not address the federal authority, but impugns the two examples derived from state law of instructional circularity adduced by appellant in flight and motive. Respondent points to appellant's mistake in adducing the superseded rule regarding flight instruction, *viz.*, that it should not be given when the issue of identity and flight are, on the evidence, identical questions. (RB, p. 66.) In suggesting this to be the current law, appellant was wrong. But the former rule was rejected not because of its logical and empirical invalidity, but because of the dictates of positive law embodied in Penal Code section 1127c, which requires, without any qualification, instruction on flight when there is evidence of flight. (See *People* v. *Mason* (1991) 52 Cal.3rd 909, 943.)[3] Prior to this, the rule was as appellant represented (*People* v. *Rhodes* (1989) 209 Cal.App.3rd 1471, 1475-1476; *People* v. *Batey* (1989) 213 Cal.App.3rd 582, 587; *People* v. *Boyd* (1990) 222 Cal.App.3rd 541, 575; *People* v. *Pitts* (1990) 223 Cal.App.3rd 606, 879), which is enough to establish the logical substance appellant's position.

Appellant also adduced the motive instruction as an example, citing *People* v. *Martinez* (1984) 157 Cal.App.3rd 660, which held that a motive instruction should not be given in an entrapment case. For when the defendant raises the issue of entrapment, that question renders the defendant's subjective motivation and consciousness of guilt irrelevant. (AOB, p. 88.) According to respondent, *Martinez* is "inapposite" because entrapment focuses on the actions of the police and *that* renders the issue of the defendant's subjective motivation "irrelevant." (RB, p. 67.)

---

[3] Section 1127c provides that "[i]n any criminal trial or proceeding where evidence of flight of defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given."

Appellant is not sure what respondent's point is. In *Martinez*, the court held that the motive instruction was "unnecessarily and erroneously" given because "appellant never claimed that he did not commit the offenses, but instead he relied entirely on an entrapment defense." (*Id.*, at p. 667.) This is certainly parallel to the instant case where appellant did not deny the charge of accessory after the fact, nor did he deny the suppression of evidence or false statements constituting that crime. Indeed, accessory after the fact was his defense against the charge of murder. In *Martinez*, the finding of guilt *vel non* necessarily resolved the issue of consciousness of guilt; in the instant case the finding of guilt *vel non* for murder did the same. In *Martinez*, consciousness of guilt instruction in the form of a motive instruction was found unnecessary and erroneous; here, the finding in regard to suppression of evidence and false statements should be the same.

## VI.
## REPLY CONCERNING THE "ACQUITTAL-FIRST" INSTRUCTIONS

The trial court in the instant case gave two "acquittal-first" instructions. One was the standard CALJIC No. 8.75, which was given here to outline the verdict procedure for first-degree murder and the lesser-included offense of second-degree murder. (9RT 1934-1936.) The other instruction was designed specifically to outline the verdict procedure for first- and second-degree murder and the lesser *related* offense of accessory after the fact (9RT 1936), which was both a charged crime and the defense expressly raised against the charge of murder. Appellant contended that the language of the special instruction, combined with the trial court's explanation of the verdict forms (9RT 2046-2047) and the logical complications of treating a lesser-related offense in the same way as a lesser-included offense, all created a reasonable likelihood that the jurors understood the court's instructions to be not merely procedural and administrative,

but to be an outline of the order in which they were to proceed with substantive deliberations. (AOB, pp. 95-104.)

Appellant's claim of error depends on the combined effect of all these elements, which, for purposes of analysis, were examined separately. Respondent answers them separately without recognition of the prejudicial interaction between them. Thus, the special instruction itself was, in respondent's view, not substantially different that CALJC No. 8.75, which in any event colored the jurors' understanding of the special instruction. (RB, pp. 76-77.) Further, CALJIC No. 17.02, informing the jurors on the necessity to decide each count separately provided a further corrective to misunderstanding. (RB, p. 77.) Finally, according to respondent, appellant's distinction between a lesser-included and a lesser-related offense, whereby appellant characterized the former as presenting a simple concept to the latter's complexity, was "grasping at straws" (RB, p. 78) and defied common-sense. (RB, pp. 78-79.)

Appellant's analysis of the special instruction along with its reflection and divergence of CALJIC No. 8.75 has been set forth in detail in the opening brief and need not be repeated in reply to respondent's contentions, which rely primarily on this Court's approval of CALJIC No. 8.75 itself. One might note that respondent takes no account of the verdict forms which told the jurors to "[a]nswer the following only if you found the defendant not guilty of murder in the first-degree . . ." and then to "[a]nswer the following only if you found the defendant not guilty of both murder in the first and murder in the second-degree in Count I." (4CT 1145-1148; see AOB, pp. 99-101.) How the jurors were not to understand "answer" as referring to the *substantive* question posed by the evidence in the case, rather than the merely formal administrative question of "what do you think?" or "what is your verdict?" is not clear by anything respondent has argued, nor would it be clear to the jurors.

Respondent's confidence in CALJIC No. 17.02 as a corrective is misplaced. The vice to be avoided in the type of error at issue here is the

appearance that the instructions mandate a set order of deliberation that interferes with the natural and helpful inclination to assess the legal and factual possibilities *together* in a free flowing consideration of the evidence and the law. (See *People* v. *Kurtzman* (1988) 46 Cal.3rd 322, 333-335) To admonish the jurors that they must "decide each count *separately*" does not narrow, but widens the potential for misunderstanding.

Finally, one might also address respondent's disdain for the distinction, in this context, between lesser-included offenses and lesser-related offenses. Appellant had asserted that "the transition from murder to accessory to murder would appear obviously more complex and different in quality, requiring a set of elements collateral to those required for murder." (RB, p. 99.) According to respondent, however, "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." (RB, p. 78.) In fact, appellant agrees with respondent, who misses the point made in the opening brief.

Appellant's point was that the apparent and obvious differences between a lesser-included offense, which was the express subject of CALJIC No. 8.75, and a lesser-related offense, which was the implied subject of the special instruction, would lead a reasonable juror to conclude that CALJIC No. 8.75 applied only to the first and second-degree murder, and that therefore any potential corrective in CALJIC No. 8.75 did not cure the fatal ambiguities in the special instruction on the lesser-related offense. Appellant was *not* arguing that the jury could *not* tell the difference between murder and accessory to murder. Appellant used the word "complexity" as a relative term that was objectively descriptive of the relationship between a lesser-related and a greater offense when compared with the relatively straightforward relationship between a lesser-included and a greater-inclusive offense.

But appellant also asserted the difference as the key to establishing prejudice. (AOB, pp. 102-103.) He showed how the lesser-related offense was more thoroughly cut-off by the erroneous instruction because of the collateral route the jurors must take to consider the lesser-related offense when compared with a lesser-included offense. Again, it is not that the jurors could not grasp the difference between murder and accessory to murder, it is that the erroneous instruction conveyed to them the impression that the law requires them to follow a certain route. When the tourist is casually pointed to go down the street to a site that is more precisely a block or two over, then he gets lost no matter how simple the route could have been. That is what occurred here to the prejudice of appellant, whose defense was in fact the commission of the lesser-related offense.

## VII.
## REPLY CONCERNING THE REQUESTED CAUTIONARY INSTRUCTION ON ACCOMPLICE TESTIMONY

Appellant contended that it was error to refuse the cautionary instruction on accomplice testimony, which instruction was based on Justice Kennard's concurring opinion in *People* v. *Guiuan* (1998) 18 Cal.4$^{th}$ 558 (at p. 576) Appellant argued that the stronger instruction was appropriate to clarify for the jurors the situation in which the expectation for reward is so strong that the prosecution has the leisure, as it were, of delaying even the suggestion of an offer of a deal. In doing so, the prosecution avoids, whether by design or not, the appearance of any connivance with the accomplice-witness and keeps impeachment evidence out of the hands of the defense. (AOB, pp. 105-126.) That was the situation presented here where confidence in the ability of the system to produce a fair assessment of Charlie Sammons' credibility is hardly buttressed by the fact that Charlie *did* get a very good deal after appellant's trial was over. (See AOB, pp. 105-106.)

The trial court informed the jurors that they "should consider the extent to which" Sammons' "testimony may have been influenced by the receipt or expectation of any benefits in return for his testimony." (9RT 1918.) The requested, but rejected, instruction was that "[b]ecause 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." (SCT 3rd, p. 9.)

Appellant's analysis of why the first was inadequate and the second was appropriate was detailed and extensive (AOB, pp. 107-124) in recognition of the heavy burden on appellant imposed by the majority opinion in *Guiuan*. Nonetheless, respondent denigrates appellant's efforts as mere "linguistic gymnastics." (RB, p. 85.) To respondent, there is no substantial difference in the language and such distinctions made by appellant about verb tenses (AOB, p. 117-118) and semantic ambiguities regarding present or future benefits (AOB, p. 118) are all overly subtle since Charlie Sammons himself testified that he expected a benefit, and because defense counsel, with the prosecutor's concession, argued that Charlie Sammons indeed expected a benefit. (RB, pp. 83-84.)

But respondent overlooks the prosecutor's exploitation of the situation to buttress his case by emphasizing the prosecution's own integrity in this entire business:

> "Now Mr. Sammons is going to testify in this case, even though his own murder trial is still pending. The District Attorney's Office has made no offers to him. There has been no plea deals, no promise of leniency, passive or express. While those – that's the case, it may well be that Mr. Sammons is hopeful of getting some sort of deal, and that may be part of the reason why he decides to testify. Because his own case has not yet concluded, it is also likely that he will attempt to minimize his own involvement in the death of his wife." (6RT 1098-1099.)

This was opening argument. The following was the prosecutor's direct examination of Charlie Sammons on this topic:

> "Q. Did the District Attorney's office or law enforcement approach you asking for your testimony, or did you through your attorney approach them?
>
> "A. I'm not quite sure.
>
> "Q. Did we come and ask you to testify or did your attorney ask us if we could work something out?
>
> "A. I believe the attorney did.
>
> "Q. And as you sit there, are there any deals or have there been any agreements made between yourself and the District Attorney's Office or any other law enforcement agency in exchange for your testimony?
>
> "A. No.
>
> "Q. Are you hopeful that at the end of this case that there will be consideration given to you?
>
> "A. I hope.
>
> "Q. Has there been any unspoken wink, wink sort of agreement made between law enforcement, prosecution and yourself?
>
> "A. No.
>
> "Q. Were any privileges, either in jail or any – of any other sort given to you in exchange for your testimony here today?
>
> "A. No." (7RT 1485.)

The following was from the prosecutor's closing argument:

> "As you know the District Attorney's Office made absolutely no promises, not even a tacit, Don't worry, we'll take care of you later. Nothing. No deals at all were made with Charles Sammons. He wanted to testify, I think he said, because he wanted to set the record straight. Well, I submit to you he didn't set the record straight, but there was no offer from the District Attorney's Office at all." (9RT 1944.)

As appellant demonstrated in the opening brief, this was a kind of reverse-vouching designed to add luster to those portions of Charlie Sammons' testimony that helped the prosecution . (AOB, pp. 112-116.) Respondent simply ignores all this, and it is this that required remedial action beyond what *Guiuan* prescribes, or the trial court provided.

The situation presented here, and indeed presented whenever the prosecution refuses genuinely or manipulatively to offer a deal or encouragement, needs a strong and clearly-worded instruction that informs the jurors that the prosecutor's protestations notwithstanding, the capacity of the prosecution to influence favorable testimony *sub silentio* is virtually inherent in the very situation of the accomplice witness. The absence of an express deal or the express promise of a future deal does not vouchsafe the integrity of the prosecution, whether on the level of evidence or on the level of morality and justice. If respondent ignores all this as irrelevant, then why was the prosecution so emphatically eager to inform the jurors that Charlie was offered no deals, no promises, and no hints of a deal or of a promise, at any time or place whatsoever?

Again, as noted in the opening brief, there are times when the jurors' lack of experience with the daily workings of the criminal justice system create an imbalance that can only be redressed by an instruction. Appellant pointed out instances of these occasions. (AOB, p. 119, fn. 28.) Thus, for example, it was thought at one time appropriate to caution jurors that a rape charge was easy to

make and difficult to disprove, and that a complaining witness's testimony in such a case be scrutinized carefully. (*People* v. *Putnam* (1942) 20 Cal.2nd 885, 891-892.) At a later point in time, and after many procedural innovations in the trial of criminal defendants, the balance shifted so that now jurors are standardly admonished that the uncorroborated testimony of a complaining witness alone is sufficient proof for conviction. (*People* v. *Gammage* (1992) 2 Cal.4th 693, 701-702.) Indeed, the cautionary instruction on accomplice witnesses, however the language is refined or modified, muted or emphasized, reflects the assumption that certain matters cannot be left merely to the argument of the parties, but must be clarified for the jurors by judicial instruction and direction.

Appellant has demonstrated that the situation of the "volunteering accomplice," as he characterizes it for shorthand purposes (AOB, p. 105), requires clarification in the terms set forth in Justice Kennard's concurring opinion in *Guiuan*. Respondent's contention that argument by counsel and the common sense of the jurors provided everything that was needed in this case, and that Justice Kennard's language added nothing in clarity (RB, p. 85) is simply unconvincing on this record, where the prosecutor distanced himself from the ruthlessness of Caesar to claim the purity of Caesar's wife.[4]

## VIII.
## REPLY CONCERNING CALJIC No. 2.01

Appellant contended that it was error to instruct the jurors in accord with CALJIC No. 2.01 because the prosecution case did not substantially rely on circumstantial evidence. The instruction was prejudicial to the defense in this case because to cast the evaluation of the case in terms of what is "reasonable" *vel non*

---

[4] Caesar divorced Pompeia merely for being in the proximity of scandalous behavior with which she had nothing to do, and which she knew nothing about. When asked why he divorced her, he explained, *Caesar's* wife "ought not even to be under suspicion." (See Plutarch, *Life of Caesar*, X, 6, in Loeb Classical Library, *Plutarch Lives*, Vol. VII, p. 467, Bernadotte Perrin, Trans.)

is detrimental where, as here, the defense depends on finding the *unusual* claim of the defendant *believable.* (AOB, pp. 126-128.) This Court's decision in *People* v. *Wilson* (1992) 3 Cal.4th 926 and the Court of Appeal decision in *People* v. *Magana* (1990) 218 Cal.App.3rd 951 were distinguishable because there was no error to begin with in giving CALJIC No. 2.01, since those cases were primarily circumstantial (AOB, pp. 128-131, 131-132) and further because they did not involved the evaluation of any otherwise bizarre and unusual claim for its credibility. (AOB, pp. 131-132.) Finally, in this case, the prosecution specifically used CALJIC No. 2.01 to impeach the defense by equating the unusual with the unreasonable. (AOB, pp. 133-134.)

Respondent contends that defense counsel's request for CALJIC No. 2.02, which applies the circumstantial-evidence rule of 2.01 to the question of mental state, invited the error in giving CALJIC No. 2.01, especially since counsel did not register any objection to 2.01. (RB, p. 87.) The doctrine is an "application of the estoppel principle" (*Nogart* v. *Upjohn Co.* (1999) 21 Cal.4th 383, 403) – a principle predicated on the unfairness of allowing a party to change its position after inducing another to do so. (*Wilcox* v. *Ford* (1988) 206 Cal.App.3d 1170, 1179-1180.) Respondent does not explain how the request for CALJIC No. 2.02 could possibly cause the court to instruct on CALJIC No. 2.01, nor does respondent explain how the failure to object to CALJIC No. 2.01 establishes invited error when the mere failure does not provide an adequate record to establish invited error. (*People* v. *Avalos* (1984) 37 Cal.3rd 216, 229.) Respondent's claim of invited error in an attempt to circumvent the mandate of Penal Code section 1259 is devoid of any merit.[5]

---

[5] Section 1259 provides in relevant part: "The appellate court may also review any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

Respondent then proceeds to argue that it was not error to instruct in accord with CALJIC No. 2.01 insofar as the prosecution's case *did* substantially rely on circumstantial evidence. Respondent concedes that the testimony of Charlie Sammons and Martin L'Esperance "can be deemed direct testimony" but appellant's statement to the police cannot, since it requires the inference that appellant was lying about not having committed the murder, with the further inference that appellant committed the murder. (RB, p. 91.) Respondent, however, ignores this Court's holding that evidence from the extrajudicial statements of a hearsay declarant are deemed to be direct evidence for purposes of CALJIC No. 2.01. (*People* v. *Gould* (1960) 54 Cal.2nd 621, 628-630.) Thus, what respondent characterizes in terms of a mental process appropriate for circumstantial evidence is really in this context the assessment of the credibility of a kind of witness.

As to the other evidence respondent identifies, these matters are indeed truly circumstantial, but they were not substantially relied upon by the prosecution. Indeed, the jurors were, as respondent points out, required to "determine whether the micro abrasions in Deborah's vagina and rectum were the result of consensual sex or rape" (RB, p. 91), but the evidence of the micro abrasions would not have been collected, nor would the question have arisen for the jurors, unless the claim of consensual sex had emerged through appellant's statement to Grate, which, as noted above, was direct evidence for purposes of CALJIC No. 2.01. The other evidence respondent speaks of was simply subordinate and corroborative *vel non* to the direct evidence consisting either of Charlie Sammons' testimony or appellant's statements to Grate, or his alleged statements to Martin L'Esperance. The giving of CALJIC No. 2.01 was, on this record, erroneous.

On the issue of prejudice, respondent simply cites the numerous cases approving of CALJIC No. 2.01 as a correct instruction in general. Again, the key here to appellant's claim is that the instruction was erroneously given and that the

prejudice to the defense stemmed from this error. Respondent does not address this matter head on, and the arguments made in the opening brief may serve as the reply made in anticipation.

## IX.
## CUMULATIVE ERROR

Appellant contended that the combined prejudice from the errors raised in arguments **I** through **VIII** required reversal if none of them was, in this Court's view, prejudicial individually. (AOB, p. 135.) Respondent first denies that there was any error, thereby rendering the question of prejudice irrelevant (RB, p. 97), but then equivocally hedges that there was no prejudice, combined or otherwise. (RB, p. 97.) Obviously the question of combined error depends on the analysis of individual error. As to combined prejudice, appellant would refer to the reader to the prefatory section of this brief regarding guilt phase prejudice (pp. 1-6) as well as to the individual discussions of prejudice attached to each claim of error in the opening brief.

## X.
## REPLY CONCERNING THE NEED TO ORDER AN ACQUITTAL FOR THE CRIME OF ACCESSORY

Appellant contended that conviction of murder required dismissal of the alternate charge of accessory after the fact. For if appellant acted to cover up his own participation, and even if this cover-up incidentally aided Charlie Sammons as a co-principal in the murder, appellant could not properly be convicted of both murder and accessory to murder. (*People* v. *Francis* (1982) 129 Cal.App.3rd 241, 245-248.)

Respondent does not explain why *People* v. *Francis*, *supra*, is not dispositive of the question. Respondent prefers to chide appellant for his ingratitude, since under *People* v. *Birks* (1998) 19 Cal.4th 108, appellant, in return

for the favor of instruction on a lesser-related offense, subjected himself to the risk of a *double* conviction. (RB, pp. 98-99.) "In this case," respondent tells us, "the prosecutor did not object to the defense request for an accessory instruction." (RB, p. 99.)

At the risk of aggravating the appearance of ingratitude, appellant would point out that the *prosecution* charged him with accessory after the fact and charged him with it expressly in the alternative. (RT Vol. Q., pp. 6-7.) How in the world could there *not* be an instruction on the elements of a crime that has been charged? If, under *Birks*, a defendant runs the risk of double conviction when he *requests* and obtains instruction on a lesser-related offense, why may the prosecution, *with its plenary discretion to charge or not as it sees fit*, not risk an acquittal on the alternative charge? Both parties have their remedies: not to request, in one case, and not to charge in the other. Beyond that no significant comment on the issue is required. Certainly if the State of California is not satisfied with merely a death penalty upon a conviction for special circumstance murder, it might at least explain in clearer and coherent terms why it is entitled also to a conviction for accessory after the fact – a crime punishable by three years imprisonment?

## XI.
## REPLY CONCERNING INSUFFICIENT EVIDENCE OF THE PRIOR MURDER CONVICTION

Appellant contended that his conviction for second-degree murder in Arizona cannot be used as a prior-murder special circumstance because the evidence was insufficient to establish that crime as punishable as first- or second-degree murder in California. The contention was based on an analysis showing that Arizona's definition of second-degree murder cannot, on its least adjudicated form of a knowing infliction of serious bodily injury that causes death (A.R.S., § 13-1104(A)(2)), be punishable in California either as first- or second-degree

murder. (AOB, pp. 138-142.) In addition, appellant demonstrated that the exhibits submitted to prove the prior conviction did not provide sufficient evidence of appellant's underlying conduct so as to bring the conviction within the terms of California's definitions. (AOB, pp. 142-148.) Finally, appellant demonstrated that, if it was legally appropriate to consider the evidence adduced at the penalty phase of trial, that evidence as well was insufficient to establish the requisite correspondence between the Arizona crime and California law. (AOB, pp. 148-154.)

Respondent's counters: 1) Arizona's "knowing" form of second-degree murder is equivalent to its "reckless" form of second-degree murder, which form, as appellant himself concedes, satisfies the definition of California's implied malice murder (RB, p. 105); 2) Arizona's "knowing" form of second-degree murder is the equivalent of California's first-degree felony-murder predicated on the commission of the crime of mayhem (RB, p. 106-107); 3) the knowing infliction of serious injury, under California law, constitutes implied malice murder, thereby rendering Arizona's "knowing" form of second-degree murder the exact equivalent (RB, pp. 107-109); 4) the evidence submitted to prove the prior conviction conclusively established that appellant committed California's first-degree felony murder predicated on the commission of robbery (RB pp. 110-114); and 5) respondent does not rely on any evidence presented at the penalty trial, although any insufficiency of evidence to prove the prior conviction for purposes of a special circumstance does not bar evidence of the underlying conduct at the penalty trial. (RB, pp. 114-115.) One may address each of these *seriatim.*

1) The Elements Test[6]

Respondent starts with the uncontroversial assertion that second-degree murder in Arizona is a homicide committed either intentionally, knowingly, or recklessly. He cites for this proposition *State* v. *Just* (Ariz.App.1983) 675 P.2nd 1353, 1366 (RB, p. 105), but the nature of Arizona's second-degree murder in this regard is self-evident on the face of the second-degree murder statute itself. (See fn. 5.)

He next quotes as follows from *State* v. *Hurley* (Ariz.App.2000) 4 P.3rd 455, 458 with his own italics added: " '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 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).' " (RB, p. 105.) He then concludes that in Arizona, "a defendant's knowing infliction of serious physical injury necessarily constitutes at least a 'reckless disregard that his conduct could result in death.' " (RB, p. 105.) Respondent then points out that appellant himself conceded that the "reckless" form of second-degree murder constitutes implied malice murder in California. (RB, p. 105.)

All this is very glib, but what respondent fails to note is that the statement in *Hurley*, through which he renders the "knowing" form of second-degree murder

---

[6] It will aid the reader to set forth the relevant statutory provisions. A.R.S. section 13-1104 provides as follows: "A. 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. section 13-105(34) provides 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."

the equivalent of the "reckless" form of second-degree murder, referred to the problem of whether reckless *manslaughter* was a lesser-included offense of the "knowing" form of second-degree murder. As will be seen in the following, the manner in which Arizona seems to establish whether or not one offense is included in another does not create necessary factual implications from the statutory elements, but is a legal determination that sometimes diverges from empirical fact – something often referred to as a legal fiction.[7] This is the case in *Hurley*, but before turning to the specific analysis of that case and another like it, one must step back and outline the general problem regarding the determination of lesser-included offenses.

In Arizona, the test for a lesser-included offense is whether "it is, by its very nature, always a constituent part of the greater offense, or whether the charging document describes the lesser offense even though it does not always make up the constituent part of the greater offense." (*State* v. *Chabolla-Hinjosa* (Ariz.App.1998) 965 P.2nd 94, 97; *State* v. *Magana* (Ariz.App.1994) 874 P.2nd 973, 975; *State* v. *Robles* (Ariz.App.2006) 141 P.3rd 748, 750-751.) This corresponds to the two tests employed in California: one, denominated the "elements test" and the other the "accusatory pleading test." (*People* v. *Lopez* (1998) 19 Cal.4th 282, 288-289.)

The California elements test "is satisfied when " 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' " (*Id.*, at p. 288, quoting *People* v. *Anderson* (1975) 15 Cal.3rd 806, 809-810.) The Arizona formulation does not speak of elements, but of the "nature" of the offense, and of "constituent part[s]." Although the softer language may account for differences in application of the test (compare *State* v. *Chabolla-Hinojosa*, *supra*, 965 P.2nd 94, 97-98 [possession of marijuana is, by its nature,

---

[7] *Black's Law Dictionary* (5th ed. 1979) defines "legal fiction" as "[a] situation contrived by the law to permit a court to dispose of the matter, though it need not be created improperly."

included within the crime of transport of marijuana] with *People* v. *Rogers* (1971) 5 Cal.3rd 129, 134 [possession of marijuana is not an essential element of transportation of marijuana]), at bottom Arizona's elements test is the same as California's and depends on the elements of the respective crimes and the factual implications necessarily inhering in these elements.[8]

But there are quirks, so to speak, and sometimes the test depends *not* on the factual implications of the definitional elements, but on their *legal* implications. What this means may be gathered from the outstanding, and perhaps sole, example of this in California law: the status of voluntary manslaughter as a lesser-included offense of murder.

Voluntary manslaughter is a lesser-included offense because murder is defined as "the unlawful killing of a human being with malice aforethought" (§ 187(a)), while voluntary manslaughter is defined as "an intentional and unlawful killing" without "malice" (§ 192). (*People* v. *Breverman* (1998) 19 Cal.4th 142, 153.) Formally, all the elements of voluntary manslaughter are included in the crime of murder. Factually, however, the case is otherwise. Voluntary manslaughter requires the *presence* of certain affirmative facts: either heat of passion or imperfect self-defense. Thus, the corpus delicti of murder can indeed be committed without committing voluntary manslaughter.

How then, under the elements test, can voluntary manslaughter be a lesser-included offense of murder? The answer is that the presence of heat of passion or imperfect self-defense is deemed the absence of malice *as a matter of law.*

---

[8] This is even clearer in the alternative formulations of these tests. In Arizona, the lesser-included offense is still an offense "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." (*State* v. *Woods* (Ariz.App.1991) 815 P.2nd 912, 193.) This is virtually indistinguishable from California's alternative formulation that "if a crime cannot be committed without also necessarily committing a lesser offense, the later is a lesser included offense within the former." (*People* v. *Lopez*, *supra*, 19 Cal.4th 282, 288; *People* v. *Birks* ((1998) 19 Cal.4th 108, 117; *People* v. *Toro* (1989) 47 Cal.3rd 966, 972.)

(*People* v. *Breverman*, *supra*, 19 Cal.4th at p. 153, fn. 5 (maj. opn.), and at pp. 181-182, Mosk, J., dissenting; *People* v. *Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1444.) In short, the elements test applies to voluntary manslaughter as a kind of legal fiction. Thus, if in some other context it becomes important to ascertain the underlying conduct of a California voluntary manslaughter conviction merely from the formal elements of the crime, one might falsely conclude that the person had killed someone without an intent to kill, or without a conscious disregard for life (§ 188), when in fact voluntary manslaughter *can* occur with the factual equivalents of what is otherwise, by definition, malice aforethought. (*People* v. *Lasko* (2000) 23 Cal.4th 101, 108-110.) The type of definitional fiat that occurs in relation to voluntary manslaughter in California is what informs the pronouncement in *Hurley* on which respondent is relying to establish the actual facts of appellant's conduct.

In *Hurley*, defendant, charged with second-degree murder was convicted of reckless manslaughter, which was an alternative offered to the jurors as a lesser-included offense over defendant's objection. (*State* v. *Hurley*, *supra*, 4 P.3rd at pp. 456-457.) It was agreed that the evidence showed at most only the "knowing" second-degree murder, and the prosecutor below initially agreed that although heat of passion manslaughter constituted a lesser-included offense, reckless manslaughter did not. (*Id.* at p. 457.) When the trial court noted that the evidence was susceptible of an interpretation that "defendant had been reckless in the degree of force employed without knowing that he would cause serious physical injury" (*ibid.*), the prosecutor agreed and requested the instruction on reckless manslaughter, leading to the conviction on this offense. (*Ibid.*)[9]

---

[9] Arizona Revised Statues, section 13-1103 defines manslaughter in relevant part provides in relevant part as follows: "A. A person commits manslaughter by: [¶] 1. Recklessly causing the death of another person; or [¶] 2. Committing second-degree murder as defined in § 13-1104 upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim . . . ."

The Court of Appeal rejected defendant's argument that the instruction was erroneous because reckless manslaughter was not a lesser-included offense of "knowing" second-degree murder. (*Ibid.*) The Court first invoked A.R.S., section 13-202(C), which provided in relevant part: " 'If acting recklessly suffices to establish an element [of an offense], that element is also established if a person acts intentionally or knowingly.' " (*Id.*, at p. 458.) The *Hurley* Court then drew this conclusion from the statute: "Thus recklessly is a lesser-included mental state of knowingly. [Citation.] 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) (Supp. 1998) (defining 'recklessly). Thus, reckless manslaughter is a lesser included offense of knowing second-degree murder." (*Id.*, at p. 458.)

It is from this conclusion in *Hurley* that respondent concludes that the *conduct* subsuming a conviction for "knowing" second-degree murder is no different than the *conduct* subsuming a conviction for reckless homicide whether it is reckless second-degree murder (A.R.S., § 13-1104(A)(3)) or reckless manslaughter. (A.R.S., § 1103(A)(1).) But it does not mean that at all. It means only that in *Hurley*, the elements test was satisfied merely on the basis of legal definition contained in A.R.S., section 13-202(C), much as the elements test for voluntary manslaughter as a lesser-included offense of murder is satisfied on the basis of legal definition. This does not and cannot establish the least adjudicated elements of a "knowing" second-degree murder as embracing the *facts* necessary to render this form of Arizona murder consistent with California's implied-malice murder.[10]

---

[10] One might question *Hurley*'s use of section 13-202(C) for purposes of establishing lesser-included offenses. For the statutory directive, that "[i]f acting recklessly suffices to establish an element [of an offense], that element is also

Understood in any other way, *Hurley* simply becomes incoherent. Thus, in *State* v. *Ontiveros* (Ariz.App.2003) 81 P.3rd 330, the Court in considering whether there can be an attempted "knowing" second-degree murder straightforwardly applied the statutory language without resorting to legal or a formal definitional equivalency:

> " . . . Under [A.R.S. § 13-1104(A)(2)] a person can commit second-degree murder without intending to kill and without knowing that his conduct will cause death if he knows that his conduct will cause 'serious physical injury' and his conduct actually causes death. The offense of second-degree murder, to be completed, requires the result of death. But if death does not occur, has a person committed attempted second-degree murder if he knew only that his conduct would cause 'serious physical injury' and did not intend or know that his conduct would cause death?" (*Id.*, at p. 332.)

The *Ontiveros* Court answered the question in the negative, because it interpreted the attempt statute as requiring an intent to effect the proscribed result, which would be death and not "serious physical injury." (*Ibid.*) But the point here is that the *Ontiveros* Court gave "knowing" second-degree murder its plain statutory meaning, while for purposes of assessing the question of a lesser-included offense, *Hurley* did not.

A similar elevation of the formal legal definition over the plain factual implications of the statutory elements occurs in Arizona in the way that all three forms of second-degree murder are deemed a lesser-included offense of premeditated first-degree murder. A.R.S., section 13-1105(A)(1) defines first-degree premeditated murder as: "A. A person commits first-degree murder if: [¶]

---

established if a person acts intentionally or knowingly," is applied straightforwardly, then it does not create a lesser-included offense in reckless manslaughter, it simply dissolves any difference between reckless manslaughter on the one hand and knowing and intentional second-degree murder on the other. Further, although one might view "recklessness" as included in "knowing," a reckless *causation of death* is not necessarily included in a knowing *causation of serious physical injury. Hurley* is not an Arizona Supreme Court case.

1. Intending or knowing that the person's conduct will cause death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child." It is clear on the face of the statute, that the elements of first-degree premeditated murder necessarily imply facts within the elements of "intentional" second-degree murder (A.R.S., § 13-1104(A)(1)) and at least a portion of "knowing" second-degree murder (A.R.S.,§ 13-1104(A)(2)).

As repeated throughout the briefing, second-degree murder occurs if "without premeditation" (A.R.S., § 13-1104(A)), the defendant intentionally (subd. (A)(1)), knowingly (subd. (A)(2)), or recklessly (subd. (A)(3)) caused the death of another. Nothing in the first-degree statute would imply the facts necessary for "reckless" second-degree murder (A.R.S., § 13-1104(A)(3)), and in *State* v. *Walton* (Ariz.App.1982) 650 P.2nd 1264, the Court found "intentional" second-degree murder and "knowing" second-degree murder to be lesser-included offenses of first-degree premeditated murder, but only noted that "reckless" second-degree murder was a separate and distinct offense. (*Id.* at 1271-1272 and fn 2.)

However, in *State* v. *Whittle* (Ariz.App.1985) 752 P.2nd 489, "reckless" second-degree murder also was found to be a lesser-included offense of first-degree premeditated murder. According to the Court in *Whittle*, second-degree murder is not divided into three separate and distinct offenses:

> " . . . . The legislature has classified it as one offense which can be committed in three separate and distinct ways. The first two require the culpable mental state of first-degree murder, except that the mental process of premeditation is omitted. The three are assigned an equal culpability value, inasmuch as each is rated as second-degree murder and each is punishable to the same extent. Although committable in three different ways, second-degree murder is one offense. Moreover, the culpable mental state, premeditation, required to convict of first-degree murder necessarily

> distinguishes it from second-degree murder. [Citations.] We find that second-degree murder is, by its very nature, a constituent part of first-degree murder, that it is an included offense, and that it was described by the terms of the charging document." (*Whittle*, *ibid.*, at p. 494.)

In other words, because the legislature's overarching definition in section 13-1104(A) of second-degree murder as a homicide committed "without premeditation," second-degree murder, despite its alternative forms constitutes a lesser-included offense of first-degree murder, which is a homicide *with* premeditation. Again, this, as in *Hurley* and as in the case of California's voluntary manslaughter, is an application of the elements test by means of legal definition and not based on factual implications from the elements.

The point here is not to criticize or improve or refine the elements test for lesser-included offenses in Arizona or California. It is to show that *Hurley*, on which respondent heavily relies does *not* establish what is required to refute appellant's analysis in the opening brief: that the least adjudicated elements of Arizona's second-degree murder necessarily implies facts that satisfy the definition of first- or second-degree murder in California. If the analysis has been elaborate, the fallacy of using the lesser-included-offense analysis of *Hurley* is insidious. But the conclusion is clear: *Hurley* is inapposite to the problem presented here.

2) Felony-murder/mayhem

Respondent's claim that a "knowing" second-degree felony murder constitutes felony-murder/mayhem in California rests on the proposition that an awareness that one is inflicting disfigurement or serious impairment amounts to the specific intent to maim required under California law for felony-murder/mayhem. (RB, pp. 106-107.)

Respondent notes that the California definition of "knowingly" is similar to that of Arizona's. (RB, p. 106, fn. 9.) In fact it is virtually identical. In Arizona,

"'[k]nowingly' means, 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. It does not require any knowledge of the unlawfulness of the act or omission." (A.R.S., § 13-105(9)(b).) In California, "[t]he word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of unlawfulness of such act or omission." (§ 7(5).) This formulation is simply not understood to establish the equivalent of the state of mind of intent or specific intent. (*People* v. *Beeman* (1984) 35 Cal.3rd 547, 558-559; *People* v. *Laster* (1997) 52 Cal.App.4th 1450, 1468-1469.)

Respondent cites no real authority because it all goes against him. In *People* v. *Sears* (1965) 62 Cal.2nd 737, this Court found insufficient evidence of the specific intent to commit mayhem as an element of first-degree felony murder where the defendant hit his victim across the nose and lip with a steel pipe. (*Id.*, at pp. 740-741, 745.) If the question was whether the defendant knew that hitting a person in the face with a steel pipe would cause a disfiguring injury, the result of this case might have been different, since a rational trier-of-fact might well conclude beyond a reasonable doubt that there was such knowledge.

Similarly, in *People* v. *Anderson* (1965) 63 Cal.2nd 351, this Court again, in a felony-murder case, found insufficient evidence of a specific intent to maim, where the evidence showed that the decedent had 41 knife wounds on her body, and about 20 more superficial cuts, with many of the wounds inflicted after death. (*Id.*, at pp. 354, 356, 358.) Could a rational trier-of-fact have concluded beyond a reasonable doubt that the defendant in *Anderson* knew he was inflicting serious disfigurement or impairment? Certainly, but this only illustrates the distinct difference between knowledge and intent, and refutes respondent's contention regarding felony-murder/mayhem.

3) Knowing Infliction of Serious Injury as implied Malice under California Law

Respondent's claim that California's malice murder can be constituted by the conscious disregard of the risk of serious injury was based on the hope that this Court would so hold in a case then pending before it. (RB, p. 107, fn. 20.) The case has now been decided, and this Court has rejected that contention, and the conscious disregard of the threat or risk of great or serious bodily injury is not part of the definition of implied malice. Rather, the act in question must be inherently life-threatening. (*People* v. *Knoller* (2007) 41 Cal.4th 139, 143 and fn. 2.)

4) The Evidence Submitted to Prove the Prior Conviction

In addressing the exhibits submitted to prove the prior conviction, respondent raises a legal possibility appellant had not considered: "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.)" (RB, p. 110.) Respondent then advances a *contingent* argument that "[i]f 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." (RB, p. 110.) Respondent's contention is meritless, but before addressing, or readdressing, its substance, certain matters omitted from the opening brief might render any controversy moot.[11]

In his opening brief appellant had hastily assumed that the question left open by *Martinez* was whether the reviewing court could refer to evidence adduced at the penalty trial to make up for deficiencies in the proof of the prior murder conviction for purposes of the special circumstance under section

---

[11] Appellant is presenting these contentions here, but is also proffering them in a supplemental opening brief so that they may be properly presented through the correct procedure, and in order to avoid ineffective assistance of appellate counsel. (*Evitts v. Lucey* (1985) 469 U.S. 387, 393-394.

190.2(a)(2). (See AOB, p. 148.) On closer consideration, appellant can see that respondent is correct about *Martinez*. In *Martinez*, this Court found defendant's Texas murder conviction to be a special circumstance for prior murder based only on the evidence that defendant pled guilty and on an analysis of the elements of the crime to which he pled guilty. The Court noted:

> "Our conclusion makes it unnecessary to reach the Attorney General's alternative argument that we properly may consider facts and circumstances underlying the offense to which defendant pleaded guilty, facts that in this case were elicited during the penalty phase. [Citations.] Contrary to defendant's contention, our reliance on the wording of the Texas indictment to determine what crime defendant committed would not constitute improper consideration of extraneous 'facts and circumstances underlying the offense.' In order to apply the 'elements' test of [*People* v.] *Andrews* [(1989)] 49 Cal.3rd [200,] at pages 222-223 . . . , we certainly must know, at the least, the crime to which defendant pleaded." (*People* v. *Martinez*, *supra*, 31 Cal.4th at p. 688.)

Clearly, this Court in the above passage was referring not only to penalty phase evidence, but also to guilt phase evidence on the prior conviction itself. *If* the *Andrews* test applies, then, arguably, the rule is that the only competent evidence of the prior conviction in this context is that evidence narrowly confined to show which crime in the foreign jurisdiction the defendant had been convicted of. If so, the unadjudicated factual representations and characterizations of the crime by either the prosecutor or defense counsel, as occurred here (see AOB, pp. 143-145) are simply not competent. It is appellant's contention that the *Andrews* test does apply here to preclude consideration of the statements of counsel at the Arizona plea hearing.

The omission of this contention from the opening brief was predicated not only on a misreading of *Martinez*, but on the uncritical assumption that a prior murder conviction under § 190.2(a)(2) is determined, like all recidivist prior

convictions, by means of the "entire record of conviction." (*People* v. *Guerrero* (1988) 44 Cal.3rd 343, 355; *People* v. *Myers* (1993) 5 Cal.4th 1193, 1195.) However, the language of the statute regarding all other recidivist priors (§ 668) and language of the statute governing the prior murder special circumstance is different, and the former does not govern the latter. (*People* v. *Trevino* (2001) 26 Cal.4th 237, 241 and fn. 2.)

Section 190.2(a)(2) provides in relevant part: "For purposes of this paragraph, an offense committed in another jurisdiction, which if committed in California, would be punishable as first- or second-degree murder, shall be deemed murder in the first- or second-degree." Section 668 provides:

> "Every person who has been convicted in any other state, government, county, or jurisdiction of an offense for which, if committed within this state, that person could have been punished under the laws of this state by imprisonment in the state prison is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if that prior conviction had taken place in a court of this state. The application of this section includes, but is not limited to, all statutes that provide for an enhancement or a term of imprisonment based on a prior conviction or a prior prison term."

Section 668 refers to the hypothetical conviction in this state of the "person" who committed the foreign offense as the measure of whether that offense can be used for recidivist enhancement. Section 190.2(a)(2) refers to "the offense" being "punishable" as first- or second-degree murder if committed by *anyone* within California. The generalizing tendency of Section 190.2(a)(2), especially when compared with section 668, is clear (see *People* v. *Trevino*, *supra*, 26 Cal.4th at p. 241), and it indicates an intent that the determination of a prior murder special be confined more narrowly to the elements of the foreign murder conviction. Hence, the *Andrews* test is dictated by statute. Again, under

*Andrews*, the unadjudicated opinions of the prosecutor and defense counsel do not constitute competent evidence.[12]

If the Court rejects this contention, and finds that the language is substantially similar, at least in regard to the problem of assessing the conduct underlying a foreign conviction, then the matter of what is and is not competent evidence of a prior conviction is still not resolved against appellant. When, in a recidivist context, it is necessary to go beyond the elements of the prior conviction, a court may consult the "record of conviction," which, as pointed out above, appellant had assumed included the plea colloquy between defense counsel and the prosecutor. This Court has offered two interpretations as to what constitutes the "record of conviction" for purposes of proving a prior conviction: it may be equivalent to the record on appeal, or it is a narrower concept, "referring only to those record documents reliably reflecting the facts of the offenses for which the defendant was convicted." (*People* v. *Reed* (1996) 13 Cal.4th 217, 223.) Although this Court has eschewed any express decision on which interpretation applies (*id.*, at p. 230), it has given a fairly decisive indication that the narrower interpretation is the proper one.

In *People* v. *Trujillo* (2006) 40 Cal.4th 165, this Court held that a defendant's statements in a probation report is not competent evidence to establish recidivist conduct because "[a] statement by the defendant recounted in a post conviction probation officer's report does not necessarily reflect the nature of the

---

[12] The conclusion that the *Andrews* test is dictated by statute is buttressed by the rule that statutes should be interpreted to avoid constitutional problems. (*People* v. *Brown* (1993) 6 Cal.4th 322, 335; *In re Catherine H.* (2002) 102 Cal.App.4th 1284, 1292.) To allow inquiry into the actual conduct underlying prior conviction, beyond the narrow documentary evidence establishing the fact of the conviction itself, becomes more like the type of criminal justice fact-finding that is subject to the due process protections of federal constitution (*Shepard* v. *United States* (2005) 544 U.S. 13, 25-26), which includes not only the right to a jury determination on proof beyond a reasonable doubt, but also Fifth Amendment protections against double jeopardy. (*Sattazahn* v. *Pennsylvania* (2003) 537 U.S. 101, 111-1112; *People* v. *Seel* (2004) 34 Cal.4th 535, 541.)

crime of which the defendant was convicted." (*Id.* at p 179.) Since a post-conviction probation report is part of the record of appeal, this suggests that "record of conviction" does refer only to documents that reliably reflect the facts of the offense. The statements of counsel at a plea colloquy, such as those at issue here, do not fit this definition. (*People* v. *Banuelos* (2005) 130 Cal.App.4th 601, 607.) Thus, again, the plea colloquy, beyond establishing that appellant pled guilty to second-degree murder and robbery in Arizona, is not competent evidence under the "record of conviction" test.

But if the evidence is competent, it is not sufficient for the reasons adduced in the opening brief. Respondent, who focuses on the prosecutor's remarks to conclude that the record "conclusively demonstrates that appellant's Arizona murder conviction qualified as a felony-murder under California law, since the victim was killed during a robbery" (RB, pp. 110-111), faults appellant for focusing on defense counsel's representations of appellant's self-serving statements (RB, p. 112) and for not acknowledging the deferent standard of review of sufficiency of the evidence. (RB, p. 113.)

Appellant has not forgotten it. Indeed, he will restate it precisely for this context. The prosecution has the burden of proving beyond a reasonable doubt that the offense for which appellant was convicted in Arizona is punishable as first- or second-degree murder in California. When such a finding has been made in the trial court, "[t]he test on appeal is simply whether a reasonable trier-of-fact could have found that the prosecution sustained its burden of proving the enhancement beyond a reasonable doubt." (*People* v. *Fielder* (2004) 114 Cal.App.4th 1221, 1232.) The record is viewed in the light most favorable to the trial court's findings. (*People* v. *Rodriguez* (2004) 122 Cal.App.4th 121, 128-129.)

But respondent in applying this standard wishes to treat the matter as though the competing comments of the prosecutor and the defense counsel during the plea hearing were the equivalent of a full trial, and one in which the charges were express malice murder and first-degree felony murder as defined in

California. With this, a casual word or description from the prosecutor then should be enough to satisfy the reviewing court that a reasonable trier-of-fact could conclude beyond a reasonable doubt that appellant committed express-malice murder or first-degree felony murder. But this is not the way it works, and the constricted evidentiary field applicable in this context will render what might be an actual inference after a full evidentiary hearing a speculation that a reasonable trier-of-fact cannot possibly treat *as* a fact.

Thus, in *People* v. *Rodriguez* (1998) 17 Cal.4th 253, this Court found insufficient evidence that defendant's prior conviction for aggravated assault was a serious felony. To be a serous felony at that time, the defendant had to have personally inflicted great bodily injury or personally used a firearm or deadly weapon. The only evidence adduced was the abstract of judgment, which labeled the crime of conviction as " 'ASLT GBI/DLY WPN." The reason was that this abbreviation reflected only the statutory language, and the defendant could have been convicted as an aider and abettor. (*Id.*, at pp. 261-262.) This Court rejected the Court of Appeal's finding that this was sufficient. Indeed, this Court quotes the Court of Appeal as follows: " 'It is possible – from the proof offered – appellant may not have 'personally used a dangerous or deadly weapon' yet still have been convicted as alleged. But as a reviewing court determining sufficiency of the evidence neither possibilities nor proof beyond a reasonable doubt is our concern.' " (*Id.*, at p. 262.) Thus, the Court of Appeal, perhaps inferring sufficient evidence of personal use from lack of a co-defendant, or from general experience that aiding and abetting convictions for this crime are not common, was in fact crediting a *speculation* on a very narrow field of evidence.

In *People* v. *Jones* (1999) 75 Cal.App.4th 616, defendant had a prior conviction for federal bank robbery in violation of Title 18 Unites States Code section 2113(a). (*Id* at p. 631.) Under that code section, the first paragraph defines a crime that comes within California's definition of robbery. The second paragraph defined a crime consistent with burglary of a bank. (*Id.*, at p. 631, fn.

7.) It had to be established that appellant was convicted for the conduct in the first paragraph in order to establish a serous felony prior, since the second paragraph did not establish it. (*Id.*, at p. 632.)

To go beyond the ambiguity in the elements of the crime itself, the People submitted a fingerprint card listing the charge as "Bank robbery," and a judgment and commitment showing that defendant pled guilty to a violation of section 2113(a) as a lesser included offense of sections 2113(a) and 2113(d) charged in the indictment. (*Id.*, at p. 633.) This latter section provided increased punishment when a defendant, "in committing, or attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device . . . ." (*Id.*, at p. 631, fn. 8.)

The Court in *Jones* found this to be insufficient:

> " . . . [E]ven viewing the record in the light most favorable to the judgment, we do not find the proffered evidence to be substantial such that a reasonable trier-of-fact could have found that the prosecution had sustained its burden of proving the defendant guilty of a prior serious felony conviction beyond a reasonable doubt. [Citation.]
>
> "Even if we assume, without deciding the hearsay and relevance issues raised by appellant, that the fingerprint card was admissible, the reference therein to "Bank Robbery" does not 'reliably reflect[] the facts of the offense for which the defendant was convicted.' [Citation.] The trial court could not have relied on it as establishing that appellant pled guilty to a violation of the first paragraph of section 2113(a). That statute is entitled 'Bank Robbery and Incidental Crimes' and the reference on the fingerprint card is on its face only a reference to the statute as a whole.
>
> "In addition, while the judgment of conviction indicates appellant pled guilty 'to the lesser included offense of violation of . . . Sections [*sic*] 2113(a,' he did not plead guilty to the charges as stated in the indictment. The reference to 'the lesser included

> offense' does nothing to clarify whether the conduct to which he admitted by way of pleading guilty fell under the first- or second paragraph of section 2113(a). Such language could mean he was convicted of a lesser included offense in not pleading guilty to the charge in the indictment under section 2113(d); alternatively, he may have pled guilty to and been convicted of a lesser included offense within the crimes describe in section 2113(a). In addition, we note that the charges apparently contained in the indictment do not establish the nature of his conduct; appellant did not plead guilty to the charges stated in the indictment. [Citation.]." (*Id.*, at pp. 633-634.)

What is clear from this, is that the narrow field of documentary facts render much more speculative the types of inferences tolerated under the sufficiency of the evidence standard when applied to trials, with its vastly broader field of evidence.

Thus, in the instant case, the prosecution and defense counsel were required only to relay enough facts to establish the least adjudicated elements of robbery and second-degree murder. The facts were casually represented without any view to the legal rigor required to establish a crime to which appellant was not pleading guilty. Indeed, they were related with no rigor at all. Appellant took Mr. Noble's wallet while the latter was sleeping in order to obtain job information. Mr. Noble woke up. A struggle ensued in which appellant used violence either to keep the wallet, defend his dog, punish Mr. Noble for assaulting his dog, or some combination of all three. In the course of the struggle, appellant cut Mr. Noble in the area of his face. An artery in the neck was severed and Mr. Noble bled to death. In light of the plea to second-degree murder, a reasonable trier-of-fact could infer no more than a "knowing" infliction of serious bodily injury that caused death; an inference of express or implied malice murder as defined in California could only be speculation on a documentary record elaborated only by the unrigorous and unadjudicated representations of counsel.

Similarly, as to felony-murder, although the record before the trial court was sufficient to establish that appellant committed robbery as that crime is

defined in California, it is speculation as to whether the killing was coincidental to the robbery or not. (See *People* v. *Green* (1980) 27 Cal.3rd 1, 59-62.) This is especially so when one considers that the law of first-degree felony murder predicated on the commission of robbery is the very same law in Arizona as in California (see AOB, pp. 146-147 and fns. 34 and 35), and appellant was not pleading guilty to first-degree felony murder in the Arizona proceedings. (*People* v. *Jones*, *supra*, 75 Cal.App.4th at p. 634.) In short, respondent's assertions of what is conclusively established on this record amounts only to his suspicions, fueled undoubtedly by his adversarial biases, as to what was going on in this case, and even a "strong suspicion is not sufficient to support a conviction" under the standard of review for sufficiency of the evidence. (*People* v. *Redmond* (1969) 71 Cal.2nd 745, 755.)

5) Penalty Phase Evidence

Appellant contended that the penalty phase evidence on the prior murder conviction is not available to this Court to remedy any deficiency in the guilt phase evidence on this conviction. As appellant argued, the "record of conviction" test does not include this kind of evidence and the competent evidence can not go beyond the record of conviction. (AOB, pp. 149-150.)

In addition, appellant raised the claim of double jeopardy based on the necessary implication of *Apprendi* v *New Jersey* (2000) 530 U.S. 466 that the basic federal constitutional rights apply when a prior conviction is resolved on evidence of underlying conduct rather than on the basis of the elements of the crime. (AOB, pp-. 150-154.) Appellant has nothing to add to this, except to note that the premise of appellant's constitutional argument has, since the opening brief been rejected by this Court. (*People* v. *McGee* (2006) 38 Cal.4th 682, 709.) Nonetheless, appellant believes that the argument is still meritorious. (*Id.*, at pp. 709-710, Kennard, J., dissenting.)

Finally, appellant contended that nothing in that evidence was sufficient to make up for the deficiencies in the guilt-phase evidence. (AOB, pp. 148-149.)

In any event, respondent does not feel the need to resort to the penalty phase evidence and makes no legal argument in regard thereto (RB, p. 114), except to note that the evidence of the conduct was at least admissible in the penalty phase. (RB, p. 115.) Appellant does not contend otherwise (see AOB, p. 155), and there is nothing here to which to reply.

## PENALTY PHASE ERRORS

## XII.

## REPLY REGARDING TRIAL COURT'S INSTRUCTIONS THAT CONFOUNDED THE FOUNDATIONAL REQUIREMENTS FOR FACTOR (b) AND FACTOR (c) EVIDENCE, THEREBY LIGHTENING THE PROSECUTOR'S BURDEN IN REGARD TO FACTOR (b)

Appellant contended that the trial court's instructions to the jury on the foundational requirements for factor (b) and factor (c) evidence conveyed to the jurors the erroneous impression that to consider the conduct of appellant's Arizona murder and robbery under factor (b), proof beyond a reasonable doubt was required to establish *not* the conduct itself, but only the fact of the prior conviction. (AOB, pp. 155-157.) This misimpression was conveyed by a combination of 1) omitting express reference to the Arizona murder and robbery, while expressly naming the crime of possession of a firearm, in CALJIC No. 8.87, the instruction on the foundational requirements for factor (b) evidence (AOB, p. 158)[13]; 2) concomitantly through CALJIC No. 8.86, designating expressly the

---

[13] "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

Arizona murder and robbery as subject to the foundational requirements for factor (c) evidence (AOB, p. 157)[14]; and 3) giving a special instruction that all but expressly conveyed to the jurors that the factor (c) foundation was all that was required to consider the Arizona murder and robbery as factor (b) evidence. (AOB, p. 159.)[15] This was prejudicial because it buffered the jurors from considering specifically and carefully the actual level of moral aggravation imported by appellant's *acts* underlying the conviction itself, the latter of which was aggravating in a distinctly different way related to recidivism. Further this was important in a penalty case where there were compelling mitigating factors surrounding appellant's abysmal childhood experiences at the hands of the sadistic Garlinghouse. (AOB, pp. 160-165.)

---

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." (11RT 2356.)

[14] "Evidence has been introduced for the purpose of showing that the defendant Robert Allen Bacon, has been convicted of the crime 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 aggravating circumstances 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." (11RT 2553.)

[15] "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 must first be satisfied beyond a reasonable doubt that the defendant was, in fact, *convicted* of those prior 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." (11RT 2356, emphasis added.)

Respondent denies that there was any instructional error at all, but if there was it was forfeited for lack of objection or for invited error, or for both. (RB, pp. 123-125.) In fact neither applies.

**A.**

Respondent's claim of forfeiture through lack of objection depends on *People* v. *Lewis* (2001) 25 Cal.4th 610. In *Lewis*, there was a partially similar claim to that made in the instant case: the omission of a factor (b) crime presented to the jury from the list specified in CALJIC No. 8.87. This Court held that the instruction correctly stated the law and was responsive to the evidence; it was only incomplete, which placed the onus on the defense to point out to the court the omission and to request the further instruction. (*Lewis*, *id.*, at p. 666.) Here, as respondent points out, the defense did not object to the omission of the robbery and murder from the 8.87 list, and therefore, per *Lewis*, this instructional error has been forfeited. (RB, p. 123.) There are several observations to make here.

First, the claim presented here is not strictly speaking the omission of the robbery and murder from CALJIC No. 8.87, but the combined effect of CALJIC No. 8.87 and 8.86, along with the court's special instruction, in allowing the jury to use the factor (c) foundation for factor (b) evidence. The omission of the robbery and murder is only one element in the combined error. If one wishes to look at it in a way that circumvents *Lewis*, the error was in the special instruction and the prejudice therefrom was propagated by CALJIC Nos. 8.86 and 8.87, which, if correct in themselves, did nothing to correct the error inherent in the special instruction.

But there is no need in any event to circumvent *Lewis*. There is rather a need to correct *Lewis*, and appellant would request the Court's indulgence to allow him to suggest that *Lewis* is not in line with established law. For it is a settled principle of instructional law that a court that *chooses* to give an instruction where there is no *sua sponte* duty to do so must nonetheless instruct *correctly*. (*People* v.

*Hudson* (2006) 38 Cal.4th 1002,1011-1012; *People* v. *Nottingham* (1985) 172 Cal.App.3rd 484, 496-497; *People* v. *Key* (1984) 153 Cal.App.3rd 888, 898-899.) This principle, *sub silentio*, has been applied by this Court to review instructions that relate voluntary intoxication to the question of mental state, but omit the specification of all relevant mental states in the case. Such instruction is not subject to a *sua sponte* duty, yet this Court, without invoking procedural default for failure to object, has consistently reviewed such a claim for its substantive merits. (*People* v. *Clark* (1993) 5 Cal.4th 950, 1021; *People* v. *Hughes* (2002) 27 Cal.4th 287, 342.)

One cannot distinguish these instances from *Lewis*, and the fact of the matter is that an incomplete instruction can be substantially misleading and thereby create *substantive* error. Further, if the omission in an instruction is sufficiently important, the instruction simply cannot be responsive to the evidence, since it is missing the very element that *responds* to the evidence. If *Lewis* has any application to the instant case at all, it ought not to stand for the principle of procedural default.[16]

To the extent that the error rests on the special instruction, respondent contends that forfeiture exists here due to invited error. Respondent, who gives a detailed account of the discussion on instructions in this case (RB, pp. 118-122),

---

[16] The rejection of the claim in *Lewis* makes more sense if viewed more consistently as a matter of lack of prejudice. In *Lewis*, the omission was one act – and one of the less salient ones – out of a list of five or six. (*People* v. *Lewis*, *supra*, 25 Cal.4th at pp. 626-627, 664-666.) Under those circumstances, a jury was not reasonably likely to construe the omission as significant, as it would when, as here, there is only *one* crime listed out of two or three. The maxim of statutory construction, *expressio unius exclusio alterius est* (the expression of one thing implies the exclusion of others (*In re J.W.* (2002) 29 Cal.4th 200, 209)) is simply a hermeneutical principle naturally inherent in the understanding of language. The force of the principle becomes diluted when the expression is of many things but the exclusion is of only one thing. Indeed, it may even become inverted, as in *Lewis*, where this Court observed that the likely conclusion for the omission was that the omitted crime simply could not be used as factor (b) evidence. (*People* v. *Lewis*, *supra*, 25 Cal.4th at p. 667

claims that because defense counsel expressed approval of the trial court's special instruction, and because that approval conformed with counsel's tactical desires, the error was invited. (RB, pp. 124-125.) Respondent does not understand the doctrine of invited error.

"The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest." (*People* v. *Wickersham* (1982) 32 Cal.3rd 307, 330, accord, *People* v. *Coffman* (2004) 34 Cal.4th 1, 49.) This means, in the context of jury instructions, that the court's duty to instruct correctly on the law " . . . can only be negated in that 'special situation' in which defense counsel deliberately or expressly as a matter of trial tactics, *caused* the error. [Citation.]." (*People* v. *Lara* (2001) 86 Cal.App.4th 139, 164, emphasis added; accord, *People* v. *Tapia* (1994) 25 Cal.App.4th 984, 1030-1031.) For this reason,

> "[t]he test for invited error is not whether the appellate court can infer from the record as a whole that failure to object to the error was a deliberate tactical decision. Invited error cannot be found even if counsel's silence was the result of a tactical decision, since the court's duty to apply the correct law is not dependent upon counsel and is not waived by counsel's failure to object to the error. Nor does the issue center on whether counsel subjectively desired a certain result. [Citation.] Error is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness. [Citation.]." (*People* v. *Lara*, *supra*, at p. 165.)

The provenance of the instant instructional errors was in the discussion related to CALJIC No. 8.87. The *prosecutor* submitted an instruction omitting the robbery and murder from the list of crimes subject to factor (b) treatment (10RT 2282), although *he* had presented extensive evidence of the facts underlying the murder and robber conviction, and not merely evidence of the conviction itself. Defense counsel was indeed silent in the face of this omission, but this cannot and

does not, by the above principles, constitute invited error. Indeed, respondent does not claim this aspect of the problem to be invited error, which is why he presented it rather as a failure to lodge an objection, *per People* v. *Lewis*, *supra*, 25 Cal.4th 610.

But the lengthy discussion about CALJIC No. 8.87 from which the robbery and murder were omitted (10RT 2282-2286), combined with the later discussion about the problem of double-counting the prior murder conviction both as factor (a) evidence for the special circumstance and factor (c) evidence for a prior felony conviction (10RT 2298-2299), raises a clear inference from the record: the parties and the court believed that the factor (b) aspect of the prior murder and robbery was identical to, or coextensive with, the factor (c) aspect of these crimes. This leads to the more immediate context of the discussion from which the special instruction emerged, and it is in this discussion that respondent locates defense counsel's "invitation" to the court to commit error.

Defense counsel wanted instruction on the elements of Arizona murder and robbery for purposes of evaluating factor (c) aggravation. If the jury adjudicated the conduct as mitigated to some degree, then that would affect the weight of the factor (c) aggravation. The prosecutor objected that instructing the jury on the elements gave the erroneous impression that he had to prove appellant guilty again of murder and robbery, when all he had to prove beyond a reasonable doubt was the fact of the convictions for murder and robbery. (10RT 2300-2301.) The court, for its part, expressed sympathy with the prosecutor's point, and the defense even agreed with it, asserting nonetheless the right of the defense to attempt to diminish the weight of the factor (c) aggravator. (10RT 2301-2306.) The court then ruled:

> "THE COURT: Here's what I'm going to do. I'll give the jury instructions on what is required to establish a particular crime that's of relevance in this case in the state of Arizona, but I'm going to make sure they understand that their job is not to determine whether or not the defendant is factually guilty of those crimes.

"MR. McKENNA: Correct.

"THE COURT: They can consider the facts and circumstances –

"MR. McKenna: In their weighing process.

"THE COURT: -- in determining the weight to be given to what happened in the state of Arizona.

"MR. McKENNA: I think that's an accurate statement.

"THE COURT: But their task is to determine whether or not there is an aggravating circumstance by virtue of finding beyond a reasonable doubt the convictions exist. But I don't want them to be misled that they've got to go through and make a finding that yes, in fact, he did commit the robbery, as opposed to he does have a conviction for the robbery.

"MR. McKENNA: But by – I think the dog's chasing the tail here. I agree with what the court is saying. However, I do believe that the elements are necessary and that limiting instruction that the court is suggesting, they should be apprised 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.

"THE COURT: Okay. Let me make a note here. All right. I'm going to have both sides prepare a concluding instruction for this proposed robbery instruction for the state of Arizona to inform the jury that their task in evaluating whether or not a prior felony conviction exists is to determine if the conviction itself exists, the instructions are being provided to them to let hem understand exactly what the crime of robbery is in the state of Arizona.

"And if the defense wants to put in language that you can also consider the facts and circumstances testified to concerning the commission of that offense to the extent that they were introduced in this trial, in deciding what weight you want to give to that factor, words to that effect." (10RT 2307-2308.)

The Court then extended this ruling to the second-degree murder as well. (10RT 2309), and then later, as respondent points out, the court chose its own draft of the limiting instruction. (11RT 2333; RB, p. 122.)

Does this even remotely sound like a court that was induced to give a limiting instruction, let alone a misleading one, because of the affirmative acts of defense counsel? Defense counsel requested an instruction on the elements of an Arizona murder and robbery; the court acceded to the request but *insisted* that this be supplemented by a limiting instruction informing the jurors that the prosecution need only prove the fact of conviction and not the underlying facts for purposes of aggravation. Anything added by the defense concerning the weight of aggravation was optional with the defense. Clearly, if the special instruction was erroneous and misleading, which it was, the error was committed on the initiative of the court. It was not caused by counsel. The doctrine of invited error has no application here.

**B.**

It will be noticed that appellant has approached the issue of invited error without any reference to respondent's laborious argument as to what the record in this case does and does not show as to defense counsel's tactics once he perceived that the prosecution, *mirabile dictu*, was not going to use the murder and robbery as factor (b) evidence. (RB, pp. 124-125.) If this were true, of course, then the prosecutor would have presented no evidence of the underlying facts of these crimes. But he did in great detail, and respondent's elaboration of this into a defense opportunity to somehow keep the factor (b) aspect of the aggravation secret from the jurors is contorted nonsense.

This is the preface to a reply to respondent's contention that there was no instructional error at all regardless of the state of forfeiture. For according to respondent, "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[,] . . . 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*." (RB, p. 125, emphasis in original.) In short, the absurdity respondent imputed to trial counsel in the service of procedural default he now imputes to the jury in an attempt to refute the claim of substantive error.

What is it reasonably likely for a jury to understand from a CALJIC No. 8.86 confined to the murder and robbery as factor (c) crimes, and from a CALJIC No. 8.87 for factor (b) crimes confined only to possession of a firearm? Would they conclude that since possession of a firearm is described in 8.87 as a "criminal act . . . which involved the threat of force or violence" that therefore murder and robbery, which are described in CALJIC No. 8.86, simply as "convictions," are *not* criminal acts involving the threat of force or violence? The answer is clearly, no, there is no reasonable likelihood of this; rather, there is no likelihood at all. What the jurors would almost certainly conclude is that CALJIC No. 8.86 and CALJIC No. 8.87 address precisely *the same* sort of aggravation, except that the *facts* of the former are vouchsafed by a conviction while the *facts* of the latter are not, at least not by a court conviction. Add, then, into the mix an instruction that for the murder and robbery, the prosecution needed to prove *only* the conviction, while the underlying facts, *as already determined by an Arizona Court,* are to be seen substantively and morally in light of the elements of Arizona murder and robbery. In other words, there was a reasonable probability that the jurors would 1) use the factor (c) crimes as factor (b) evidence; and 2) feel themselves relieved of any necessity of scrutinizing carefully the factor (b) aspect of the prior crimes for moral extenuation.

This is borne out by the prosecutor's argument, where, intentionally or not, he exploits the substance of the factor (b) aspect of the murder and robbery under no greater burden than that of proving the fact of a conviction:

"Now, the penalty process, the penalty phase process is different. As you noted from the instructions that have been read, they're very different instructions. They're different rules and there's a different standard. The standard that you are to apply is not proof beyond a reasonable doubt. Reasonable doubt is read to you only in a very narrow circumstance, and I'll tell you how that applies.

"In order to consider certain aggravating factors, you need to find beyond a reasonable doubt that those aggravating factors are true. Now, a couple of those relate to the conviction in the state of Arizona. Now I would submit to you that there's no issue as to whether or not the defendant was convicted of murder and robbery in the state of Arizona. You heard testimony about that from Lieutenant Duffner who told you, yes, in fact, the defendant pled guilty to a murder and to a robbery. And you also will have People's Exhibit 30, the bottom tag, which was submitted to the court in the hearing that was held while you were deliberating in the guilt phase.

"And if you look on the second page in the middle, you will see second degree murder, the sentence imposed, and robbery, and the sentence that was imposed. So there really isn't an issue that the defendant has been previously convicted of murder and robbery in the state of Arizona.

"But you must be instructed by law that you need to make that finding beyond a reasonable doubt before you can consider that fact. 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 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 a 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 a reasonable doubt 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 type of conduct involves great 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." (11RT 2368-2369.)

This argument illustrates compactly and straightforwardly the likely and highly probable misunderstanding of the law conveyed by the instructions in this case. Whether one expressly uses the terms factor (b) and factor (c) or not, the murder, robbery, and possession of a firearm would all be understood substantively and functionally as factor (b) evidence, with the murder and robbery subject to the less onerous foundational requirement due to certification by a court conviction. This is exactly how the prosecutor himself understood the law, and for respondent to assert that the prosecutor "never argued that the evidence underlying the murder and robbery was factor (b) evidence" (RB, p. 127) is nothing more than an empty formalism. The passages in the prosecutor's argument cited by respondent to show that the murder and robbery were used only in reference to lack of remorse and in an admonition against double-counting or some other purpose apart from factor (b) aggravation (RB, pp. 127-131) do not inject substance into this vacuity, which must remain empty so long as the crimes in question are murder and robbery, and so long as the prosecutor introduced actual evidence far beyond the fact of conviction.

For respondent to claim, similarly, that the jurors did not use the robbery and murder *substantively* as factor (b) evidence is to impute to them a senseless understanding of the instructions and argument. The combined instruction on

CALJIC No. 8.86, CALCJIC No. 8.87, and the court's special instruction all conduce to a reasonable *certainty* that the jurors were misled to believe that all that was required to consider the underlying facts of the murder and robbery was proof beyond a reasonable doubt that those facts were certified by a court conviction. This is not the law.

**C.**

In regard to prejudice, appellant went over the facts presented regarding the Arizona murder and robbery and demonstrated in specific detail how those facts, through the close scrutiny forced on them by the prism of a correct instruction, might have appeared less morally aggravating than they otherwise did through the blurry prism of erroneous instruction. Appellant pointed out how there was substantial ground to conclude that appellant had not killed Mr. Noble by cutting his throat with a bottle. This was a daylight assault and there were eyewitnesses, none of whom saw any weapon in appellant's hand. There was debris all over the roadside, and a reasonable trier of fact could have conceived a reasonable doubt as to whether appellant did anything more than knock Mr. Noble to the ground where he fell on broken glass. Although this does not take the crime out of the realm of factor (b) evidence, it considerably reduces its aggravating force, and the case for death required all the aggravating force that it could muster to outweigh substantially the substantial mitigating force of the defense case.

Respondent dismisses the argument as "conclusory and unpersuasive." (RB, p. 132.) One does not expect respondent to be persuaded, but to call a detailed argument predicated on the examination of specific facts "conclusory" means only that respondent objects to *appellant* drawing any conclusion that does not amount to a confession that the error he complains of is in fact harmless. Presumably, if that were stated, even in a conclusory fashion, respondent would have no objection. But respondent simply ignores the facts that appellant cites, such as the eyewitness testimony, and then employs what one may call a

conclusory bit of purple prose by proclaiming that appellant had "literally beaten [John Noble] to a pulp" (RB, p. 132) – a description that is "literally" inaccurate.

Respondent also in his extensive discussion of prejudice makes absolutely no mention of the defense case in mitigation, which, again, was a substantial one. From 6 months of age virtually continuously until age 12, appellant was neglected or abused or both, and, under Bill Garlinghouse, that abuse was savage, perverse, and relentless. It indeed would require a very strong case in aggravation to hold appellant fully answerable for the death penalty when the experience of his tender years was so cruelly harsh and stunted his ability to develop the powers of mature reflection later in life. This does not mean that he was not required to muster sufficient self-governance to refrain from crime, but it does mean that there are in this case substantial reasons to punish him with the *second highest* penalty imposed in this state for any crime. It cannot on this record be shown beyond a reasonable doubt that the instructional error, which does exist, and which was not forfeited, was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Brown* (1988) 46 Cal.3rd 923, 965.)

## XIII.
## REPLY CONCERNING INSTRUCTION ON VOLUNTARY MANSLAUGHTER

Appellant contended that it was error to reject his request for instruction on voluntary manslaughter for purposes both of evaluating the factor (c) aggravation and the factor (b) aggravation inhering in the Arizona murder. Appellant relied 1) on the general principle that the trial court is obligated to instruct on the elements of the crimes used under factor (b) or factor (c); 2) on the specific holding of *People* v. *Adcox* (1988) 47 Cal.3rd 207, 256, that further instruction may be necessary to clarify the actual structure of the conviction under factor (c); and 3) on the implied suggestion in *People* v. *Price* (1991) 1 Cal.4th 324, 489, that a *request* for instruction on a lesser-included offense for a factor (b) crime might be

appropriate. (AOB, pp. 165-167.) The more overarching rule is that governing requested pinpoint instructions that place the defense theory of the issue before the jurors. (AOB, p. 167.)

Respondent's answers to these arguments seem to be based on one of two positions or on both: first, that once a court verdict certifies the crime, *that* is the crime that the jury receives instruction on for factor (c); secondly, in this case, the murder was presented *only* as a factor (c) crime. Thus, according to respondent, appellant was convicted of murder in Arizona, and nothing more had to be clarified per *Adcox*; thus too, there was no need to instruct in regard to a factor (b) lesser because that would be appropriate only *if* the murder here was unadjudicated, which it was not. (RB, pp. 1340-137.) The problem with appellant's claim, according to respondent, is that the penalty phase is not "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." (RB, p. 136.)

This is all very catchy, but not explained. *How* exactly, does the defendant attempt to re-write history? Does he expect that a finding on the lesser-included offense will then undo the special circumstance finding and thereby nip the penalty phase in the bud? This at least is not appellant's contention. Appellant's contention is that in the moral assessment of the case, an aggravating circumstance under factor (c) or factor (b) is not morally as aggravating if the jury believes that the facts of the prior crime are in some regard extenuated in a way not reflected in the conviction (factor (c)) or not reflected in the *prosecutor's* characterization of the conduct (factor (b)).

There is nothing controversial in any of this. It is governed by established principles of law that do not, and have not, entailed any administrative burdens on the courts in criminal cases generally. In appropriate circumstances, the trial court should give a requested instruction that pinpoints the crux of the defense theory of the case. (*People* v. *Ward* (2005) 36 Cal.4th 186, 214-215; *People* v. *Castillo*

(1997) 16 Cal.4th 1009, 1119; *People* v. *Rincon-Pineda* (1975) 14 Cal.3rd 864, 883.) " 'But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation].'" (*People* v. *Coffman* (2004) 34 Cal.4th 1, 99, quoting *People* v. *Bolden* (2002) 29 Cal.4th 515, 558.)

As for instruction on voluntary manslaughter, there was substantial evidence to support the instruction, and respondent does not claim that there is not. Secondly, purveying to the jurors the elements of voluntary manslaughter is not argumentative; it only facilitates in a neutral manner the opportunity for defense counsel to make his counter argument to the prosecution's own claims for the aggravating force of the prior crime. Finally, instruction on voluntary manslaughter was not duplicative of any other instruction. There was simply nothing in the instructions that gave legal scope to the jury's power and authority to find a diminution of aggravation in the actual facts of the prior act as presented to them. In short, it was error to refuse the requested instruction.

As to prejudice, respondent invokes the wrong standard of review when he asserts that "appellant cannot demonstrate a reasonable likelihood that he would have received a more favorable result in the penalty phase." (RB, p. 138.) Rather, *respondent* must show that there was no reasonable *possibility* that the error affected the penalty phase verdict, which is to say, respondent must show harmlessness beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Brown* (1988) 46 Cal.3rd 923, 965.) This respondent cannot do, at least without recognizing that the issue is not whether the jurors could find the murder to be factor (c) and factor (b) evidence, but whether the jurors might have found the aggravating force of the murder, either under (c) or (b), diminished to the point that under the *correct* standard of review, the penalty verdict must be reversed.

Finally, respondent rejects the existence of any Eighth Amendment error here on the ground that an irrelevant instruction does not, and did not here, prevent

the introduction of mitigating evidence. (RB, p. 138.) The assertion seems to be full of superfluities, since the refusal to give an *irrelevant* instruction is no kind of error at all, state or federal. However, if respondent is intimating that there is a constitutional difference between the preclusion of mitigating evidence and an instruction that screens the jury from considering mitigating evidence that had been admitted, then respondent is wrong. They are the same Eighth Amendment error. (*Weeks* v. *Angelone* (2000) 528 U.S. 225, 232-233; see also *Brown* v. *Payton* (2005) 544 U.S. 133, 142-144; and *Boyde* v. *California* (1990) 494 U.S. 370, 380.)

## XIV.
## REPLY CONCERNIING PAROLE VIOLATION AS FACTOR (b) EVIDENCE

Appellant contended that his possession of a firearm while on parole from his Arizona murder conviction did not qualify as factor (b) aggravation. Parole status did not bring the conduct within the rule that possession of a weapon by an inmate in physical custody is, as a matter of law, a crime involving a threat of violence. Nor did the specific facts of this case bring the conduct within that definition, given the nature of the weapon as a small caliber handgun, and the circumstances of possession, wherein the gun was kept inside his home under his pillow, and was not carried abroad on his person. (AOB, pp. 172-175.)

According to respondent, parole is a custodial status, and custody is custody. (RB, pp. 140-142.) Appellant's attempts to distinguish actual and constructive custody was based on faulty reasoning. "As a parolee, appellant was subject to a search condition which is precisely how the loaded handgun was discovered. [Citation.] 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

official who must also search and interact with parolees outside the closed confines of a secure prison setting." (RB, p. 143.)

It is, however, respondent's confounding the conditions of constructive custody with those of actual physical custody that is fallacious. Actual physical custody in close quarters in a volatile environment is the factor that renders the mere possession of a weapon an *imminent* threat of violence. Constructive custody, wherein the parolee does not exist at close quarters with either security personnel or other inmates, and can be isolated at a broad range of locations while a search is conducted, is clearly a different situation exhibiting a significantly lesser degree of threat and menace.

One might consider the problem from the other end of the scale for illustrative purposes. By respondent's reasoning, any one of us, law abiding citizens though we appear to be, who nonetheless possess a weapon, legally or illegally, are even *more* dangerous to law enforcement authorities, who have no notice whatsoever that we need to be approached carefully and with concern for security and safety. Yet, apart from custodial status of one sort or another, no one would contend that the possession of a weapon as such constitutes a factor (b) crime. Again, the nodal point for deciding the issue here is whether parole status tends more toward the conditions of actual physical custody or the conditions of full freedom with reference to factor (b). Appellant takes the position that comports more with logic and sense.

To buttress his position, however, respondent criticizes appellant's citation to *People* v. *Holloway* (2004) 33 Cal.4$^{th}$ 96, where this Court found that parole status did not contribute to the existence of a custodial interrogation for purposes of *Miranda*. Respondent contends that nothing in *Holloway* illuminates the differences between actual and constructive custody. (RB, p. 142.) But this is mere assertion on respondent's part and exhibits a grim determination to draw no conclusions from the self-evident: parole status and actual custody do have different consequences in reality despite the legal fact that they are both forms of

custody. Undoubtedly, respondent makes an attempt to establish the substantive similarity between constructive and actual custody in relation to possession of a weapon, but the argument still depends more on the dim light shed by synonymous formalities to make different things *appear* to be the same. The weaker argument should be rejected. The trial court erred in allowing the possession of a weapon as a factor (b) crime in this case.

Respondent turns to the concomitant instructional error of informing the jurors that a non-violent felony is a violent one. The claim is "refuted," according to respondent, because the determination of whether or not a crime qualifies as a factor (b) aggravator is a question of law for the court. (RB, pp. 143-144.) Of course, appellant's argument on the instructional error, which he raised as an Eighth Amendment claim (AOB, p. 175), *presupposes* that the trial court in fact made *an error of law* in finding the possession of a weapon to qualify as a factor (b) crime.

## XV.
## REPLY CONCERNING FAILURE TO PARTIALLY SUPPRESS APPELLANT'S STATEMENT

Appellant contended that if this Court did not find the failure to partially suppress appellant's statement to Grate prejudicial, then it was prejudicial at the penalty phase. (AOB, pp. 176-177.) Respondent devotes a good deal of time to rearguing that there was no error at all (RB, pp. 145-147) – to which appellant has submitted his reply above. (See pp. 13-25.) He devotes the second half of the argument to show that the prosecutor had plenty of aggravation left over to make a case for the death penalty without resorting to the second portion of appellant's statement. (RB, pp. 147-148.) Finally, he argues that in Martin L'Esperance's testimony, and in the first portion of the statement, there was a sufficient amount of disgusting brutality of expression to provide a compelling surrogate for the second part of the statement to Grate. (RB, p. 149.) All of this, according to

respondent, would require an affirmance under the standard of review formulated in *People* v. *Watson* (1956) 46 Cal.2nd 818. (RB, p. 149.)

Again, respondent gets the standard of review wrong. (See above, at pp. 13, .) If the failure to suppress constitutes an error, whose effect reached into the penalty phase of trial, then respondent must bear the burden to show that the error was harmless beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24) and, which amounts to the same thing, beyond a reasonable possibility. (*People* v. *Brown* (1988) 46 Cal.3rd 923, 965.)

Once this is straightened out, the matter looks quite different. First of all, respondent's confidence in Martin L'Esperance is much too uncritical to survive unfavorable scrutiny under the appropriate standard of review. (See above, pp. 13, 24-25, 72.) Beyond L'Esperance's incredible testimony, there was still much in the record to raise a disgust for appellant's brutal expressions in the first half of the interview. Nonetheless, there was ample room in this case for toleration in the moral calculus, given the substantial case in mitigation based on appellant's childhood – a matter that respondent hardly even deigns to discuss. Even though toleration has its limits, respondent cannot demonstrate beyond a reasonable doubt that the error here was harmless.

## XVI., XVII.
## REPLY CONCERNING THE ERRONEOUS ADMISSION OF THE NOTE AND REFUSAL OF SPECIAL ACCOMPLICE INSTRUCTION

In arguments XVI and XVII of the opening brief, appellant argued that the exclusion of the note as evidence (AOB, pp. 178-179) and the denial of Justice Kennard's instruction on accomplice testimony from *People* v. *Guiuan* (1998) 18 Cal.4th 558 (AOB, pp. 179-180) each rendered a prejudice that extended into the penalty determination. Respondent denies there were any errors or any prejudice at the penalty phase. (RB, pp. 150-154.) There is nothing much here that requires a response, except to point out that respondent keeps invoking the standard of

review of *People* v. *Watson* (1956) 46 Cal.2nd 818 (RB, pp. 152, 154), which of course is incorrect. (See *People* v. *Brown* (1988) 46 Cal.3rd 432, 447-448.)

## XVIII.-XXI.
## REPLY CONCERNING SYSTEMIC ERRORS

In arguments XVIII through XXI appellant raised the systemic issues which, however meritorious they are in appellant's view, have been rejected repeatedly by this Court. Respondent's short responses reflect this. (RB, pp. 155-156.) There is nothing further to add.

## XXII.
## REPLY CONCERNING COMBINED PENALTY PHASE ERROR

Appellant's last argument was that the combined penalty phase errors required reversal of the death judgment. This was respondent's opportunity to address the defense case in mitigation. Never in any discussion of prejudice from any of the individual errors does respondent address this compelling evidence (RB, pp. 131-134, 147-149) except once in a single sentence that noted that "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. (11RT 2394-2402.)" (RB, p. 147.)

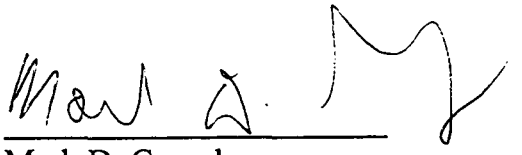
This notice of an argument made by defense counsel does not do justice to the undisputed, and self-consistent evidence from credible witnesses. Any rational discussion of prejudice would at least have to analyze the import of the defense evidence in the overall context of the case. The last issue was respondent's last chance to do this, and he does not take it, hoping, it seems, to leave the impression that the defense case was negligible and not *worth* noting. Whether respondent has the prestige to make a point on the cheap in this way, only an unbiased judge can determine.

## CONCLUSION

For the reasons adduced in this brief and in appellant's opening brief, appellant's conviction for capital murder must be reversed; at the very least, the death penalty must be reversed.

Dated: February 18, 2008

Respectfully submitted,

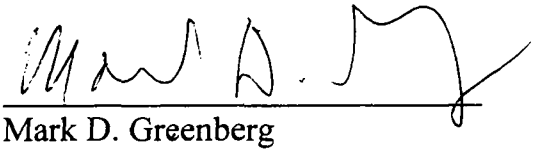


Mark D. Greenberg
Attorney for Appellant

## CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 25,373 words.

Dated: February 18, 2008



Mark D. Greenberg
Attorney for Appellant

[CCP Sec. 1013A(2)]q

The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

APPELLANT'S REPLY BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on February 19, 2008, addressed as follows:

Attorney General
455 Golden Gate Ave., No. 11000
San Francisco, CA 94102

Superior Court
Hall of Justice
600 Union Ave.
Fairfield, CA 94533
FOR DELIVERY TO THE HON. R. MICHAEL SMITH

District Attorney
600 Union Ave.
Fairfield, CA 94533

Scott Kauffman
California Appellate Project
101 Second Street, Ste. 600
San Francisco, CA 94105

Robert Allen Bacon, P-41600
San Quentin State Prison
San Quentin, CA 94974

Timothy McKenna
Attorney at Law
Solano County Dept. of Child Support
435 Executive Ct. N.
Fairfield, CA 94534-4019

Robert C. Fracchia, Commissioner
Superior Court
600 Union Ave., Ste. E
Fairfield, CA 94533

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 19, 2008 at Oakland, California.

Mark D. Greenberg
Attorney at Law