

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

COLE ALLEN WILKINS,

Defendant and Appellant.

**SUPREME COURT
FILED**

Case No. S190713

DEC - 6 2011

Frederick K. Ohlrich Clerk

Deputy

FILED WITH PERMISSION

Fourth Appellate District, Division Three, Case No. 06NF2339
Orange County Superior Court, Case No. G040716
The Honorable Richard Toohey, Judge

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ISSUE FOR REVIEW

This Court granted review on the following issue: Whether the trial court should have instructed the jury, as requested, with CALCRIM No. 3261, on the theory that a homicide and an underlying felony do not constitute one continuous transaction for purposes of the felony-murder rule if the killer has escaped to a place of temporary safety before the homicide takes place.

INTRODUCTION

Appellant was convicted of first degree felony murder after stealing several large kitchen appliances, including a stove, from a house under construction on a construction site in Menifee in Riverside County. In his haste, he put the items completely unsecured in the back of his pickup truck with the tailgate down. As he was driving en route on the freeway to his home, about 60 miles from the burglary, with the stolen items, the stove fell off his truck, resulting in a fatal traffic collision that took the life of a Los Angeles Sheriff's Deputy. The deputy, who had been driving on the freeway swerved to avoid hitting the stove and collided with a big rig. The big rig fell on top of the deputy's car, crushing and killing him. An Orange County jury found appellant guilty of first degree murder (Pen. Code,¹ § 187, subd. (a)) based on a felony-murder theory.

At trial, appellant asked the court to instruct the jury with CALCRIM No. 3261 that a burglary continues until the perpetrator reaches a place of temporary safety (the "escape rule"). His request was based on his version of the facts and his self serving testimony that he had not burglarized the items, but instead had purchased them from a man in a Home Depot parking lot the night before the fatality. Appellant also

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

testified that after buying the items he had then gone to his friend's house in Palm Springs, where he stayed for about an hour before heading back to his home in Long Beach.

The trial court denied appellant's request. Instead, the trial court instructed the jury on the one continuous transaction doctrine. That instruction provided essentially that the jury could find appellant liable for a homicide occurring during the burglary if the homicide and the burglary were part of one continuous transaction. The instruction also listed several factors for the jury to consider to determine whether there was a continuous transaction.

In a published opinion, the Fourth Appellate District, Division Three, held that the trial court properly instructed the jury. In support of its ruling, the Court of Appeal cited *People v. Cavitt* (2004) 33 Cal.4th 187, in which this Court held that an instruction on the continuous transaction doctrine, which was virtually identical to the one given in the current case, was sufficient to inform the jury on the duration of a felony for purposes of the felony-murder rule. Citing *Cavitt*, the Court of Appeal explained that the escape rule, which terminates a felony at the point the perpetrator reaches a place of temporary safety, defined the scope of an underlying felony for certain ancillary purposes but not for felony-murder purposes.

The Court of Appeal's decision should be upheld because it is consistent with this Court's decision in *Cavitt*. Moreover, the Court of Appeal's decision in upholding the trial court's instruction is consistent with the long standing purpose of the felony-murder rule, holding a defendant responsible for homicides causally related to his actions while perpetrating the underlying felony. The escape rule on the other hand requires only that a defendant reach an arbitrary place of temporary safety to end his liability for felony murder and is insufficient in and of itself to break a chain of actions that are causally related.

Also, appellant has forfeited his claimed error that the trial court should have, at the least, included “escape to a place of temporary safety” as a factor to consider as part of the continuous transaction doctrine by failing to make such a request at trial.

Finally, even assuming the trial court erred in denying appellant’s request to instruct the jury on the escape rule, his conviction must still stand because the error did not prejudice the outcome of the case.

STATEMENT OF THE CASE

On May 5, 2008, an Orange County jury found appellant Cole Allen Wilkins guilty of first degree murder (§ 187, subd. (a)).² (1 CT 189; 2 CT 406-407.) Appellant admitted a prior prison term enhancement allegation (§ 667.5, subd. (b)). (2 CT 407.)

The trial court sentenced him to 26 years to life in prison. (2 CT 563-564.)

Appellant appealed, raising a variety of challenges to his conviction. As relevant to the instant claim, appellant maintained that the trial court erred in refusing his request to instruct the jury pursuant to CALCRIM No. 3261 [burglary complete upon the burglar reaching a place of temporary safety]. The Court of Appeal disagreed, and affirmed the conviction.

On May 11, 2011, this Court granted appellant’s petition for review, limiting the issue to the one set forth above.

STATEMENT OF FACTS

On July 6, 2006, appellant was living with his girlfriend, Nancy Blake, at Blake’s house in Long Beach. (2 RT 254-255.) During June and July 2006, appellant was employed by his uncle to install dry wall in

² The People also initially charged appellant with receiving stolen property, but it was later dismissed by the court at the People’s request. (1 CT 189, 282.) Appellant was not charged with burglary.

several homes at a home construction site in Menifee, a city located in Riverside County. (2 RT 90-93, 109, 255.) One of the homes under construction belonged to Dennis and Audrey Kane. The Kanes' home was located about 300 to 400 yards away from the homes on which appellant was working. (2 RT 113, 115.)

On June 28, 2006, the Kanes received a delivery from Home Depot consisting of a stove, a refrigerator, a dishwasher, a microwave, light fixtures, door locks, ceiling fans, a range hood, and a kitchen sink. (2 RT 115-118.) Appellant's cell phone records showed that he was in the area of the Menifee jobsite on the day the appliances were delivered. (3 RT 466-471.)

On the evening of July 6, 2006, construction workers left the Kanes' home between 7:30 and 8:00 p.m. When they left, the delivered items were secured inside. (2 RT 132-133, 135.) The following morning around 7 a.m., one of the workers arrived at the home and noticed all of the purchases were missing and called Mr. Kane. (2 RT 121-122.)

At approximately 9:00 p.m. on the evening of July 6, 2006, appellant left Blake's house driving a Ford pick-up truck and did not return home until the following morning at about 5:30 a.m. (2 RT 258-259.) The truck was registered to Kathleen Trivich, a woman with whom appellant had previously been romantically involved. (3 RT 323-325.) Trivich had purchased the truck for appellant as part of a real estate venture she and appellant were engaged in at the time. Trivich had purchased a piece of land in Palm Springs and they planned to build a house on the land and sell it for a quick profit. Trivich had supplied the money for the land and the truck and appellant was going to use his experience installing dry wall and his contacts in the construction business to build the house. (3 RT 325-328, 330.)

Around 10:30 p.m. on July 6, 2006, appellant called Trivich and left her a message. At 12:45 a.m., on July 7, 2006, Trivich returned appellant's call. Appellant told her that he had gotten some big kitchen items for the house. (3 RT 337-339, 368.)

According to appellant's cell phone records, he was in the area of the Kanes' home during the early morning hours of July 7, 2006. (3 RT 481-482.) Just before 5 o'clock that morning, appellant was driving westbound on the 91 freeway in Long Beach going about 60 to 65 miles per hour. He had a lot of large boxes on the bed of his truck and boxes piled in the cab. The boxes in the back were not tied up and the tailgate was down. (2 RT 164-167, 175, 179.) Around the Kraemer Boulevard exit, a large box, which contained the stolen stove from the Kanes' home, fell from the back of appellant's truck onto the freeway. (2 RT 164-168.)

Dan Lay was driving behind appellant's truck and saw the stove fall from appellant's truck bed. Lay's car hit the stove and the stove bounced to the right. (2 RT 168-169.) Appellant continued driving after the stove fell. (2 RT 169.) Lay followed appellant for a few miles, honking his horn and flashing his lights, but appellant would not stop. (2 RT 169-171.) Lay pulled up to the right side of appellant's truck and could see boxes piled high in the cab. (2 RT 170.) Lay then pulled up to the left side of appellant's truck, honked his horn continuously and flashed his lights. Appellant slowed down and looked over at Lay, but then accelerated and drove off. (2 RT 171-172.) Lay again pulled up next to appellant's car and yelled at appellant to get off the freeway. (2 RT 173.) Appellant eventually pulled over to the off ramp and stopped. (2 RT 173.) Lay yelled out his window that appellant needed to stop his car and appellant said, "Okay, I'm going to fuck you up, though." (2 RT 174.) Lay and appellant then drove to a nearby parking lot. (2 RT 174.) Appellant got out of his truck and said, "I'm going to kick your ass." (2 RT 175.) Lay replied,

“Bring it on, but first something fell from your truck.” (2 RT 175.)

Appellant walked to the back of his truck and said, “Oh, my God. It’s a thousand-dollar stove.” (2 RT 175.) Lay asked appellant for his name and identifying information. Appellant said he did not have any proof of registration or insurance and gave Lay a fake name.³ Appellant told Lay that Kathleen Trivich owned the truck and gave Lay her phone number. (2 RT 176-178.) The entire cab of appellant’s truck was full of boxes. (2 RT 179.) Lay gave appellant his name and number, got back in his car and left. (2 RT 183.) Lay was unable to contact Trivich using the number appellant gave him. (2 RT 208.)

Meanwhile, there was pandemonium where the stove was still in the middle of the freeway. Numerous cars had struck the stove sending it careening into adjacent lanes and into the path of other travelers. Other cars had to swerve in order to avoid hitting the stove. (2 RT 217, 219; 3 RT 390.) Charles Thomas was driving in the number two lane. The stove was sitting in his lane when he hit it. (2 RT 216-217.) David Piquette, a Los Angeles County Sheriff’s Deputy, was driving to work that morning. He was in the number two lane, in which the stove was still sitting, when he suddenly swerved. (2 RT 224-225.) As a result, he struck a big rig carrying a full load of cement. The big rig jack-knifed and fell onto Piquette’s car, killing Piquette and injuring the big rig driver. (2 RT 234-236, 248-249; 3 RT 428.)

Appellant did not attempt to go back and retrieve the stove or call 911. (3 RT 379.) Instead he drove to Blake’s house. When he got there, he parked across the street and used a dolly to put most of the remaining large appliances into Blake’s backyard. He and Blake then put the

³ Police later found appellant’s identification card and proof of insurance in the truck’s glove box. (4 RT 528.)

remaining items from the truck into a small trailer Blake owned. After loading it up, appellant took the trailer to a repair shop and left it there with the stolen items inside. When appellant returned from the repair shop, he and Blake reloaded the remaining items that appellant had put in Blake's backyard back onto the bed of appellant's truck. Blake found ties in the pocket of back seats of appellant's truck and used them to tie the appliances down. She then put up the tailgate. After the load was secure, Blake and appellant drove to Palm Springs. Appellant made arrangements with a man named Sean Dougherty to hide the items in Dougherty's garage at his house in Palm Springs. (2 RT 269-272; 3 RT 374-376.)

Appellant and Blake spent the night at Doherty's house. The following morning, Trivich went to Doherty's house. Appellant asked Trivich to say she was the person driving the truck when the stove fell out. (3 RT 381-382.) Trivich refused. (3 RT 388.) When Dougherty asked appellant why he had not gone back when he found out the stove had fallen out of the truck, appellant said he did not want to go to jail. (3 RT 380.) Appellant told Blake not to tell anyone about the accident until he could find a lawyer. (2 RT 275-276.)

Appellant contacted a lawyer the day after the fatal accident. Blake overheard appellant ask the lawyer if he could be liable for murder because his driver's license had been suspended after a previous drunk driving conviction. (2 RT 276, 289-290.)

Police found the ceiling fans, light fixtures, door handles, locks and range hood which had been stolen from the Kaness' home inside Blake's trailer. (3 RT 399-400.) They also found the Kaness' stolen refrigerator, dishwasher, microwave oven, and kitchen sink in Doherty's garage. (3 RT 403-405, 461-462.)

One of the investigating officers testified that the distance between the accident scene on the freeway and the Kaness' house in Menifee, using

the 91 freeway to the 215 freeway, was 62 miles. The officer drove that distance around midnight and it took about 60 minutes. A call from appellant's cell phone at 4:27 a.m. pinged off of a cell phone tower near the intersection of the 60 and the 91, which was about 30 miles from the accident scene. (4 RT 544-548.)

A. Defense

Appellant testified that on June 28, 2006, the day the appliances were delivered to the Kanés' house, he had been doing community service at a park at Lake Skinner in Temecula from about 7:45 a.m. until 4 p.m. (5 RT 753-754.)

Appellant testified that he bought the Kanés' appliances from a friend named Rick in the Home Depot parking lot off Weir Canyon in Yorba Linda at 11 p.m. on July 6, 2006. (5 RT 764, 766-767.) He paid \$1,500 for all the appliances. Rick and another man helped appellant load all the items into appellant's truck. Appellant suspected the items were stolen. (5 RT 766-769.) Appellant then drove to Sean Doherty's house in Palm Springs. When he got there, Doherty was not home. Appellant spent about five minutes in Doherty's driveway trying to unload the items but realized he could not unload them by himself. (5 RT 864.) He went into Doherty's house, "used the bathroom, got something to drink, laid on the couch for a little while and just figured out what [he] was going to do." (5 RT 777.) He stayed there for about an hour. (5 RT 866.) Appellant then decided to leave Doherty's house a little after 3 a.m. and started driving back to Long Beach. (5 RT 577, 868-869.) He still did not take the time to tie up the appliances in the back of his truck or to put up the tailgate. (5 RT 867-868.) The only stop he made between Doherty's house and the location where the stove fell out was a two to five minute stop at a gas station, where he used a payphone to call his cell phone which he had misplaced in his truck. (5 RT 868-869.) After finding his phone, he called

Blake and told her he was on his way home. (5 RT 777-778.) He then headed home, driving in the fast lane most of the time as he was headed back to Long Beach. He made no more stops until Dan Lay forced him off the road after the stove fell out of his truck around 5 a.m. (5 RT 869-870.)

Appellant did not realize the stove had fallen out of his truck. (5 RT 780.) He admitted lying about his name to Lay because he did not have a driver's license at the time and was not covered by Trivich's insurance. (5 RT 782.) Appellant then drove to Blake's house. He and Blake unloaded the items from the truck using a dolly. (5 RT 783-784.) Appellant called his attorney and learned about the fatality on the freeway. (5 RT 786.)

Appellant admitted that he had stolen property from two victims in 1991. (5 RT 743.)

An accident reconstruction expert testified that, based on his investigation, Deputy Piquette made a sudden lane change which he was unable to correct and subsequently collided with the big rig. (4 RT 614.) The expert did not think Deputy Piquette's car hit the stove and did not believe that the deputy had swerved to avoid hitting the stove. (4 RT 615.) The expert believed the stove was a factor in the fatal accident, but did not know whether it was a contributing factor. (4 RT 642.)

B. Rebuttal

An accident reconstruction investigator for the California Highway Patrol testified that based on his investigation the stove on the freeway was a substantial contributing factor in the fatal accident. (4 RT 651-652, 655-656, 663-664.)

ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CONTINUOUS TRANSACTION DOCTRINE, WHICH ACCURATELY DEFINES THE DURATION OF FELONY-MURDER LIABILITY

Appellant claims that the trial court erred in refusing his request to instruct the jury pursuant to CALCRIM No. 3261 [During Commission of Felony: Defined – Escape Rule], that a burglary continues until the perpetrator has reached a place of temporary safety. He argues that the jury should have been instructed that a continuous transaction ends when an actual perpetrator has reached a place of temporary safety and therefore is no longer liable for any homicides causally related to his underlying felony which occur thereafter. (AOB 12-55.) The trial court properly declined the requested instruction and the Court of Appeal correctly affirmed appellant's murder conviction. The trial court's instruction was consistent with the holding by this Court in *Cavitt*. Also, the trial court's instruction is consistent with the long standing purpose of felony murder, holding a defendant liable for the homicides he commits during the course of an underlying felony which are causally related to his actions in committing the underlying felony. Appellant's requested instruction that he is no longer liable for homicides he has caused once he has reached an artificial place of temporary safety is not sufficient in and of itself to break the causal chain of actions he set in place and is therefore inconsistent with the purpose of the felony-murder rule.

Also, appellant has forfeited his claimed error that the trial court should have, at the least, included "escape to a place of temporary safety" as a factor to consider as part of the continuous transaction doctrine by failing to make such a request at trial.

Additionally, even assuming the trial court committed error in denying appellant's requested instruction on the escape rule, any such error was harmless. The evidence showed that appellant had not yet reached a place of temporary safety when the homicide occurred.

A. Background

At trial, the court instructed the jury that appellant was charged with murder under the felony murder rule. (6 RT 1009.) Appellant asked the court to instruct the jury with CALCRIM No. 3261, which defines the escape rule and provides in pertinent part:

The crime of burglary . . . continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased [,and (has/have) unchallenged possession of the property].]

(5 RT 727-734; 2 CT 400.)

The court denied appellant's request. (5 RT 734.) In so doing, it cited the bench notes following the instruction, which specifically provide that the instruction should not be given in a felony murder case to explain the temporal connection between the felony and the death.⁴ (5 RT 727, 731-732, 734.)

The court instructed the jury on felony murder with a modified version of CALCRIM No. 540C [Felony Murder: First Degree – Other Acts Allegedly Caused Death (Pen. Code, § 189)] as follows:

⁴ The bench note following CALCRIM No. 3261 provides: "This instruction should not be given in a felony-murder case to explain the required temporal connection between the felony and the killing." (Cal. Crim. Jury Instns. (2011) Bench Notes to CALCRIM No. 3261, p. 990.) The bench note is based upon this Court's holding in *Cavitt, supra*, 33 Cal.4th at page 187.

The defendant is charged . . . with murder under a theory of felony murder. To prove that the defendant is guilty of . . . first degree murder under this theory, the People must prove that:

1. The defendant committed a burglary;
2. The defendant intended to commit burglary;
3. The commission of the burglary was a substantial factor in causing the death of another person;
4. The act causing the death and the burglary were part of one continuous transaction; and
5. There was a logical connection between the act causing the death and the burglary.

The connection between the fatal act and the burglary must involve more than just their occurrence at the same time and place.

A person may be guilty of felony murder even if the killing was unintentional, accidental or negligent.

If you decide whether the defendant committed the burglary, please refer to the separate instructions that I will give you on that crime.

You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

There may be more than one cause of death. An act causes death only if it is [a] substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

The defendant must have intended to commit the felony burglary before or at the time of the act causing the death.

It is not required that the person die immediately as long as the act causing the death and the felony are part of one continuous transaction. It is not required that the person killed be the victim of the felony.

(6 RT 1010-1012; 2 CT 350-351.)

The trial court further instructed the jury on the definition of continuous transaction with CALCRIM No. 549 [Felony Murder: One Continuous Transaction – Defined], as follows:

In order for the People to prove that the defendant is guilty of murder under a theory of felony murder, the People must

prove that the burglary and the act causing the death were part of one continuous transaction.

The continuous transaction may occur over a period of time and in more than one location.

In deciding whether the act causing the death and the felony were part of one continuous transaction[] you may consider the following factors:

1. Whether the felony and the fatal act occurred at the same place.
2. The time period, if any, between the felony and the fatal act.
3. Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony.
4. Whether the fatal act occurred after the felony but while the perpetrator continued to exercise control over the person who was the target of the felony.
5. Whether the fatal act occurred while the perpetrator was fleeing from the scene of the felony or otherwise trying to prevent this discovery or reporting of the crime.
6. Whether the felony was the direct cause of the death.
7. Whether the death was a natural and probable consequence of the felony.

It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction.

(6 RT 1012-1014; 2 CT 353-354.)

B. Law Regarding The Trial Court's Duty To Instruct

It is the duty of the trial court to make sure the jury is fully instructed on the law applicable to the case in order to ensure that the jury will properly consider the full range of possible verdicts. (*People v. Wickersham* (1982) 32 Cal.3d 307, 324, 325.) The trial court is required to instruct the jury with legally correct statements of law that are not confusing, duplicative or argumentative. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1079, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Mincey* (1992) 2 Cal.4th 408, 437.)

Instructions are not considered in isolation. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citations.]” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248; see also *People v. Haskett* (1990) 52 Cal.3d 210, 235.)

C. General Principles Of Felony Murder

Felony murder is statutorily defined as “all murder . . . which is committed in the perpetration of . . . [certain enumerated felonies including burglary].” (§ 189.) First degree felony murder encompasses not only deliberate and premeditated murder, “but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.” (*People v. Dillon* (1983) 34 Cal.3d 441, 477.)

The mental state required for felony murder “is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed. [Citations.]” (*People v. Berryman* (1993) 6 Cal.4th 1048, 1085, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140.)

“The consequences of the evil act are so natural or probable that liability is established as a matter of policy.” (*People v. Roberts* (1992) 2 Cal.4th 271, 316; *People v. Washington* (1965) 62 Cal.2d 777, 780.) “Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning -- if a death results from his commission of that felony it will be first degree

murder, regardless of the circumstances.” (*People v. Burton* (1971) 6 Cal.3d 375, 387–388.)

‘The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.’ The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates . . . one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof

(*People v. Farley* (2009) 46 Cal.4th 1053, 1121, quoting *People v. Washington* (1965) 62 Cal.2d 777, 781, citations omitted.)

D. Whether The Homicide Occurred “In the Perpetration Of” The Underlying Felony -The Development Of The Continuous Transaction Doctrine

When the prosecution invokes the felony-murder rule, the issue of whether the homicide occurred “in the perpetration of” the underlying felony often arises. “First degree felony murder does not require a strict causal relation between the felony and the killing. The only nexus required is that both are part of one continuous transaction. [Citations.]” (*People v. Johnson* (1992) 5 Cal.App.4th 552, 561; *People v. Cavitt, supra*, 33 Cal.4th 187, 207; see also *People v. Earp* (1999) 20 Cal.4th 826, 888.)

This has been the law of the state since as far back as 1898 when this Court decided *People v. Miller* (1898) 121 Cal. 343, 345. In *Miller*, the defendant tricked a woman into bringing Nellie Ryan, the defendant’s former housekeeper, to a house owned by a woman named Mrs. Burns. When Ryan arrived and discovered the defendant was inside, she turned and left. The defendant descended the stairs, exited the house, and

immediately began shooting at Ryan, who ran across the street and entered a house owned by the Childs. The defendant attempted to pursue Ryan and had his hand on the door handle of the Child residence when James Child took hold of the defendant. The defendant immediately turned and shot Childs. (*Id.* at p. 345.) This Court rejected the defendant's contention that the trial court erred in instructing the jury regarding burglary, noting that section Penal Code 189 applied to killings "committed in the perpetration, or attempt to perpetrate . . . burglary" and entry with the intent to kill Ryan would suffice. (*Id.* at pp. 346–347.) This Court concluded "[t]he attempt to kill Nellie Ryan and the shooting of Childs were parts of one continuous transaction." (*Id.* at p. 345.)

Fifty years later in *People v. Chavez* (1951) 37 Cal.2d 656, this Court continued to measure liability for felony murder using the one continuous transaction doctrine. In *Chavez*, this Court stated "The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction." (*Id.* at p. 670, citing *People v. Miller, supra*, 121 Cal. at p. 343.) This Court explained:

The law of this state has never required proof of a strict causal relationship between the felony and the homicide. The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this court has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistence of the felony before the homicide was completed.

(*Id.* at pp. 669-670.)

Nine years later, in *People v. Mason* (1960) 54 Cal.2d 164, this Court had to decide whether a killing which occurred 20 hours after a burglary was committed in the perpetration of the burglary. This Court wrote:

Although the killing in the present case occurred about 20 hours after defendant entered the house, if the jury found that

defendant committed burglary by entering the house with the intent to commit a felonious assault, the homicide and the burglary were parts of one continuous transaction.

(*Id.* at p. 169.)

Three years later, in *People v. Whitehorn* (1963) 60 Cal.2d 256, 260, 264, this Court held that the defendant “who had raped the victim, was guilty of felony murder when [his] accomplice strangled the victim after the rape.” In reaching that conclusion, this Court noted that “[s]ection 189 of the Penal Code has been construed as not requiring a strict causal relation between the felony and the homicide, and the homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction.” (*Id.*, citing *People v. Mason, supra*, 54 Cal.2d at pp. 168-169; and *People v. Chavez, supra*, 37 Cal.2d at pp. 669-670.)

More recently, in *People v. Hayes* (1990) 52 Cal.3d 577, this Court applied the continuous transaction rule to the special circumstance of a killing in the course of a burglary, stating that “a killing is committed in the perpetration of an enumerated felony if the killing and the felony ‘are parts of one continuous transaction.’” (*Id.* at pp. 631-631, citing *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016 [“felony murder does not require proof of a strict causal relation between the felony and the homicide, and the homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction”], and *People v. Welch* (1972) 8 Cal.3d 106, 118 [§ 189 “has been construed as not requiring a strict causal relation between the felony and the homicide, and the homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction”]; see also *People v. Coefield* (1951) 37 Cal.2d 865, 869 [“the killing was committed in connection with conduct intended to facilitate escape after the robbery and as part of one continuous transaction; accordingly, it constituted murder of

the first degree”]; *People v Cartier* (1960) 54 Cal.2d 300, 310 [“a homicide is committed in the perpetration of a felony when the killing and felony are parts of one continuous transaction”]; *People v Mitchell* (1964) 61 Cal.2d 353, 362-363 [“the robbery and the homicide were parts of a continuous transaction, and the homicide therefore constituted first degree murder”].)

E. The Genesis Of The Escape Rule

Despite this Court’s consistent application of the continuous transaction doctrine, courts of this state have on occasion, referred to escape or reaching a place of temporary safety in relation to felony murder liability.

The first mention of the escape with respect to the felony murder rule was made in passing by this Court in *People v. Boss* (1930) 210 Cal. 245. In that case, Boss and a co-defendant robbed a store. One of the employees ran after the defendants and chased them across the street. Boss turned and shot the employee, killing him. (*People v. Boss, supra*, 210 Cal. 245 at p. 247-248.) This Court rejected a contention that the defendants were not liable for felony murder because the victim was shot after the defendants had already fled from the store. This Court explained:

It is a sound principle of law which inheres in common reason that where two or more persons engage in a conspiracy to commit robbery and an officer or citizen is murdered while in immediate pursuit of one of their number who is fleeing from the scene of the crime with the fruits thereof in his possession, or in the possession of a co-conspirator, the crime is not complete in the purview of the law, inasmuch as said conspirators *have not won their way even momentarily to a place of temporary safety* and the possession of the plunder is nothing more than a scrambling possession. In such a case the continuation of the use of arms which was necessary to aid the felon in reducing the property to possession is necessary to protect him in its possession and in making good his escape. Robbery, unlike burglary is not confined to a fixed locus, but is frequently spread over considerable distance and varying periods of time. The escape of the

robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property. Without revolvers to terrify, or, if occasion requires, to kill any person who attempts to apprehend them at the time of or immediately upon gaining possession of said property, their plan would be childlike. The defense of felonious possession which is challenged immediately upon the forcible taking is a part of the plan of robbery, or as the books express it, it is *res gestae* of the crime.

(*People v. Boss*, *supra*, 210 Cal. at pp. 250-251; italics added.)

Thirty years later, in *People v. Kendrick* (1961) 56 Cal.2d 71, 78-79, 89-90, this Court concluded that a killing 48 minutes after the actual taking of the property was within the felony-murder rule. The defendant in *Kendrick* robbed a market and began driving away on the highway. (*Id.* at p. 90) A police officer found the defendant and pulled him over. The defendant shot and killed the officer. (*Id.* at pp. 89-90.) This Court observed that “[r]obbery, unlike burglary is not confined to a fixed locus, but is frequently spread over considerable distance and varying periods of time. The escape . . . with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property” (*Id.* at p. 90.) This Court further stated “The homicide, committed as it was while defendant was in hot flight with the stolen property and in the belief that the officer was about to arrest him for the robbery, falls well within this rule.” (*Ibid.*)

Subsequently, courts of appeal began referring to escape or reaching a place of temporary safety in relation to felony murder liability. For example, in *People v. Fuller* (1978) 86 Cal.App.3d 618, a police officer saw the defendants stealing tires from a closed car lot. When the defendants got into their car and drove away, the officer followed and a high speed chase ensued. The chase ended when the defendants ran a red light and hit a car, killing the driver. (*Id.* at pp. 621–622.) In affirming the

defendant's conviction for murder under the felony murder doctrine, the court stated, "Flight following a felony is considered part of the same transaction as a subsequent homicide as long as the felon has not reached a 'place of temporary safety.'" (*Id.*, at p. 623, quoting *People v. Salas* (1972) 7 Cal.3d 812, 822.)

Similarly, in *People v. Johnson* (1992) 5 Cal.App.4th 552, the defendant committed robberies in San Mateo. Thereafter, he drove south on Highway 101 to Highway 92 and observed that no one was following him. He continued to Highway 280 and again noticed that no one was chasing him. As he was driving north on Highway 280, Johnson noticed what he thought was a law enforcement officer in a car. When the officer turned on the emergency lights, Johnson sped up and a pursuit began. Eventually Johnson's car hit another car, killing the victim in the other car. The accident occurred 30 minutes after Johnson fled the robbery scene, a distance of 22 miles away. (*Id.* at pp. 569-562.) The court in *Johnson* upheld the jury's finding that the robbery and homicide were parts of a continuing transaction, noting that "[f]irst degree felony murder does not require a strict causal relation between the felony and the killing. The only nexus required is that both are part of one continuous transaction." (*People v. Johnson, supra*, at p. 561.) The court also stated, "A fleeing robber's failure to reach a place of temporary safety is sufficient to establish the continuity of the robbery within the felony-murder rule." (*Johnson, supra*, 5 Cal.App.4th at p. 561, citing *People v. Salas, supra*, 7 Cal.3d at p. 823.)

In *People v. Thongvilay* (1998) 62 Cal.App.4th 71, the perpetrators killed an innocent victim as they were being chased following an automobile burglary. The court, upholding the defendants' convictions for felony murder observed, "Felony-murder liability continues throughout the flight of a perpetrator from the scene of a robbery until the perpetrator reaches a place of temporary safety *because the robbery and the accidental*

death, in such a case are parts of a 'continuous transaction.'" (*Id.* at p. 77, emphasis added.)

In *People v. Portillo* (2003) 107 Cal.App.4th 834, the court recognized

'because flight following a felony has also been considered as part of the same transaction (*People v. Fuller* (1978) 86 Cal.App.3d 618, 623, quoting *People v. Salas* (1972) 7 Cal.3d 812, 822), it has generally been held that a felony continues for purposes of the felony murder rule "until the criminal has reached a place of temporary safety." (*People v. Beigelow* (1984) 37 Cal.3d 731, 753.)'

(*Id.* at p. 843.)

Moreover, as the Court of Appeal pointed out (Slip Opn. at p. 21), courts in sister states with similar felony murder statutes have held that the felony murder liability is appropriately determined by considering whether the homicide and the underlying felony are part of a continuing transaction. For example, the Kansas Supreme Court held that "[t]he felony-murder rule applies when the victim's death occurs within the *res gestae* of the underlying felony. *Res gestae* has been defined as those acts done before, during, or after the happening of the principal occurrence when those acts are so closely connected with the principal occurrence as to form, in reality, a part of the occurrence." (*State v. Jackson* (2005) 280 Kan. 541, 124 P.3d 460, 463, internal citations omitted; see also *Bellcourt v. State* (Minn.1986) 390 N.W.2d 269, 274 [res gestae requires killing and felony be part of *one continuous transaction*]; *Parker v. State* (Fla.1994) 641 So.2d 369, 376 [felony-murder rule applies in "the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing"].)

F. The Trial Court Properly Instructed The Jury On The Continuous Transaction Doctrine Based On This Court's Holding In *People v. Cavitt*

Any confusion about the correct test to be used in determining felony murder liability ended in 2004 when this Court decided *People v. Cavitt*. In *Cavitt*, defendants James Cavitt and Robert Williams and Cavitt's girlfriend, Mianta McKnight, burglarized the home of Mianta's 58-year-old grandmother, Betty. Cavitt and Williams covered Betty with a sheet and bound her wrists and ankles with rope and duct tape. Betty was also beaten and left hog-tied, facedown on a bed. Cavitt and Williams tied up Mianta to make it appear that she also was a victim. Cavitt and Williams then left with Betty's jewelry and other valuables. By the time Mianta untied herself and reported the burglary, Betty had died from asphyxiation. (*People v. Cavitt, supra*, 33 Cal.4th at p. 193.)

Cavitt and Williams were tried separately. The defense theory at their trials was that Mianta had killed Betty for her own personal reasons after the defendants had left the house with the valuables. They argued that they had reached a place of temporary safety with the property before Betty died and thus were not liable for felony murder of Betty. (*People v. Cavitt, supra*, 33 Cal.4th at p. 195.) The trial court instructed each jury that a killing "is committed in the commission of a felony if the killing and the felony are parts of one continuous transaction. There is no requirement that the homicide occur while committing or while engaged in the felony or that the killing be part of the felony, so long as the two acts are part of one continuous transaction." (*Id.* at p. 206.)⁵

⁵ Cavitt's jury was further instructed as follows:

When a killing occurs after the elements of the felony have been committed, the felony-murder rule applies if the
(continued...)

(...continued)

killing and the felony were part of 'one continuous transaction.' Some factors that you may consider in determining whether the killing and the felony were part of, 'one continuous transaction' might include, but are not limited to, the following considerations: (1) whether or not any aider and abettor exercised continuous control over the victim. [¶] (2) whether or not the killing occurs in pursuance of a felony. [¶] (3) the distance between the location of the perpetration of the felony and the location of the killing. [¶] (4) the time lapse between the perpetration of the felony and the killing. [¶] (5) whether the killing is a direct causal result of the felony. [¶] (6) whether the killing occurs while the perpetrators are attempting to protect themselves against discovery of the felony or reporting of the crime. [¶] (7) whether the killing is a natural and probable consequence of the felony.

No one of these factors, or any combination of factors is to be considered by you to be determinative of the phrase 'one continuous transaction.' There is no requirement that the defendant be present at the scene of the killing so long as the defendant's participation in the felony sets in motion a chain of events which resulted in the killing.

Williams's jury, in addition to the instruction that a killing is committed in the long as the two acts are part of one continuous transaction, was instructed commission of a felony if the killing and the felony are parts of one continuous transaction and there is no requirement that the homicide occur while committing or while engaged in the felony or that the killing be part of the felony, so:

For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time. [¶] A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrators are in possession of the stolen property and fleeing in an attempt to escape. Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrators or to regain the stolen property. [¶]

(continued...)

Cavitt and Williams challenged the instructions regarding the temporal relationship between the homicide and the felonies. This Court found no error, pointing out that it was presented with “two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule.” (*Cavitt*, 33 Cal.4th at p. 207.) This Court explained that the escape rule applies to the duration of the *felony itself*, while the one continuous transaction doctrine is what is important in determining liability under the *felony murder rule*, stating:

The ‘escape rule’ defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary safety. [Citation.]⁶

(...continued)

A robbery is complete when the perpetrators have eluded any pursuers, have reached a place of temporary safety, and are in unchallenged possession of stolen property after having effected an escape with such property.

The trial court also instructed:

The perpetrators have not reached a place of temporary safety if, having committed the robbery [or burglary] with other perpetrators, any one of the perpetrators continues to exercise control over the victim. Only when all perpetrators have relinquished control over the victim[,] are in unchallenged possession of the stolen property[,] and have effected an escape can it be said that any one of them has reached a place of temporary safety.

(*Cavitt, supra*, 33 Cal.4th at p. 206.)

⁶ These ancillary consequences, as the Court of Appeal noted, include:

determining whether the defendant inflicted great bodily injury in the course of a robbery (*People v. Carroll* (1970) 1 Cal.3d 581, 584–585, 83 Cal.Rptr. 176, 463 P.2d 400 [injury inflicted on a robbery victim after property asported but before robber reached place of temporary safety]), whether a

(continued...)

The continuous-transaction doctrine, on the other hand, defines the duration of *felony-murder* liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. [Citations.]

(*Id.* at p. 208; italics in original.)

This Court explained:

Our case law has consistently rejected a “strict construction of the temporal relationship” between felony and killing as to both first degree murder and [the] felony-murder special circumstance.’ [Citation.] Instead, we have said that ‘a killing is committed in the perpetration of an enumerated felony if the killing and the felony “are parts of one continuous transaction.”’ [Citation.]

(*Id.* at p. 207.)

This Court further explained:

Our reliance on the continuous-transaction doctrine is consistent with the purpose of the felony-murder statute, which ‘was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this court has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistence of the [felony] before the homicide was completed.’ [Citation.] In particular, the rule “was not intended to relieve the

(...continued)

kidnapping was for the purpose of committing a robbery (*People v. Laursen* (1972) 8 Cal.3d 192, 199–200, 104 Cal.Rptr. 425, 501 P.2d 1145 [kidnapping during escape may constitute kidnapping to commit a robbery]), and whether a firearm was used during the crime (*People v. Fierro* (1991) 1 Cal.4th 173, 225–226, 3 Cal.Rptr.2d 426, 821 P.2d 1302 [firearm used in escape constitutes use during commission of the robbery])

(Slip Opn. at p. 20.)

wrongdoer from any probable consequence of his act by placing a limitation upon the res gestae which is unreasonable or unnatural.” The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction’ [citation], with the proviso ‘that felony-murder liability attaches only to those engaged in the felonious scheme before or during the killing.’ [Citation.]

(*Id.* at p. 207.)

This Court then noted that “[i]t would have been sufficient to have instructed the Williams jury on the continuous-transaction doctrine alone, as the Cavitt jury was instructed.” (*Id.* at p. 208.) This Court concluded that Cavitt’s and Williams’s juries were properly instructed on the one continuous transaction doctrine. (*Id.* at p. 208.)

Thus, this Court clarified any ambiguity about which instruction should be given when instructing a jury on felony murder liability. As set forth above, this Court held that “[t]he continuous-transaction doctrine . . . defines the duration of *felony-murder* liability . . .” while “[t]he ‘escape rule’ defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony.” (*Id.* at pp. 207-208; italics in original.) This Court also held that the trial court properly instructed Cavitt’s jury on the continuous transaction doctrine and noted that it “would have been sufficient to have instructed the Williams jury on the continuous-transaction doctrine alone.” (*Id.* at p. 208.) Based on this Court’s holding, the trial court in the current case properly instructed the jury on the one continuous transaction doctrine and the Court of Appeal correctly agreed.

G. Limiting Liability To Only Homicides Committed Before Reaching A Place Of Temporary Safety Is Contrary To Long Standing Policies Consistently Applied To All Felony Murder Cases

Appellant acknowledges this Court's clear holding in *Cavitt*.

(ABOM 19-21.) Nonetheless, he attempts to distinguish it on the ground that *Cavitt* involved an aiding and abetting situation (the complicity aspect of felony murder), while the current case involved only a sole perpetrator (the aggravation aspect of felony murder). (ABOM 21-23.) Appellant's attempt to limit *Cavitt* is contrary not only to that decision, but to the policies underlying the felony-murder rule.

Admittedly, *Cavitt* involved multiple perpetrators and this Court in *Cavitt* did state that it involved the “”complicity aspect”” of felony murder (*Cavitt*, 33 Cal.3d at p. 196). However, in holding that the jury was properly instructed on the continuous transaction doctrine, this Court specifically stated, “Indeed, we have invoked the continuous-transaction doctrine not only to *aggravate* a killer's culpability, but also to make *complicit* a nonkiller, where the felony and the homicide are parts of one continuous transaction.” (*Cavitt*, 33 Cal.3d at p.207; emphasis added.) As such, respondent submits that this Court did not limit its holding regarding the proper instruction to be used to determine felony murder liability to only those cases dealing solely with the complicity aspect of the felony murder rule. It *applies* equally to cases also dealing with the aggravation aspect of the felony murder rule.

Additionally, both *Cavitt* and *Williams* were direct perpetrators in the home invasion and killing of the victim. (*Cavitt*, 33 Cal.4th at p. 194.) Thus, as this Court held that *Cavitt* and *Williams*'s juries should have been instructed on the one continuous transaction doctrine, there is no reason why this Court's holding in *Cavitt* should not apply with equal force to the current case. Moreover, even if *Cavitt* and *Williams* were not direct

perpetrators, as this Court stated in *People v. McCoy* (2001) 25 Cal.4th 1111, 1121,

the dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator and in part as the aider and abettor of the other, who also acts in part as an actual perpetrator.

(*Id.*)

Thus, *Cavitt* should not be distinguished for this reason alone.

Moreover, appellant's attempt to limit liability to only those homicides committed before a defendant has reached a place of temporary safety is contrary to the long standing policies applied to all felony murder cases.

This Court has consistently held that the "duration of felony-murder liability is not determined by considering whether the felony itself has been completed." (*People v. Ainsworth, supra*, 45 Cal.3d at p. 1016; *People v. Chavez, supra*, 37 Cal.2d at p. 656.) This Court has consistently rejected a "strict construction of the temporal relationship' between felony and killing as to . . . felony-murder special circumstance." (*People v. Sakarias* (2000) 22 Cal.4th 596, 624; *People v. Hayes, supra*, 52 Cal.3d 577, 631; *People v. Earp, supra*, 20 Cal.4th 826, 888; *People v. Whitehorn, supra*, 60 Cal.2d 256, 260.)

The felony murder rule "was adopted to make punishment of this class of crime more certain. It was not intended to relieve the wrongdoer from any . . . consequences of his act by placing a limitation upon the res gestae which is unreasonable or unnatural." (*People v. Boss, supra*, 210 Cal. at pp. 252–253; see also *People v. Chavez, supra*, 37 Cal.2d at p. 670; *People v. Ulsh* (1962) 211 Cal.App.2d 258, 271; *People v. Mitchell* (1964) 61 Cal.2d 353, 362; *Cavitt*, 33 Cal.4th at p. 207.)

Yet, the escape rule, which defines the duration of the underlying felony (*Cavitt*, 33 Cal.3d at p. 208) would do just that. Defining felony murder liability based on the duration of the felony would impose a strict construction of the temporal relationship between the felony and the killing.

Limiting the felony murder rule to only those homicides occurring before a defendant has reached a place of temporary safety is also contrary to the long standing policy that “once a person perpetrates . . . one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such *fine judicial calibration*, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.” (*People v. Farley*, *supra*, 46 Cal.4th 1053, 1121, quoting *People v. Washington* (1965) 62 Cal.2d 777, 781, citations omitted & emphasis added.)

Appellant also argues that numerous cases of this state support his argument that a continuous transaction ends as soon as the actual perpetrator reaches a place of temporary safety. (ABOM 15-16.) In support, he cites a post-*Cavitt* case, *People v. Young* (2005) 34 Cal.4th 1149. (ABOM 16.) In that case, the defendant, the actual and sole perpetrator, claimed on appeal the evidence was insufficient to support his felony murder conviction. This Court affirmed the conviction, stating, “a robbery is not complete until the perpetrator reaches a place of temporary safety” (*Young*, 34 Cal.4th at p. 1177.) This Court also stated, however, that “[u]nder the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction” and “[t]his transaction may include a defendant’s flight after the felony to a place of temporary safety.” (*Id.* at p. 1175, citing *People v. Ainsworth*, *supra*, 45 Cal.3d 984, 1015-1016.)

Appellant also cites *People v. Fields* (1983) 35 Cal.3d 329. (ABOM 16-17.) In *Fields*, the defendant, the actual perpetrator, claimed on appeal there was insufficient evidence to support his robbery felony murder conviction. This Court upheld the conviction, stating: “[t]he trier of fact could reasonably find that defendant’s murder was a continuation of the robbery, done because until the robbery victim was killed, [defendant’s] home was not a place of even temporary safety.” (*Fields*, 35 Cal.3d at p. 368.)

Appellant relies upon *People v. Ford* (1966) 65 Cal.2d 41, overruled on other grounds in *People v. Satchell* (1971) 6 Cal.3d 28, 35, in which this Court, while discussing a sentencing issue, stated “‘the crime is not complete in the purview of the law, *inasmuch as said conspirators have not won their way even momentarily to a place of temporary safety and the possession of the plunder is nothing more than a scrambling possession.*’” (*Ford*, 65 Cal.2d at p. 56, quoting *People v. Boss*, *supra*, 210 Cal. at p. 250-251; italics in original.)

Respondent does not question that these decisions used the “escape” and “reaching a place of temporary safety” language in discussing whether there was sufficient evidence to support the defendants’ convictions for felony murder. However, “language used in any opinion is to be understood in the light of the facts and the issue then before the court. Further, cases are not authority for propositions not considered.” (*McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38; *People v. Mendoza* (2000) 23 Cal.4th 896, 915.) A review of the language regarding escape and temporary safety in these cases reveals that the term was used descriptively but not as a limitation on felony murder liability.

The issue in the current case was not raised or addressed in *Young*, *Fields* or *Ford*, i.e., whether the trial court should have instructed the jury on the theory that a homicide and an underlying felony do not constitute

one continuous transaction for purposes of the felony-murder rule if the killer has escaped to a place of temporary safety before the homicide occurs. *Young* and *Fields* discussed the sufficiency the evidence and *Ford* involved a sentencing issue. Thus, those cases do not undermine the clear holding in *Cavitt* which discussed the exact issue in this case.

Appellant also cites several decisions of the courts of appeal which refer to the escape rule and he claims they stand for the proposition that the escape rule should be used in cases such as the current one. Among those cases, appellant cites *People v. Russell* (2010) 187 Cal.App.4th 981; *People v. Thongvilay* (1998) 62 Cal.App.4th 71; *People v. Bodely* (1995) 32 Cal.App.4th 311; and *People v. Fuller* (1978) 86 Cal.App.3d 618. (ABOM 17-18.) However, not only do these cases not address the issue in the present case, but they are all factually distinguishable because they involved or discussed situations where a pursuit following the commission of the underlying felony occurred. (*Russell*, 187 Cal.App.4th at p. 992; *Thongvilay*, 62 Cal.App.4th at p. 80; *Bodely*, 32 Cal.App.4th at p. 312; *Fuller*, 86 Cal.App.3d at p. 622.)

Additionally, many of the cases appellant cites involved a robbery and an immediate pursuit following the underlying felony. Robbery has been deemed an ongoing crime because the robber has to asport the loot. However, there is no such requirement in burglary which is complete upon entry of the building with the requisite intent. The perpetration of a burglary is theoretically complete once the burglar leaves the structure because burglary does not necessarily require that the perpetrator asport any loot. Thus, limiting felony murder cases to only those where the killing occurs before the felon has reached a place of temporary safety could lead to confusion amongst the jury. However, application of the one continuous transaction doctrine to crimes such as burglary and those where there does not need to be an immediate pursuit for purposes of felony murder would

cure any confusion and would not force a jury to have to reconcile the absurdity of applying an escape rule to crimes such as burglary, which are technically complete without any need for an escape.

Moreover, at the very least, these cases stand for the proposition that the escape rule and the one continuous transaction doctrine are consistent with each other. For example, in *Bodely*, the court stated, “Since the application of the escape rule to burglary is consistent with the ‘one continuous transaction’ test, we conclude that felony-murder liability continues during the escape of a burglar from the scene of the burglary until the burglar reaches a place of temporary safety.” (*Bodely, supra*, 32 Cal.App.4th at p. 314.) Also, the court in *Fuller* stated, “Flight following a felony is considered part of the same transaction as long as the felon has not reached a “place of temporary safety.” (*Fuller, supra*, 86 Cal.App.3d at p. 623.)

Respondent acknowledges that *Young* is a post-*Cavitt* decision and references the escape rule. However, this Court also stated that “[u]nder the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of *one continuous transaction*” and “[t]his transaction *may include* a defendant’s flight after the felony to a place of temporary safety.” (*Id.* at p. 1175, citing *People v. Ainsworth, supra*, 45 Cal.3d 984, 1015-1016; emphasis added.)

While admittedly this Court in *Young* did refer to reaching a place of temporary safety as defining the underlying felony, it also stated that the ultimate question for determining felony murder liability is whether the underlying felony and the homicide are “part of one continuous transaction.” (*Young*, 34 Cal.4th at p. 1175.) Thus, this Court’s decision in *Young* is clearly in line with and does not undermine or contravene the clear holding in *Cavitt*. Moreover, this Court stated that the one continuous

transaction “may include” the defendant’s flight from the underlying felony to a place of temporary safety. (*Young*, 34 Cal.4th at p. 1175.) Thus, *Young* could be read as holding that reaching a place of temporary safety is not always *necessary* to terminate felony murder liability, only that it is *sufficient* in determining liability.

Indeed, as the Court of Appeal in the current case explained:

[r]econciling *Cavitt* with cases that have discussed temporary safety as a component of the felony-murder rule, leads us to the following conclusion: for purposes of the felony-murder rule, a robbery or burglary continues, at a minimum, until the perpetrator reaches a place of temporary safety. That is to say a killing, even an accidental killing, committed while the perpetrator is in flight and prior to reaching a place of temporary safety, may be fairly said to be part of one continuous transaction with the underlying felony. But reaching a place of temporary safety does not, in and of itself, terminate felony-murder liability so long as the felony and the killing are part of one continuous transaction.

(Slip Opn. at pp. 22-23.)

While, as a general matter, failure to reach a place of temporary safety will result in liability under the one continuous transaction doctrine, the converse is not necessarily true; reaching a place of temporary safety does not mean that the causal chain has been broken.

Thus, respondent submits that while the escape rule might have a role to play in establishing liability under the felony murder theory, it alone does not terminate liability and is not necessary for a finding of felony murder liability.

Appellant also argues that applying the rule in *Cavitt*, i.e., the one continuous transaction doctrine, to decide cases involving only the aggravation aspect of felony murder would overrule settled precedent that an actual perpetrator is no longer liable for felony murder once he has reached a place of temporary safety. (ABOM 22-23.) However, it is long

settled precedent that the only requirement in determining whether the felony and the homicide are part of a continuous transaction is whether there is a causal nexus linking the felony and the homicide. (*People v. Farley, supra*, 46 Cal.4th at p. 1121; *People v. Cavitt, supra*, 33 Cal.4th at p. 207; *People v. Earp, supra*, 20 Cal.4th at p. 888.)

The purpose of felony murder has consistently been to protect people from acts that a defendant sets in motion that may accompany one of the enumerated felonies. Indeed, as this Court recognized in *Cavitt*, limiting the felony murder rule to only those killings that occur prior to the felon reaching a place of temporary safety would lead to absurd and unintended results. (*Cavitt*, 33 Cal.4th at pp. 199-200.)

The facts of this case illustrate that point. Appellant was directly engaged in transporting the stolen goods from the burglary scene to his home, where he could conceal them, when the stove fell off his truck and caused the victim's death. Although the site of the burglary may have been 40 or 50 miles from the location of the devastation on the freeway and an hour or more may have elapsed since the burglary, the time and distance under these circumstances do not result in a causal break in the continuous nature of the activities.

It was appellant's act of driving away from the burglary scene with his truck loaded down with items precariously placed in his truck that caused the victim's death. Had appellant taken the time at the crime scene or on his way home to secure the stolen items, there would have been no fatality. Appellant's driving of the truck with the stolen items untied in the back of his truck with the tailgate down was absolutely critical to the killing. Thus, there was a logical causal nexus between the burglary and the homicide.

Yet, application of the escape rule would relieve appellant of all liability after he went to Doherty's house if the jury found that he had

reached a place of temporary safety there despite the fact that there was a logical causal nexus between his careless driving of the stolen loot and the homicide it caused.

Although it might be true that the escape rule serves the legitimate public policy considerations of deterrence and culpability in the context of determining certain ancillary consequences of robbery, burglary, and other crimes the rule does not similarly serve those considerations in the context of determining felony murder liability. As such, it would artificially cut short liability for any homicides caused by a defendant's actions committed or set in motion as part of the underlying felony he committed once he has reached a place of temporary safety. The following two hypothetical situations demonstrate why this is so and why the escape rule would lead to bizarre and unintended results.

In the first situation, Defendant A steals a stove from a home and loads it into the back of his truck without securing it or closing the truck's tailgate. Defendant A drives to his friend's house nearby, parks in his friend's driveway, takes a quick nap, and then heads to his ultimate destination on the freeway, without securing the stove or the tailgate. The stove falls off the truck and a driver is killed in the pandemonium that ensues.

In the second scenario, the sequence of events is the same except that after the thief, Defendant B, takes a quick nap at his friend's house, he secures the stove with a rope and drives slowly on surface streets to his destination. As he is driving, an animal crosses his path, causing him to brake sharply. The stove breaks free of the rope and falls on the road. The driver behind B swerves to avoid the stove, collides head-on with a driver on the other side of the road, and dies.

If the escape rule were applicable, neither A nor B would be liable for felony murder because both reached a place of temporary safety before

the other drivers died. Yet A is clearly more culpable than B; A's burglary was the cause of the driver's death whereas B's burglary was not, the animal was. Consequently, requiring different instructions for different situations would generate confusion in the trial courts and would lead to inconsistent and illogical results.

The facts of this case also illustrate why the continuous transaction rule rather than the escape rule should continue to govern felony murder cases. As set forth above, appellant loaded the stolen items into his truck and neither tied them down nor closed his tailgate. As he headed home, where he could conceal the stolen items, the stove fell off his truck and caused the victim's death. The time and distance under these circumstances do not cause a break in the continuous nature of the activities. Appellant would be no less culpable under these circumstances even if he had stopped. Nor would he be more culpable if the killing had occurred 1 mile from the scene or within the first few minutes after he drove away from the scene.

Limiting the extent of liability to killings committed before the perpetrator has reached a place of temporary safety is contrary to the public policy behind the felony-murder rule of deterring felons "from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*People v. Farley, supra*, 46 Cal.4th at p. 1121.) As stated above, the felony murder rule is not intended to benefit the perpetrator of the underlying felony. It "was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker" (*Cavitt*, at p. 207, citing *Chavez*, 37 Cal.2d at pp. 669-670.) Indeed, holding Defendant A in the hypothetical discussed earlier as well as appellant liable for felony-murder protects the community by deterring felons "from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*People v. Farley, supra*, 46 Cal.4th

at p. 1121.) The deaths in both Defendant A's hypothetical and in appellant's cases could have been avoided if A and appellant had taken the time to secure the stolen goods and close the tailgates of their trucks.

Appellant, however, argues that a single rule cannot feasibly be applied to both types of defendants (those involving complicity and those involving aggravation) because it would be overbroad in some cases and too narrow in others. For example, according to appellant, once a perpetrator under the aggravation aspect has reached a place of temporary safety, he no longer has an opportunity to kill someone in connection with the felony. (ABOM 23.) On the contrary, appellant fails to consider the situation in which he has set in motion actions during the felony which ultimately caused a death, actions which could possibly occur after a defendant has reached a place of temporary safety.

As an example, respondent presents the following hypothetical. A defendant decides to burglarize his neighbor's house. After entering with the intent of stealing his neighbor's property and while stealing those items, he knocks over a candle causing a fire. He runs back to his house with the stolen loot where he hides it. As a fire fighter is subsequently putting out the fire, he is burned and dies. While the defendant in that situation had already reached a place of temporary safety when the homicide occurred, there remains a logical causal nexus between the burglary and the homicide and he should be liable for the homicide that occurred as a result of the chain of events he set in motion. This is an example of why application of the escape rule for any felony murder case, regardless of whether there is only one perpetrator or several, is contrary to public policy. It would relieve the wrongdoer from liability for the homicide even though he intended to commit the underlying felony and caused a homicide in the course thereof.

Apart from leading to absurd and illogical consequences, application of the escape rule in felony murder cases would also require an inquiry into the subjective state of whether the perpetrator believed he was safe. (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 83 [“[c]ertainly appellate courts have considered the defendant’s belief about whether he or she reached a place of temporary safety”], quoting *People v. Kendrick* (1961) 56 Cal.2d 71, 90; see also *People v. Salas* (1972) 7 Cal.3d 812, 823-824 [court found defendant did not reach a place of temporary safety, noting that he was in hot flight and subjectively believed he was about to be arrested for the robbery]; see also *People v. Johnson* (1992) 5 Cal.App.4th 552, 561.)

However, such a determination would require the jury to consider the defendant’s mental state beyond whether the defendant intended to commit the enumerated felony. This Court and courts of this state have consistently held that for purposes of felony murder the prosecution need only establish the intent to commit the underlying, enumerated felony, which, in essence, supplants the mens rea of express malice usually necessary for first degree murder liability: “The felony-murder rule dispenses with the requirement of malice and replaces it with the specific intent to commit the underlying felony.” (*People v. Jones* (2000) 82 Cal.App.4th 663, 667; citing *People v. Coefield, supra*, 37 Cal.2d at pp. 868-869; see also *People v. Dillion* (1983) 34 Cal.3d at pp. 465, 472-477; *People v. Olsen* (1889) 80 cal. 122, 125-127.

Also, any fear that felony murder liability would continue indefinitely is unfounded if the jury is instructed on the continuous transaction doctrine. As this Court stated in *Cavitt*, “if Mianta had untied Betty, revived her, and two weeks later poisoned her in retaliation for some perceived slight, the burglary-robbery and the murder would not be part of ‘one continuous transaction.’” (*Cavitt*, 33 Cal.3d at p. 208.) The same is

true here. If appellant had not dropped the stove directly on his way home from the burglary, but instead went home, took the smaller items out of the cab of his truck, ate dinner, went to sleep for the night, and then the following day on his way to work in the afternoon, he dropped the stove onto the freeway and someone died after hitting it, no reasonable jury instructed on the continuous transaction doctrine would have found him liable under a felony murder theory. If those were the facts of this case, there would have been a break in the chain of events before the homicide occurred. Thus, any concern that the continuous transaction doctrine would expand felony murder liability indefinitely should be rejected.

Finally, any suggestion that the one continuous transaction rule is unworkable or has no outer limits is entirely without merit. Civil and criminal juries have been called upon to determine causation in cases for more than a century. (See *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 162 N.E. 99, 100; *Dillon v. Legg* (1968) 68 Cal.2d 728, 731; *People v. Roberts* (1992) 2 Cal.4th 271, 301; *People v. Brady* (2005) 129 Cal.App.4th 1314,1325.) For example, in determining whether a defendant committed murder under the provocative act doctrine, a jury is instructed that:

To constitute the crime of [murder] there must be in addition to the [death] an unlawful [act][or] [omission] which was a cause of that [result of the crime].] [¶] The criminal law has its own particular way of defining cause. A cause of the [death] is an [act][or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the [death] and without which the [death] would not occur.

(CALJIC No. 3.40.)

Likewise, the continuous transaction doctrine simply requires jurors to determine if there was some logical nexus between the underlying felony and the killing. The jury instruction given here clearly conveyed this concept to the jury, a concept juries are often required to consider.

Moreover, it should be pointed out that, under the continuous transaction instruction, a defendant is not foreclosed from arguing that he had reached a place of temporary safety. As stated above, one of the factors the court provided the jury with in determining whether there was one continuous transaction was whether the fatal act occurred while appellant was fleeing from the scene. Under this instruction, a defendant may argue to a jury that he had reached a place of temporary safety. Likewise, appellant was not precluded under the one continuous instruction as given in his case that he had reached a place of temporary safety, and therefore broke the causal chain, when he went to Doherty's house in Palm Springs or that he had reached a place of temporary safety based on the distance between the burglarized home and the location on the freeway where he dropped the stove. Accordingly, respondent submits that there was no instructional error in this case and the Court of Appeal correctly agreed and affirmed the conviction.

In sum, acceptance of appellant's limitation of the felony-murder rule to only those killings done while he is escaping to a place of temporary safety is contrary to, and would substantially frustrate, this Court's pronouncements in *Cavitt* and related cases. The focus for purposes of felony murder liability is not on the duration of the underlying felony but rather on whether the felony caused the homicide and whether the felony and homicide were part of a continuous transaction. Application of the escape rule to felony murder cases is also contrary to the purpose of the felony murder rule, which is to protect the community when an enumerated felony is perpetrated. In the abstract or even under the defense theories, Deputy Piquette's death was proximately caused by appellant's commission of the burglary and his subsequent driving of the stolen loot carelessly to his house. Thus, appellant's requested instruction on the escape rule sets the point at which felony-murder liability terminates and is an incorrect

statement of the law. It is an attempt to carve out an exception to the long standing rule that holds all perpetrators responsible for all homicides causally related to their actions in the underlying felony and should be rejected.

H. Appellant Forfeited His Claimed Error That The Trial Court Should Have Included Escape To A Place Of Temporary Safety” As A Factor To Consider As Part Of The Continuous Transaction Doctrine

In the alternative, appellant argues that the trial court should have at least included “escape to a place of temporary safety” as one of the factors in the continuous transaction instruction for the jury to consider as part of the standard jury instruction. He argues that it “was a significant factor to be considered with the other significant factors, even if not dispositive.” (ABOM 32.) However, appellant never asked the trial court to modify the standard jury instruction. He has forfeited this claim by failing to do so.

A defendant cannot complain on appeal that an instruction correct and responsive to the evidence is too general or incomplete unless requested to clarify or amplify at trial. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Jennings* (2010) 50 Cal.4th 616, 671.) .

For example, in *People v. Cox* (1991) 53 Cal.3d 618, 669, this Court rejected a claim that it was error to omit a modification to aiding and abetting instructions requiring the jury to find whether the crime was a “natural and probable consequence” of the act encouraged. (*Id.* at p. 669.)

The court stated:

The modification . . . constitutes a clarification of the jury's fact-finding responsibility, not the delineation of an element of a crime or a form of criminal liability That is, as worded, the instruction does not withdraw an element from the jury's determination or otherwise interject an impermissible presumption into the deliberative process. [¶] Under such circumstances, we require the defendant to

request further instructional amplification or explanation as he deems necessary.

(*People v. Cox, supra*, 53 Cal.3d at p. 669, fn. and citations omitted.)

Likewise, modification of CALCRIM No. 549 by insertion of a new factor regarding escape to a place of temporary safety should have been sought by appellant. He has forfeited this claim of error by failing to do so.

Furthermore, appellant's proposed modification of CALCRIM No. 549 to include the reaching of a place of temporary safety factor is a pinpoint instruction on his theory of the defense. Although a criminal defendant is entitled on request to an instruction that pinpoints the defense theory (*People v. Rogers* (2006) 39 Cal.4th 826, 878-879; *People v. Wharton* (1991) 53 Cal.3d 522, 570), "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024; see also *People v. Anderson* (2011) 51 Cal.4th 989, 997.) Thus, if appellant believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions. He has forfeited his claim of error by failing to request that the factor regarding reaching a place of temporary safety be included in the standard jury instruction given in this case. (*People v. Dennis* (1998) 17 Cal.4th 468, 514; accord, *People v. Young* (2005) 34 Cal.4th 1149, 1202 ["a defendant's failure to request a clarification instruction forfeits that claim on appeal"].)

I. Any Error Was Harmless

Even assuming the trial court committed an error in not instructing the jury on the escape rule, any such error was harmless. Appellant claims the error should be evaluated under the *Chapman* reasonable doubt standard applicable to federal constitutional violations because the court's instruction on one continuous transaction amounted to a misinstruction on

an element of the offense in violation of the right to due process under the Fourteenth Amendment and the right to trial by jury under the Sixth and Fourteenth Amendments. (AOB 36, citing *United States v. Gaudin* (1995) 515 U.S. 506, 509-510 [115 S.Ct. 2310, 132 L.Ed.2d 444] and *People v. Hudson* (2006) 38 Cal.4th 1002, 1013.)

Respondent submits that any error in this case did not result in a misinstruction on an element of the offense. In such a case, a judgment will not be set aside on the basis of instructional error unless, after an examination of the entire record, the error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) A miscarriage of justice occurs only when it is reasonably probable that the jury would have reached a result more favorable to the appellant absent the error. (*People v. Wharton* (1991) 53 Cal.3d 522, 571-572, fn. 10; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, appellant's requested instruction on the escape rule is a pinpoint instruction. A court's refusal to instruct with proposed pinpoint instructions is harmless under the *Watson* standard where defense counsel's jury argument pinpoints the defense and the instructions given sufficiently cover the topic. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144; *People v. Hughes* (2002) 27 Cal.4th 287, 363; *People v. Fudge* (1994) 7 Cal.4th 1075, 1111-1112.)

However, even under the *Chapman* standard of prejudice there is no reasonable possibility that an error by the trial court in failing to instruct the jury on the escape rule might have contributed to the conviction in this case because even if the jury had been instructed on the escape rule, the jury would have found appellant had not yet reached a place of temporary safety at the time Deputy Piquette was killed.

The instruction on the continuous transaction doctrine given to the jury instructed them that they could consider whether the "the fatal act was

committed for the purpose of aiding the . . . escape after the felony” and “whether the fatal act occurred while the perpetrator was fleeing from the scene of the felony or otherwise trying to prevent this discovery or reporting of the crime.” (6 RT 1013.) Despite this instruction, the jury still found appellant liable for felony murder.

Moreover, the only evidence that appellant did not head straight from the burglary site to his home in Long Beach was based on appellant’s self-serving, uncorroborated, and inconsistent testimony that he already had the stolen loot the night before Deputy Piquette’s death when he bought it in the Home Depot parking lot and then subsequently drove to his friend Doherty’s house in Palm Springs with the loot where he remained for some time before bringing the loot back toward Long Beach and arriving in Orange County where the collision occurred. (5 RT 577, 764, 766-767, 777, 864, 866, 868-869.)

However, the jury disbelieved appellant’s story that he bought the items at Home Depot, by finding he committed burglary as the underlying felony for his felony murder liability. (2 CT 350 [instruction that in order to find appellant guilty of felony murder, the jury must find appellant committed burglary], 402 [verdict], 406 [minute order]). There is no reasonable possibility that the jury believed appellant’s other story about going to Doherty’s house immediately after the obtaining the items.

Appellant’s credibility as a witness was also thoroughly undermined. The jury learned that appellant had a prior theft conviction (7 RT 633-644), had previously stolen property from two different victims on different occasions (5 RT 790-791), admitted lying to Dan Lay about his name and giving false contact numbers for Trivich (5 RT 791-792); and admitted lying to Lay to keep himself from getting in trouble (5 RT 794).

Also, it was uncontested that the stove fell off appellant’s truck around 5 a.m. (2 RT 164, 215; 3 RT 390; 5 RT 778; 2 CT 569.)

Appellant's version and timing of the facts preceding the stove falling off his truck is inconsistent with the uncontested fact that the stove fell off around 5 a.m. and, therefore, significantly undermined appellant's credibility and version of the events. Appellant testified that he left Doherty's house around 3 a.m. and drove straight home, stopping only once for about two to five minutes at a gas station to look for his cell phone. (5 RT 577, 868-869.) Appellant testified that he drove in the fast lane almost the entire time and said there was "zero traffic" at that hour. (5 RT 869.) It is about 85 miles from Doherty's house to the freeway exit near where appellant dropped the stove. Based on appellant's version of the events, he would have reached the location where he dropped the stove much earlier than 5 a.m. when it was uncontested that he dropped the stove.

Additionally, even assuming the jury believed appellant's claim that he went to Doherty's house, it still would not have found he had reached a place of temporary safety. Doherty's house was not a place of temporary safety as the large items were still piled in the back of and in the cab of appellant's truck parked in front of Doherty's house, visible to police and passers-by. These large items were clearly visible to onlookers, who at any moment, could notify the police of the precariously and suspiciously placed stash. In order to complete a successful escape, appellant had to get the items to a secure location. Because he did not and could not secret the stolen items at Doherty's house when he was there, means he was not safe there.

And, there is no other factual theory before the jury to even suggest another defense scenario that appellant had reached a place of temporary safety. Appellant's only testimony was that he went to Doherty's, which there is no reason to believe the jury did not reject outright considering appellant's inconsistent version and timing of the events and his lack of credibility. Given that the jury clearly rejected appellant's theory of how he got the property in the first place, there is no reason to suggest the jury

believed appellant's version of the where he went after stealing the property.

Thus, even if the jury had been instructed on the escape rule, there is no reasonable possibility that the jury would have found appellant had yet reached a place of temporary safety at the time Deputy Piquette was killed.

CONCLUSION

For the reasons stated above, respondent respectfully requests this Court hold that the trial court did not err in instructing the jury on the continuous transaction doctrine. Further, any possible error was harmless. Accordingly, the judgment must be affirmed.

Dated: November 23, 2011 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Answer Brief on the Merits uses a 13 point Times New Roman font and contains 14,134 words.

Dated: November 23, 2011

KAMALA D. HARRIS
Attorney General of California



SUSAN MILLER
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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: *People v. Wilkins*
No.: S190713

I declare:

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

On November 28, 2011, I served the attached ***RESPONDENT'S BRIEF ON THE MERITS*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on November 28, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

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 November 28, 2011, at San Diego, California.

Terri Garza
Declarant


Signature