In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **WILLIE LEO HARRIS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S081700

Kern County Superior Court, Case No. SC071427A
The Honorable Roger D. Randall, Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

In his second supplemental opening brief, appellant argues the trial court erred in denying his motion for mistrial after Detective Stratton testified to appellant's prior statement in which he referred to Alicia as "the bitch," and claims the curative instruction was prejudicial and improper. (Second Supp. AOB 1-7.) Appellant previously raised this claim in his opening brief (AOB 273-275), and he now attempts to make an additional argument in support of this claim. For the reasons stated in respondent's brief (RB 119-120), and the additional reasons stated below, appellant's claim should be rejected.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL FOLLOWING THE ADMISSION OF APPELLANT'S PRIOR STATEMENT REFERRING TO ALICIA AS 'THE BITCH" AND ANY ERROR IN THE COURT'S INSTRUCTION WAS INVITED AND HARMLESS

As previously outlined in respondent's brief (RB 119-120), prior to the first trial, the defense moved to exclude several statements appellant made during his June 11, 1997 jailhouse interview with Detectives Stratton and Herman. (4 CT 959-966.) The trial court did not exclude the statements in their entirety, but instead ruled the term "bitch," while commonly used by young African-American men to refer to all women, was still offensive in the Anglo culture and should be excluded under Evidence Code section 352. (2 RT 678-679.) The prosecutor indicated he would instruct Detective Stratton on the court's ruling. (2 RT 679.)

Prior to the second trial, the trial court indicated all previous in limine rulings remained in effect. (18 RT 4249.) During the second trial, Detective Stratton testified that during an interview with himself and Detective Herman appellant stated, "I'm conniving just like you're

conniving, but I didn't kill the bitch." (29 RT 6800.) Defense counsel objected to the statement, moved to strike it, requested that the trial court instruct the jury not to consider it, and asked the court to declare a mistrial. (29 RT 6800-6801.) The trial court offered to either strike the statement or to instruct the jury that young African-American males use the word bitch in a non-pejorative manner, but declined to declare a mistrial. (29 RT 6802.) The defense chose the latter and the trial court instructed the jury as follows:

> Ladies and gentlemen, you just heard the officer testify to a quotation from the defendant and I'll take judicial notice of something.
>
> Judicial notice is sort of like a stipulation, that the attorneys stipulate to certain facts, you accept them as true. Judicial notice is a notice by the Court that something is accurate or factual, such as that the 19th of May in 1997 was a Monday, for example. That would be judicial notice.
>
> I'll take judicial notice that in our society young African-American males frequently use the word bitch in a non-pejorative fashion, whereas it is generally true that Caucasian males and Hispanic males, if they use that word, are using it in an angry fashion with regard to females.

(29 RT 6802-6804.)

Appellant previously argued in his opening brief that the court's instruction was insufficient to cure the prejudice caused by the admission of his prior statement. (AOB 273-275.) Appellant now contends the court's instruction further prejudiced him, and was an improper use of judicial notice. (Second Supp. AOB 2.) Appellant's additional arguments are meritless.

Preliminarily, appellant is precluded from attacking the propriety of the trial court's instruction, because he invited any error by requesting that the trial court give the instruction he now seeks to attack.

> 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. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . .[I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.

(*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.) This is not a case in which defense counsel merely acquiesced in the giving of the instruction, defense counsel affirmatively requested that the court give the contested instruction rather than instruct the jury to simply disregard the word "bitch." (29 RT 6082.) The record shows defense counsel had a "clearly implied tactical purpose" for requesting such an instruction, and thus appellant cannot now complain that the instruction was erroneously given. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 ["In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be sufficient to invoke the invited error rule."].)

In any event, the instruction was not prejudicial. Appellant argues it was improper for the court to take judicial notice that young African-American men commonly use the word "bitch" in a non-pejorative fashion, whereas Caucasian and Hispanic men generally use the word in a derogatory way. (Second Supp. AOB 2-5.) He contends this "fact" does not come within any of the categories of facts that must or may be judicially notice under Evidence Code sections 451 and 452. (Second Supp. AOB 3-4.) Respondent agrees that this fact does not appear to fit within any of the categories of facts that must or may properly be judicially noticed. (See Evid. Code, §§ 451, 452.) Respondent, however, submits it does not matter if you call it judicial notice, an instruction, or a stipulation, what matters is the substance of what the court told the jury. Appellant

contends the court's statement prejudiced him by allowing the jurors to view him "as different, lesser, more deserving of disapproval and more likely to be guilty," and gave the jurors "permission to impose the death penalty by marginalizing and dehumanizing appellant." (Second Supp. AOB 5-6.) This is a fanciful and utterly unreasonable interpretation of the court's instruction. In fact, the court's instruction directly addressed the potentially prejudicial portion of appellant's prior statement by telling the jury that petitioner did not use the word "bitch" in a derogatory manner. The jury is presumed to have followed this instruction. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Moreover, "[j]urors today are not likely to be shocked by offensive language." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1009; see *People v. Halsey* (1993) 12 Cal.App.4th 885, 891 [no abuse of discretion in allowing a witness' testimony as to defendant's statement that the deceased victim was a "son-of-a-bitch"].) Petitioner simply fails to show how the instruction, that he requested, prejudiced him.

In sum, any error in the giving of the instruction was invited by appellant, because defense counsel specifically requested that the court give such an instruction. Moreover, appellant cannot show he was prejudiced by the instruction. Finally, for the reasons stated in respondent's brief and expanded here, the trial court properly denied appellant's motion for mistrial.

CONCLUSION

For the foregoing reasons, and the reasons set forth in respondent's brief, respondent respectfully requests that the judgment be affirmed.

Dated: May 20, 2011

Respectfully submitted,

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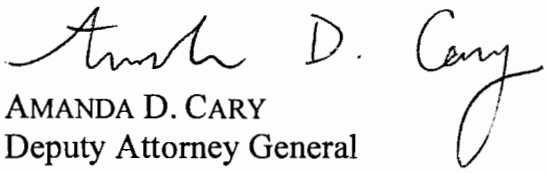

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CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 1,373 words.

Dated: May 20, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Harris**
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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 20, 2011, at Fresno, California.

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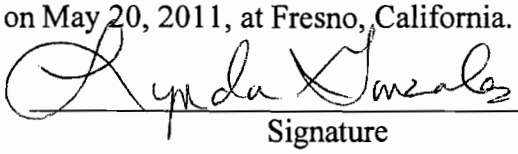
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