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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DAVID EARL WILLIAMS,

Defendant and Appellant.

CAPITAL CASE
S029490

Los Angeles County Superior Court No. A 579310-01
The Honorable J.D. Smith, Judge

RESPONDENT'S BRIEF

SUPREME COURT
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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DAVID EARL WILLIAMS, Defendant and Appellant.	**CAPITAL CASE** S029490

STATEMENT OF THE CASE

In a second amended information filed by the District Attorney of Los Angeles County, appellant was charged in count 1 with the murder of Joanne Lacey, a violation of Penal Code section 187, subdivision (a).[1] In count 2, appellant was charged with second-degree robbery, a violation of section 211. In count 3, appellant was charged with arson causing great bodily injury, a violation of section 451, subdivision (a). In count 4, appellant was charged with kidnaping for robbery, a violation of section 209, subdivision (b). In count 5, appellant was charged with kidnaping, a violation of section 207, subdivision (a). (CT 495-499.)

The second amended information further alleged, as to count 1, three special circumstances: (1) the murder was committed while appellant was engaged in a robbery, within the meaning of section 190.2, subdivision (a)(17); (2) the murder was committed while appellant was engaged in a kidnaping,

1. All further statutory references will be to the Penal Code, unless otherwise indicated.

within the meaning of section 190.2, subdivision (a)(17); and (3) the murder committed involved the infliction of torture, within the meaning of section 190.2, subdivision (a)(18). It was further alleged as to count 1 that appellant personally used a firearm, within the meaning of section 12022.5. (CT 495-496.)

The second amended information further alleged, as to all counts, that appellant suffered a 1983 conviction for residential burglary, within the meaning of section 667, subdivision (a), and one prior prison term for a 1983 rape conviction, within the meaning of section 667.5, subdivision (a). (CT 498-499.)[2] Appellant pled not guilty and denied the special allegations. (CT 1785.)

During selection of the jury, the trial court declared a mistrial after appellant's lead counsel suffered two heart attacks. (CT 1816-1812.) Prior to trial, appellant's motion to suppress his statements to police was denied. (CT 1872.) Trial was by jury. (CT 1896.)

Appellant was found guilty of all counts and all special allegations were found to be true. (CT 1983-1984.) Appellant waived his right to trial on the issue of his prior-conviction allegations, and admitted one prior felony conviction and one prior prison term. (CT 1986.) At the conclusion of the penalty phase, the jury fixed the penalty at death as to count 1. (CT 2031-B.)

Appellant's motion for a new penalty phase was denied. Appellant's automatic motion for reduction of sentence, pursuant to section 190.4, subdivision (e), was likewise denied. The trial court imposed a sentence of death on count 1, in accordance with the jury's verdict. (CT 2067-2069, 2112-2117.)[3]

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2. The 1983 convictions arose out of the same facts and were tried under the same case number. (CT 483.)

3. The trial court imposed and stayed, pending completion of sentence on count I, consecutive sentences of one year on count 2; nine years on count

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. Guilt Phase

A. Prosecution Evidence

1. The Kidnaping, Robbery and Disappearance of Joanne Lacey

On March 20, 1989, Joanne Lacey, age 42, had been married to Napoleon Lacey for 19 years. They lived at 2846 North Casitas in Altadena. Mrs. Lacey worked as a supervisor at the downtown Los Angeles branch of the Post Office from 9:00 a.m. to 7:00 p.m. Mr. Lacey left for work at approximately 7:55 a.m. that day. Mrs. Lacey was sitting on the sofa, looking out the window, as she did every morning prior to getting dressed for work. Mrs. Lacey's mother, Justie Johnson, who lived with them, was sitting next to her. As Mr. Lacey left for work, he saw his wife's recently purchased Volvo 760 parked in front of the house. He did not know if his wife had any plans after work that day. Mrs. Lacey, however, usually returned home between 7:30 p.m. and 8:00 p.m. If she came home later, which was rare, Mrs. Lacey would call her mother. Mrs. Lacey occasionally stopped for groceries after work, and usually went to Boys Market on Lake Street in Pasadena. (RT 1037-1042.)

On March 20, 1989, after work, Luis Martinez, a mailroom clerk at the U.S. Postal Service, walked to the employee parking lot with Mrs. Lacey, to see

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3; one year, eight months on count 5; plus five years to run consecutively to count 1 for the firearm enhancement; plus five years for the prior felony conviction and one year for the prior prison term. Sentence on count 5 also was stayed pursuant to section 654. On count 4, the trial court imposed and stayed a sentence of life imprisonment with possibility of parole, to run consecutive to the determinate sentence. (CT 2068-2069.)

her new Volvo. Mrs. Lacey acted "like she always did, happy." Martinez saw Mrs. Lacey drive out of the parking lot, between 7:00 to 7:15 p.m. (RT 1035-1037.)

On March 20, 1989, between 7:40 and 8:00 p.m., Faye Swain, a friend and co-worker, saw Mrs. Lacey at the Pasadena Mall, near J.C. Penney's. Mrs. Lacey was wearing a black dress with little dots on it, and was "her usual pleasant self." They exchanged pleasantries and Swain left to continue her shopping. (RT 1237-1240.)

On March 20, 1989, at approximately 8:00 p.m., Shirley Bobbe was in the parking lot of Boys Market in Altadena. As Bobbe was loading groceries into her car, she noticed a dark blue Volvo with tinted windows pulling out of a parking space. The driver of the Volvo was a middle-aged Black female. Bobbe did not see any passengers in the Volvo. By the time Bobbe finished unloading her bags, got into her car, and was ready to pull out of her parking space, she saw that the Volvo still had not pulled out of its parking space. The Volvo was only halfway pulled out of its parking space. (RT 1056-1060.)

Jay Zima went to Security Pacific Bank at approximately 9:46 p.m. on March 20, 1989, to use the Versateller. A man and a woman were using the Versateller so he had to wait. Zima could not identify the people who were in front of him that night. Zima did not recognize appellant as being at the bank that night. (RT 1229-1233.)

Ruby Croskey, the customer service manager at Security Pacific Bank in Altadena, testified Joanne Lacey was the only authorized signatory on an account she had at the bank. A $200 Versateller withdrawal was made from Mrs. Lacey's account on March 20, 1989, at 9:45 p.m., at the Orangewood Shopping Center on California Boulevard in Pasadena. Other withdrawals from different accounts were made at 9:46 p.m. and at 9:48 p.m. (RT 1052-1056, 1060-1061.)

On March 20, 1989, at about 10:30 p.m., Carrie Runnels, a friend of Mrs. Lacey's who lived in Altadena, arrived home from church. As she was getting ready for bed, she received a telephone call from Mrs. Lacey. Mrs. Lacey said, "Mrs. Runnels, can I get you to do me a favor?," and Runnels replied, "Yes." Mrs. Lacey sounded excited and like she was in a hurry. Mrs. Lacey asked, "Can I get you to let me have $500?" Runnels said, "What?" Mrs. Lacey said, "I had an accident." Runnels responded, "Well, all right." Mrs. Lacey told her to come to Palm and Loma Alta. Runnels said, "All right. Well, I will bring my husband," but Mrs. Lacey said, "No, come alone." Runnels hung up the phone. Mrs. Lacey had borrowed money from Runnels approximately 12 to 25 times in the past, so Mrs. Lacey's request was not unusual. Runnels thought it was unusual, however, that Mrs. Lacey told her not to bring her husband. Runnels's husband was asleep and she did not wake him. Runnels got dressed and drove towards Palm and Loma Alta. (RT 1062-1069, 1077-1078, 1285-1280.)

As Runnels drove about a block and a half from her residence, she noticed a parked car, on Ventura, between El Nido and Casitas, blinking its parking lights. Runnels slowed down, thinking, "If that is her, she will turn around and come." As Runnels drove, the car with the blinking parking lights made a U-turn and headed towards her. Runnels pulled over to the side of the street, and saw that the approaching car was Mrs. Lacey's Volvo. The Volvo pulled up beside her. The passenger-side window came down, and Mrs. Lacey, without saying a word, reached her left hand out. Runnels already had the money in her hand, so she gave it to Mrs. Lacey. Runnels gave Mrs. Lacey $500, consisting of a $100 bill, a $50 bill, and some $20 bills. Mrs. Lacey looked sad and her head was down. Mrs. Lacey, who was sitting in the passenger seat, took the money and passed to the driver, whom Runnels could not see. Runnels twice asked Mrs. Lacey if she was all right, and Mrs. Lacey

replied each time, "Yes," and nodded. Runnels asked one more time if Mrs. Lacey was okay, and Mrs. Lacey told her, "Yes. I'll talk to you tomorrow." The Volvo then pulled away. The driver of the Volvo had shoulder-length black hair. (RT 1069-1075, 1079.)

After Runnels returned home, she called the Lacey residence at about 11:00 p.m., and asked Mrs. Lacey's daughter, "Has your mama made it home?" Mrs. Lacey's daughter said, "Not yet." Runnels hung up without saying anything else. Runnels was very disturbed by Mrs. Lacey's demeanor that night, because "something just didn't feel right. . ." (RT 1075-1076.)

Troy Cory lived at 639 Rosemont in a secluded residential neighborhood about half a mile from the Rose Bowl. At about 11:00 p.m. on March 20, 1989, Cory was working in his home office and heard some loud noises. He thought there was a party across the street. Cory heard yelling and someone saying, "Let's get out of here," or "Get in there." The voices sounded like male voices, but there might have been female voices too. Cory heard loud noises, which sounded like a motorcycle or an automobile driving off. He also heard rustling noises in front of his window. About one minute after he heard the loud voices, Cory heard firecrackers or two to three gunshots. He called 911. Cory next heard a loud explosion, and saw a fireball go up above the trees near the retaining wall across the street. He ran outside and saw a car on fire parked next to the retaining wall. Cory noticed a gun and some money lying in the street. The fire department arrived a few minutes later. (RT 1096-1107.)

2. The Fire And Discovery Of Mrs. Lacey's Body

On March 20, 1989, at approximately 11:30 p.m., Pasadena Fire Department Firefighter Robert Taylor responded to a fire near Rosemont Avenue and Prospect Terrace in Pasadena. He was part of the first engine

company to arrive at the scene. A car, parked near the curb on Rosemont, facing westbound, was fully engulfed in flames. The three to five feet flames "blew out" the windows of the car. The firefighters initially attacked the fire with water from hoses, but then noticed there was a gasoline fire on or next to the curb, heading down the street. The firefighters established another hose line to fight the curb fire. It took about 15 to 20 minutes to get the fire under control. The car was "a throwaway; it was totally ruined." Around midnight, as part of their "overhaul" procedures, Taylor went to open the trunk of the car, but it was locked. He obtained a sledgehammer and hit the truck of the car three times. After his third swing, the trunk "flew open" and then slammed shut. While the trunk was open, Taylor observed what appeared to be a burned body, lying on its stomach, in the trunk. Based upon his experience, he assumed the person was dead, because no one could have survived a 20-minute fire of that nature. He did not try to reopen the trunk, because it appeared a crime had been committed and he was not supposed to disturb a crime scene. Taylor was instructed to secure the scene. Police and arson investigators were called. (RT 952-960.)

Pasadena Police Department Officer Jayce Ward responded to the scene around midnight. He saw a burnt Volvo and was informed by the fire department that a body was in the trunk. The Volvo was brand new, with temporary "paper" license plates, and appeared to be dark blue. Looking through the burned-out backseat, he saw a body in the trunk. There was a revolver in the middle of the street, about three feet from the Volvo. There were three cartridges, two expended and one live round, in the revolver. The police located a vehicle identification number underneath the Volvo's hood, but the car had not yet been registered with the Department of Motor Vehicles. The temporary plates indicated the Volvo had been purchased in Torrance. (RT 961-964.)

Once homicide detectives and a representative from the Coroner's office arrived, the fire department used the "jaws of life" to open the trunk, at about 1:40 a.m. on March 21, 1989. There was a charred body in the trunk lying face down. The body was large, and appeared to be that of a Black female. The hands were tucked underneath the body. The body was nude, but there was black and white polka-dot material underneath the body. Two objects, which appeared to be buttons, had melted into the skin. The body was removed by the Coroner. As the body was lifted out of the trunk, hair, which was later determined to be a wig, stuck to the right side of the inner trunk. The body was photographed, both face up and face down. There was a briefcase underneath the body, which contained papers identifying the decedent as Joanne Lacey of Altadena. (RT 965-976, 1225-1227.)

Pasadena Police Department Field Investigation Assistant Susan Rogers was assigned to photograph the scene and collect evidence. She collected a .22 caliber revolver, containing two expended rounds and one live round, three shell casings, a gas spout, change and a $20 bill, a bag of pins, a gold chain, and a paper bag and receipt. The gas spout was on the grass. From the front passenger floorboard area of the Volvo, Rogers recovered a bag of groceries from Boys Market, a J.C. Penney's bag containing children's clothing, a purse, car keys, and some papers. (RT 979-991.)

On March 20, 1989, Napoleon Lacey returned from work at about 5:00 p.m. He left to go to his sister's house and did not come home again until about 9:30 or 10:00 p.m. His daughter and mother-in-law were there, but his wife was not home yet. He watched television and then went to sleep. Mrs. Johnson woke him up at midnight or 12:30 a.m., and told him that his wife still had not returned. Mrs. Johnson said that they should get in the car and look for her. Mr. Lacey got dressed, and drove with Mrs. Johnson, first around Pasadena, and then to the Post Office in Los Angeles. They did not find Mrs. Lacey and

returned home around 2:30 or 3:00 a.m. As he drove up to his house, he saw two men in civilian clothes, looking into the windows and entrance with flashlights. The two men introduced themselves as Pasadena police officers and asked Mr. Lacey for identification. The officers took Mr. Lacey into the den of his home and told him his wife was dead. (RT 1042-1044.)

Mr. Lacey told the officers that his wife wore jewelry almost every day, including her wedding ring, a heart-shaped pinky ring, a watch, one or two necklaces, a brooch, and a gold bracelet with diamonds on it. (RT 1044-1046.) Mrs. Lacey never owned a gun and was "terribly afraid" of guns. She was not in the habit of carrying large amounts of cash. Mrs. Lacey had a separate checking account at Security Pacific Bank in Altadena. After his wife's death, Mr. Lacey learned that there were numerous withdrawals from her account on the night of her murder and subsequent days. Mrs. Lacey was the only person with access to that account. Mrs. Lacey was about 5'10" tall, and weighed about 185 pounds. She sometimes drove by Lincoln Street on her way home from work, because they owned two rental properties there and she wanted to see if the houses were being properly maintained. (RT 1046-1049.)

Pasadena Police Detective John Knebel responded to the crime scene at about 1:00 a.m. on March 21, 1989. He saw a Volvo, which had been totally destroyed by fire, parked on Rosemont. There was a .22 caliber revolver on the sidewalk near some money, a necklace, and a gas spout. Detective Knebel saw the body removed from the trunk of the Volvo; it did not have any jewelry. He later submitted the gun for fingerprint analysis and for comparison with the bullet recovered from Mrs. Lacey's hand. At about 3:00 a.m., the officers found several magazines with Mrs. Lacey's name and address on them. Detective Knebel went to the Lacey residence with another officer to try to contact Mrs. Lacey's next of kin. He interviewed Napoleon Lacey and neighbor Runnels. In the initial stages of his investigation, there were no leads. Fingerprint tests

came back negative, meaning no prints could be lifted. The Pasadena Police Department contacted the local paper, the "Star News," and asked for assistance. The police requested that any witnesses contact them. (RT 1081-1087.)

3. Mrs. Lacey's Pain And Suffering And The Cause Of Death

Los Angeles County Medical Examiner Susan Selser performed an autopsy on Mrs. Lacey on March 23, 1989, at about 9:00 a.m. At that time, Mrs. Lacey had not yet been identified. Mrs. Lacey died from inhalation of products of combustion, basically smoke, and thermal burns. Mrs. Lacey was alive at the time the fire started because there was soot and smoke in her air passages. Once the smoke reached Mrs. Lacey, she could have lived from the time it would take to draw one breath up to 10 minutes. A person could live longer if he or she held their breath. The level of carbon monoxide, one of the products of combustion, in Mrs. Lacey's body was 49.5 percent, whereas a smoker's level might be 5 to 10 percent. Part of Mrs. Lacey's left arm was burned down through the skin to the muscle, which was a full thickness burn. Her body also sustained several other, mainly superficial, burns. It was difficult to determine if the burns were ante- or post-mortem. (RT 1018-1025, 1029-1032.)

Additionally, Mrs. Lacey sustained a gunshot wound to her left hand, and bruises to her neck, indicating neck compression. Mrs. Lacey also had petechial hemorrhages on the mucosa of her larynx, which could be consistent with strangulation. However, these injuries were not fatal, because Mrs. Lacey was alive when the fire started. A bullet was removed from Mrs. Lacey's hand. (RT 1025-1027.)

Dr. William Dean Davies was a burn surgeon affiliated with the Burn Unit at Torrance Medical Center. Burns suffered in a trapped environment were

some of the "more severe" burns he had treated. Pain from burns was "an all-consuming type of pain." Burn injuries were unique in that most pain was localized to the site of the injury, but pain from burns "seem[ed] to come from everywhere at once." Burn pain was conducted by pain fibers attached to the skin, and there was a stimulation that continued even after the burning stopped, because the tissues of the skin were altered. Pain from burns was immediate. Dr. Davis examined photographs of Mrs. Lacey's body and the coroner's report. Dr. Davis opined Mrs. Lacey was alive when the fire started and experienced excruciating pain at the time of her entrapment in the trunk. Dr. Davis's opinion that Mrs. Lacey was alive when the fire started was based upon the respiratory findings (soot in her mouth, lungs, and gullet), and the pulmonary findings (waterlogged lung caused by the irritant effects of smoke). The level of carbon monoxide in Mrs. Lacey's blood would not ordinarily cause death. (RT 1240-1250.)

Due to the smoke in the trunk, Mrs. Lacey would not have been able to breathe, plus she would have been in pain from the burns. Mrs. Lacey would have experienced choking, salivation, running eyes, intense coughing, and possible nausea. As the oxygen in the trunk was depleted, Mrs. Lacey would have experienced dizziness, faintness, and then, ultimately, loss of consciousness. Based on the photographs of Mrs. Lacey's body, which showed burns with a bull's-eye concentric circle appearance, she was alive when she suffered those burns, because those type of burns were only seen when blood was still circulating at the time of the burn. These burns were on Mrs. Lacey's right cheek and right arm. Dr. Davis estimated Mrs. Lacey lived for at least four to fifteen minutes. It was probable that Mrs. Lacey prolonged her life, and her suffering, by holding her breath, as that was a normal response to smoke. Mrs. Lacey sustained full-thickness burns, which were third degree burns, over 90 percent of her body. Dr. Davis agreed with the Coroner's diagnosis, which was

that Mrs. Lacey died from inhalation injury and burns. (RT 1250-1268.)

4. Appellant's Arrest And Statements To Police

On March 24, 1989, at about 4:00 p.m., Detective Knebel received a call from John Wright, who said his daughter had overheard something about the instant crime, but she was too scared to contact the police. Detective Knebel asked Wright to talk his daughter into coming forward. Detective Knebel called Wright the next day, and Wright arranged for a three-way phone call with his daughter later that day. Detective Knebel learned that Margaret Williams had talked to Wright's daughter about being paid some money to get some gasoline and to be a "lookout" while someone burned up a car. Williams lived on Lincoln where another murder had occurred a few months earlier. Detective Knebel checked some records and learned that Williams lived at 800 Lincoln and had an outstanding warrant for an assault charge. (RT 1087-1088.)

After Williams's arrest, subsequent investigation led to the arrest of appellant on March 25, 1989, at approximately 1:30 p.m., in front of appellant's driveway at 1868 Lincoln, while appellant was driving his red Chevy Vega. Appellant had shoulder-length black hair at the time of his arrest. A .22 caliber live round was recovered from a television stand in appellant's residence. Appellant's Vega had collision damage to the rear of the vehicle, as well as other damage elsewhere. Appellant's and Mrs. Lacey's cars were impounded for evidence. Detective Knebel asked the Highway Patrol to perform an investigation of the two vehicles to see if it could be established whether the two cars had been involved in a mutual collision. (RT 1088-1090, 1177-1178.)

Appellant was interviewed four times while in custody, from March 25, 1989 to March 28, 1989. (RT 1090.)

a. Appellant's First Interview

On March 25, 1989, at about 4:00 p.m., Detective Knebel and Detective Salgado asked appellant if he wanted to talk to them. Appellant agreed to talk and to have the conversation tape-recorded. The interview took place in a room in the detective bureau, where five detectives had their desks. Appellant was handcuffed to a chair, with one hand free, during this interview. Detective Knebel turned on the tape recorder and read appellant his constitutional rights from a Pasadena Police Department admonition card. Appellant gave up his right to remain silent. When Detective Knebel asked appellant if he wanted an attorney present, appellant said, "Yes." Detective Knebel said, "That's fine. We will have to wait until Monday because the offices are closed and we will get an attorney for you on Monday or a public defender if you can't afford one." Appellant replied, "No, no. I want to talk now." The interview proceeded. (RT 1090-1094,1112, Peo. Exhs. 55, 56.)

The first interview lasted about half an hour, and consisted of appellant denying knowing anything about the instant crime. Appellant also stated his friends could provide him an alibi. During the interview, Detective Knebel told appellant the police had some witnesses who could identify appellant at the Versateller and that appellant had left fingerprints. The police did not have such information but Detective Knebel mentioned witnesses and fingerprints as a tool to attempt to persuade appellant to tell the truth. Appellant initially was arrogant, "like 'You don't have anything on me.'" When appellant was shown a photograph of Mrs. Lacey, he became very quiet and would not look at the photograph. For the remainder of the interview, appellant was very subdued. Appellant eventually was returned to his cell. The tape of this interview was transcribed and played at trial. (RT 1090-1094, 1112-1117; Peo. Exhs. 55, 56.)

b. Appellant's Second Interview

On March 27, 1989, at approximately 9:00 a.m., Detective Knebel interviewed appellant a second time in the detective bureau. Detective Knebel traveled alone to the Pasadena Police Department jail facility and transported appellant to the detective bureau. Detective Knebel did not re-advise appellant of his constitutional rights. He told appellant that he wanted to talk to him about the Vega, and appellant agreed to the interview. Appellant was "cooperative, quiet [and] subdued." Appellant also agreed that the interview could be tape-recorded. Once the interview commenced, Detective Knebel asked appellant how long he owned the Vega, how the collision damage to the front of the Vega occurred, and when appellant had replaced some light lenses on the Vega. Appellant said he had not been in any traffic collisions and the Vega was in that damaged condition when he purchased it. Appellant also stated he had been on Orange Grove the night of the incident, where he had gotten into a fight with "Macho Man." The second interview lasted between five and ten minutes, and the tape of it was transcribed. The tape of the second interview was played to the jury. (RT 1117-1122, 1166; Peo. Exhs. 55, 57.)

c. Appellant's Third Interview

Detective Knebel went to the jail to interview appellant for a third time on March 28, 1989, at about 8:45 a.m. For the first time, Detective Knebel noticed some injuries to appellant's person, consisting of large pink spots, which looked like burns, on his left index finger and left ankle. Appellant was transported to Huntington Memorial Hospital for examination. He was examined by Dr. Coffey, who was not a burn expert. After the examination, Detective Knebel drove appellant to the detective bureau, where appellant's hand and ankle were photographed. (RT 1122-1125, 1135-1137; Peo. Exhs. 59

A-F.)

As Detective Knebel was taking appellant back to jail, appellant asked him if they could talk some more. Detective Knebel took appellant back to the detective bureau and asked two other detectives, Cauchon and Richter, to be present as witnesses. At about 10:00 a.m., Detective Knebel reminded appellant of his constitutional rights, and appellant waived his right to remain silent. This conversation was not tape-recorded, because appellant initiated the conversation and Detective Knebel did not want to interrupt the "flow or tenor" of the conversation, and he knew he could record it later. Appellant was cooperative and somber, "not belligerent or arrogant like before." Detective Knebel asked, "What did you want to say, David?" Appellant said he had been on Orange Grove when Loretta Kelley pulled up in a new car, a blue Volvo, and honked at him. Appellant asked Kelley if he could drive the car, and Kelley agreed. Appellant drove his own car to his house on Lincoln, and then drove around Pasadena with Kelley in the Volvo. (RT 1125-1128, 1167-1169.)

Appellant said Kelley was acting "funny," so he asked her, "Where did you get this car?" Kelley replied that it was a "G.T.A.," which meant it was stolen. Appellant said he panicked because he was on parole, and he knew he would be sent back to prison if he was found to be involved with a stolen car. Because his fingerprints were on the car, appellant said he told Kelley they should burn up the car, as that was the only way to get rid of his fingerprints. According to appellant, Kelley agreed and they drove to a mini-market on Los Robles and Walnut, bought some gasoline, and took the car near the Rose Bowl. Both appellant and Kelley doused the car with gasoline. Kelley lit the fire with a lighter before appellant was ready, and the gasoline flashed and burned appellant's hand and leg, and singed his hair. Thereafter, appellant and Kelley went to the home of Margaret Williams to tell her about it. Appellant treated his burns at Williams's house and then Williams drove him to Mark's house on El

Molino. Appellant also said that Kelley had a "large wad of money," and some jewelry. Kelley gave appellant some of the money. Appellant also took a large bracelet and hid it from Kelley. Appellant said he later threw the bracelet in a storm drain on Garfield near the freeway, because the bracelet was not real gold. The third interview lasted between five to ten minutes. As appellant was transported back to jail, Detective Knebel asked appellant if he wanted to tape-record his statement, and appellant agreed. Detective Knebel told appellant they would wait for Detective Salgado to return. (RT 1128-1131.)

d. Appellant's Fourth Interview

On March 29, 1989, Detectives Knebel and Salgado brought appellant back from jail to the detective bureau at about 12:45 p.m. to tape record the interview. There was some conversation about what appellant had said during the third interview, but Detective Knebel could not recall what was said. Appellant was calm and cooperative. The fourth interview was tape-recorded, commencing at 1:15 p.m. Detective Knebel re-read appellant's constitutional rights, and appellant waived them. About a minute into the interview, appellant asked to stop the tape because he wanted to ask Detective Salgado a question. The tape was stopped and appellant asked Detective Salgado, "You said you could help me. How can you help me?" Detective Salgado replied, "The only way you can be helped is to tell the truth, the whole truth and not part of the truth and not half the truth because in a court when the jury listens to it, they want to hear the whole truth." About three minutes after the taping was stopped, the tape recorder was turned on again. After about ten minutes of taped conversation, the tape recorder was again turned off, as the detectives believed the interview had concluded. Immediately after the tape was turned off, appellant said, "Oh, yeah, now I remember. The first time that I knew there was

a woman in the trunk of that car is when I saw it in the paper, when Margaret [Williams] showed it to me in the paper." Detective Knebel asked appellant if he wanted to put that statement on tape, and appellant agreed, so the tape recorder was turned on again, two minutes later. The interview lasted for approximately five minutes, and then the tape recorder was turned off. (RT 1131-1139,1151-1153; Peo. Exhs. 55, 58.)

Detective Salgado realized he had another question to ask appellant. The detective asked appellant if he had just lit the car on fire, why was a gun found at the scene. Appellant said it was his gun, which he had since his release from prison. Appellant then began to cry and looked down and "very slowly and quietly said that he had robbed her and that he wanted to go back on the tape." The tape was turned on six minutes later, and appellant stated that he and Kelley robbed the victim. According to appellant, Kelley made Mrs. Lacey get into the trunk, and appellant helped in sprinkling the gas. Appellant opened the trunk, and Kelley shot Mrs. Lacey through the car seat. The tape recording of appellant's fourth police interview was played at trial. (RT 1153-1155; Peo. Exhs. 55, 58.)

5. Margaret Williams's Testimony

In the early morning hours of March 21, 1989, Margaret Williams was at her North Lincoln Avenue home in Pasadena with her mother and three children. At 2:00 a.m., someone knocked on her door, waking her up. Loretta Kelley, who was Williams's "associate," and an infrequent visitor, was at the door. Kelley said that she was with appellant, who had something to tell Williams. The two women went into Williams's bedroom and sat down. Appellant, who was the uncle of Williams's daughter and a friend, came to the front door and Williams opened it. As appellant walked by her into the

bedroom, Williams smelled gasoline and saw a T-shirt wrapped around one of appellant's hands. After sitting in the bedroom, appellant went into the kitchen and took a can of grease off of the stove. He started wiping his hand with the grease. Williams saw a burn on appellant's hand. Appellant also put grease on the back of his neck and his ankle. Appellant took $100 and $20 bills out of his pockets, along with some jewelry. There was about $600 to $700. Williams saw gold-diamond rings and a gold nugget-style bracelet. One ring had a cluster of diamonds and the other ring only had a couple of diamonds on it. Williams also saw a thin rope necklace, which appellant gave to Kelley. (RT 1203-1210, 1215-1218.)

Williams asked appellant what happened, and he replied, "I robbed a bitch." Williams asked what he had done, and appellant said, "I burnt the bitch up." Appellant told Williams the following: he had hit a woman's car; the woman wanted to call the police, but appellant did not want her to call; he told the woman to wait while he went to his car to get his driver's license and he returned to her car with a gun; appellant made the woman move over to the passenger seat; appellant drove the woman around for a while, and then took her to a Versateller where she took out $250 and gave it to appellant; appellant later picked up Kelley; The woman said, "Please don't hurt me. Please don't kill me"; appellant had the woman call a friend, who brought them $500 cash in Altadena; appellant asked Kelley what he should do to the woman; appellant gave Kelley $50 to "watch out," but he did not say what Kelley was supposed to be watching out for; appellant paid someone $100 to go get $2 worth of gas; and appellant and Kelley had set the woman's car on fire, and as he was setting the fire, he looked up and saw he was on fire. Kelley was in the bathroom while appellant talked to Williams. Kelley said she had been riding around with appellant and the woman. Kelley was "paranoid," and kept looking out the windows. Williams told appellant and Kelley to get ready so she could drop

them off, because Williams did not want to be involved. (RT 1210-1215, 1221.)

Williams drove appellant to Del Mar and El Molino, where one of appellant's friends lived. Williams next dropped off Kelley on Summit. Williams drove to the gas station, stopped at Tastee's, and then went home. (RT 1214, 1221.) Two days later, Williams saw her best friend, Jeanette Morris, at Taco Bell. Williams told Morris what appellant had said. Morris's friend, Cheryl, was inside getting food while Morris and Williams talked outside. Later that week, Williams read in the newspaper that a lady was burned in Pasadena. When Williams saw the newspaper article, she thought, "Damn, he did do it." At some point, appellant came to her house and Williams asked if he had seen the newspaper. Appellant said he had seen it already. Williams was arrested in connection with this case, and was released four days later. (RT 1218-1221.)

Nine months following her release, Williams was subpoenaed to testify in this case. She "didn't want nothing to do with" the case, but she responded to the subpoena. Williams was interviewed by the prosecutor, and testified at the preliminary hearing. Prior to her testimony, an attorney was appointed for Williams, and she testified under a grant of immunity. There were no conditions of the immunity, other than to tell the truth. Williams knew that perjury meant to lie. (RT 1222-1224.)

6. Other Evidence

On March 21, 1989, at approximately 12:30 a.m., Pasadena Fire Department Investigator Robert Eisele was present when Mrs. Lacey's car trunk was opened for the second time and her body was removed. The body had a burn on its forehead which looked like it had burned through to the skull. The hood of the vehicle had not been burned, except near the windshield area. The engine compartment was untouched. The roof of the car collapsed, because the

metal had lost its tension. The sunroof and seats had burned away completely. There were burn patterns along the driver's side and left rear side doors. The burn patterns indicated the driver's side door had been open during the fire, as there was relatively no damage to the paint in the exterior door handle area, and there was ash and debris on the ground near that door. The burn patterns in the trunk were not as severe as those near the passenger compartment of the car. The left rear taillight was intact, while the right rear taillight had burned away. Mrs. Lacey's head was on the right side of the car trunk. The reason why the right side of the trunk was burned more severely than the left side might have been because the car itself tipped to the right, as it was parked near a gutter. There was an odor of gasoline in the footwells of the car, and samples of the floormats were sent for analysis. (RT 992-1009.)

Investigator Eisele opined the fire was intentionally set by someone, and that a flammable liquid, gasoline, was poured into the passenger compartment and ignited by a hand-held device, either a match or a cigarette lighter. The fire had burned through the passenger compartment into the right trunk area, leaving a white residue. Mrs. Lacey's forehead had adhered to the right rear fender well. It also was possible that gasoline had been poured directly into the right side of the trunk. All accidental causes of fire were eliminated, such as an electrical short or gas tank rupture. A firestarter could suffer injury as a result of starting a fire from a build-up of vapors, which would be caused by delaying lighting the fire after pouring the flammable liquid. Due to the location of the gas spout and other items of evidence on the ground, Investigator Eisele opined the person who set this fire might have been injured, as it appeared there was an immediate explosion when the fire was lit. After he left the scene, Investigator Eisele contacted a hospital network system to advise that the suspect might have been burned and he should be contacted if anyone sought treatment for burns at an emergency room. (RT 1010-1014, 1117.)

On March 24, 1989, Carolyn Owens, fingerprint identification technician for the Pasadena Police Department, examined a .22 caliber handgun, a paper bag, and a $20 bill for fingerprints. No fingerprints were found on these items. If gasoline were on the surfaces of the items, fingerprints could not be expected to be found, as the oiliness of the chemical would either wash away or obliterate any fingerprints. (RT 1145-1150.)

Los Angeles County Sheriff's Department Criminalist James Bailey, an expert on paint comparisons, compared a paint transfer from a Volvo to a control sample of a red Vega. He was given a blue piece of plastic with a red transfer on it, and was asked to compare it to control samples of red paint taken from the Vega. Bailey concluded the red scraping on the blue plastic could have come from the red Vega. (RT 1179-1182.)

Los Angeles County Sheriff's Department Firearms Examiner Edward Robinson conducted an analysis of the bullet recovered by the Coroner's Office and the H&R revolver found at the crime scene to determine if the expended bullet had been fired from that particular gun. The expended bullet was so mutilated and distorted that there were no general or individual characteristics left on it. However, a visible base remained on the bullet, and the base was consistent with a .22 caliber copper-plated or washed bullet. The expended bullet was similar to the live round recovered from appellant's home. (RT 1182-1188.)

California Highway Patrol Sergeant Jon West, an accident reconstruction expert, analyzed whether Mrs. Lacey's blue Volvo and appellant's red Vega had been in a collision. Sergeant West inspected both vehicles. Appellant's Vega had both front- and rear-end damage, most of it minor to moderate. Mrs. Lacey's Volvo, in addition to being extremely damaged by fire, had some scuffs and gouges to the right front bumper. The lens for the turning signal and parking lamp was missing from the Volvo. There

were red paint marks on the Volvo's headlamp lens. Sergeant West concluded there was some damage consistent with each vehicle, so that the two cars might have made contact with each other at some time. Sergeant West opined the two cars might have come into contact at a slight angle, perhaps 40 degrees, whereby the right front corner of the Volvo contacted the rear of the Vega, to the right of the Vega's rear license plate, which had a slight gouge and some black marks. Sergeant West stated this would have been a very low speed impact, in the five to ten mile per hour range, such as in a parking lot accident. He further opined the contact was made in one of three ways: 1) the Volvo rear-ended the Vega as the Vega was suddenly slowing or stopping at an intersection before making a right-hand turn; 2) the Volvo impacted with the Vega as the Vega was turning into, or pulling out of, a driveway; or 3) the Volvo impacted with the Vega as the Vega was backing out of a driveway or parking lot. (RT 1188-1202.)

Los Angeles County Sheriff's Department Criminalist Carl Fleming analyzed two metal cans containing liquid and a vehicle floor mat. He found gasoline on the floor mat. (RT 1234-1237.)

After appellant's arrest, Detective Knebel went to the storm drain on Garfield and retrieved the bracelet appellant threw away. Mr. Lacey identified the bracelet as belonging to his wife. Appellant changed his hairstyle to a braided-style after he was taken into custody. The Lacey family worked with a police artist to create a sketch of the items of jewelry worn by Mrs. Lacey. One of the items in the police sketch was similar to the bracelet recovered in the storm drain. Kelley was arrested regarding this case, but no charges were filed, as there was no evidence she was connected to this crime. (RT 1155-1161.)

During one of the taped interviews, appellant told Detective Knebel that he had obtained a repair estimate of about $2,000 for the body damage to his Vega. The detective did not find a repair invoice during an inventory search of appellant's car. Detective Knebel never asked appellant to sign an

admonition card. During his first interview of appellant, Detective Knebel was a little angry, because he felt appellant was responsible for the crime and was lying about it. During the interviews, Detective Knebel told appellant, "You are going to fry in the gas chamber." No promises were made to appellant. It was common police procedure to turn off a tape recorder upon a defendant's request. Detectives Knebel and Salgado did not play "good guy/bad guy" when interviewing appellant. When appellant told the police Kelley was "sprung," that meant she was addicted to cocaine. Neither Detective Knebel nor any other officer told appellant the most jail time he would receive was 18 years if he confessed. Appellant was told the penalty for this crime was life in prison or death. Appellant said he was standing by the driver's side door at the time the fire was lit. (RT 1162-1165, 1170-1175.)

Pasadena Police Department Detective Lionel Salgado testified the Laceys' rental property was in close relation to appellant's home. The rental property was less than two miles from the AM/PM Market to where the Volvo was found. Williams's home was eight to ten residential city blocks from where the Volvo was found. (RT 1268-1275.)

B. Defense Evidence

Appellant did not present an affirmative defense. (RT 1286.)

II. Penalty Phase

A. Prosecution Evidence

1. The 1983 Burglary And Rape Of Raina Taylor[4]

On March 15, 1983, Raina Taylor lived at 169 West Loma Alta Drive. She was a record producer who worked out of her home, who also did work for Columbia Pictures. Ms. Taylor had recording equipment at her home. That day she had been at a recording session and then attended a Bible study class. Ms. Taylor drove home from the Bible class in her 1971 dark green Mercedes sometime after 11:00 p.m. She entered her kitchen from the garage, used the bathroom, and went into her bedroom to get ready for bed. Ms. Taylor wore only a robe, with nothing on underneath, for bed. After Ms. Taylor got into bed, she heard footsteps. She sat up in bed and was hit across her face several times with a large blunt object, which felt like a "huge stick." She also was hit on her chest and body, more than a dozen times. Ms. Taylor heard appellant say, "Bitch, get on your knees." Ms. Taylor was pulled out of bed and turned onto her knees. Appellant lifted up the back of her robe and tried to penetrate Ms. Taylor's anus with his penis. It was very painful and appellant could not enter her anus. Appellant said, "Bitch, are you a virgin or something?" Ms. Taylor replied, "No, I'm a Christian." Appellant turned her over and Ms. Taylor said, "In the name of Jesus, leave me alone." Appellant threw her face-down on the bed. Appellant climbed on top of Ms. Taylor and repeatedly penetrated her vagina with his penis. During the sexual act, appellant repeatedly said, "Bitch." (RT 1405-1411, 1416, 1419.)

Appellant then called his partner, Shelby Fulcher, who had been

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4. After the guilty verdict, appellant admitted the 1983 rape of Raina Taylor. (RT 1394.)

standing in the room, and said, "Fuck this bitch." Fulcher said, "Man, we didn't come here for this." Appellant responded, "Man, I said fuck this bitch." Fulcher climbed on top of Ms. Taylor, but his penis was not erect. Fulcher whispered into Ms. Taylor's ear, " I really don't want to do this. He's crazy. Do whatever he says cause he'll kill you." Fulcher stayed on top of Ms. Taylor for a little while. Fulcher told her, "Lady, I didn't even touch the money that was in your Bible. I'm really sorry about this." Fulcher then got off of Ms. Taylor, who rolled onto the floor. Appellant came back into the room and said, "Where's your gun? I know you've got a gun. Where's your money? Where's your jewelry?" Appellant grabbed Ms. Taylor by her hair and began tying her hands and legs together with telephone wire. Ms. Taylor's nose was bleeding and blood was running down her face. Appellant was "enjoying what he was doing." "It was like he was really getting off . . . As though the more pain he gave, the more he enjoyed doing it." Appellant took Ms. Taylor's car keys off of her dresser and asked where her car was. Ms. Taylor said, "I can't breathe. I'm choking." In response, appellant stuffed a sock down her throat so she would choke even more. Fulcher said, "Let's get out of here." Appellant said, "Wait a minute, man," and went into the bathroom. After using the bathroom, appellant said, "We need to get rid of our fingerprints. Get something." They left the bedroom and returned with orange juice. Ms. Taylor felt cold liquid being poured over her hands and feet. She heard the two men walking around her house, silence, and then her car starting. Ms. Taylor managed to crawl to the kitchen and call the police. She was in a lot of pain and very scared. Ms. Taylor lost consciousness until the paramedics and police arrived. Ms. Taylor identified appellant as her assailant. (RT 1411-1418.)

As a result of that attack, Ms. Taylor sustained a broken nose, black eyes, and bruises to her whole body. It was originally believed she would need plastic surgery, but Ms. Taylor healed, which she believed was a miracle from

God. As a result of the rape, Ms. Taylor gave up her job and home, and moved out of the area. (RT 1411, 1418-1419.)

Shelby Fulcher, age 21, was appellant's partner in the rape of Ms. Taylor. In March 1983, Fulcher, who had no money, had been kicked out of his house, so he went to live at appellant's grandmother's home, which was next door to Ms. Taylor's house. While walking with appellant, who said that he knew a place where they could get some money, Fulcher and appellant broke Ms. Taylor's window and entered her house. They entered Ms. Taylor's bedroom, and unbeknownst to Fulcher, appellant hit Ms. Taylor with a piece of wood. Fulcher entered the house to get money or a stereo. They knew Ms. Taylor was home before they entered the house, but Fulcher thought she would just be tied up. As appellant was hitting Ms. Taylor, Fulcher left the room to look for items to steal. When he returned, appellant was having sex with Ms. Taylor. Appellant then told Fulcher, "Go ahead. You do it right." Fulcher could not, and did not want to, get an erection. He felt bad and told Ms. Taylor to stay down, to not move, and to not say anything because he feared for her life, as appellant was talking about killing her. Appellant tied up Ms. Taylor and they left the house. They took some coats, stereo equipment, money, and the car. Fulcher was arrested three days later and named appellant as his crime partner. Fulcher expressed remorse, pled guilty, and was sentenced to 10 years in state prison. Appellant also pled guilty and was sentenced to 10 years in prison. Fulcher served about five years, eight months of his sentence. No one made him any promises in exchange for his testimony in this case. (RT 1423-1431.)

At approximately 4:00 a.m. on March 15, 1983, Los Angeles County Sheriff's Department Sergeant Timothy Curtis responded to Ms. Taylor's home. The house was ransacked and there was blood throughout. A window in the living room was broken. (RT 1420-1423.)

On March 15, 1983, Los Angeles County Sheriff's Department Sergeant Terry Robinson responded to the emergency room at Saint Luke Hospital to interview rape victim Raina Taylor. Ms. Taylor was "visibly emotionally shaken." She was bleeding, had a puncture wound on her nose, a swollen wrist, and welts. Ms. Taylor had been beaten with a piece of tree. Appellant pled guilty to Ms. Taylor's rape. (RT 1402-1405.)

Los Angeles County Sheriff's Department Sergeant Susan Lawton interviewed appellant following his arrest in April 1983. After appellant waived his constitutional rights and signed an admonition form, appellant initially denied any involvement in the crime. He stated a friend named, "Ahli," had come over to his house with some property and a Mercedes, and asked for appellant's help in disposing the items. "Ahli" was really Fulcher. Appellant had no idea who the property belonged to or where it came from. After Sergeant Lawton told appellant that Fulcher had implicated him in Ms. Taylor's rape, appellant said he did not want to talk. After about a hour, appellant announced that he wanted to talk. Sergeant Lawton brought appellant out of his cell and reminded him of his constitutional rights. Appellant said he was walking with Fulcher when Fulcher decided to burglarize Ms. Taylor's house. Appellant confirmed Fulcher's version of the events inside the home, but attributed the rape and violence to Fulcher. Appellant eventually admitted he hit Ms. Taylor with a stick, raped her, and tied her up. Appellant further stated Fulcher punched and kicked Ms. Taylor as appellant was hitting her. Appellant admitted to pouring orange juice on Ms. Taylor and putting a sock in her mouth. (RT 1454-1460.)

2. Victim Impact Evidence

Amber Lacey, Mrs. Lacey's daughter, was 17 years old at time of trial

and 13 years old when her mother died. Her last memory of her mother was as Amber was leaving for school, her mother came to the door and asked if she had her lunch money. Amber was an only child and was very close to her mother, who was her role model. Mrs. Lacey sent Amber to piano lessons, charm school, and church. The night of her mother's disappearance, Amber was anxious to show her mother her report card, because she had received an "A" in math. Amber went to sleep in her mother's bed to wait for her. When Amber woke up, she wondered why no one had woken her up for school. She heard a lot of noise in the living room. Amber thought her mother was talking on the phone. Her father, Napoleon Lacey, came into the room, along with several other people, and held her. Amber knew something was wrong before anyone said anything. Amber's father told her that her mother had died in a car accident. Amber only recently learned the true circumstances of her mother's death. Amber was not allowed to come to court until this trial. She received psychological help in trying to cope with her loss. (RT 1432-1438.)

After Mrs. Lacey's death, Amber was sent to live with her maternal aunt, because Amber began doing things she had not done before, such as getting into fights and being suspended from school. Amber lived with her aunt for two years. Recently, Amber's father sent her the newspaper articles containing the true facts of her mother's death. After Amber read the details, she broke a plant, "let it loose," and her aunt had to call for medical assistance for Amber. Mrs. Lacey did not deserve what happened to her and it was not fair. It also was not fair that Amber was deprived of a mother-daughter relationship. (RT 1438-1441.)

Justie Johnson, Mrs. Lacey's mother, lived with the Laceys for five years. Mrs. Johnson helped her daughter with Mrs. Lacey's two foster children for about a year prior to her death. Mrs. Lacey did not have any foster children at the time of her death, but she had planned to take in more foster children.

When Mrs. Lacey did not return home on the evening of March 20, 1989, Mrs. Johnson became increasingly worried as the hours passed. She asked Mr. Lacey to drive around with her to look for her daughter. After her daughter's death, Mrs. Johnson had sleepless nights and did not know if she was "going or coming." Mrs. Johnson had two other daughters and now lived with one of them. It was not Mrs. Lacey's custom to keep a lot of cash at her home or to carry a lot of cash. (RT 1441-1445.)

Leola Johns, Mrs. Lacey's younger sister, explained that the baby clothes found in Mrs. Lacey's car were Easter gifts for their other sister's grandchildren. Mrs. Lacey had a fear of violence and guns. She would get hysterical about guns. Ms. Johns's husband had a gun, and one time he left in on the table in the den. When Mrs. Lacey stopped by after church, she saw the gun and just started screaming. Mrs. Lacey said, "There's a gun on the table. Whose gun is that?" Ms. Johns put the gun away and tried to calm down her sister. (RT 1445-1448.)

3. The Prior Felony Convictions

A certified copy of the record of appellant's 1983 felony convictions for the residential burglary and rape of Ms. Taylor, and certified copies of court documents and documents from the California Youth Authority regarding appellant's 1981 attempted residential burglary were admitted into evidence. (RT 1448-1450; Peo. Exhs. 74-75.)

4. Admission Of Previously Redacted Portions Of Appellant's March 25, 1989 Police Interview

During his March 25, 1989, police interview, appellant stated he pled guilty and was sentenced to ten years in state prison for the burglary, rape, and

grand theft in Ms. Taylor's case. Appellant served five years in prison. Appellant said he served time at Soledad, San Quentin, Vacaville, and Folsom prisons. (RT 1451-1453.)

B. Defense Evidence

1. Appellant's Background

Evangeline Williams, appellant's wife, was employed by Bank of America and had worked for several other financial institutions. She and appellant met when she was 14 years old and appellant was 17 years old. She was in love with appellant and did not want the jury to return a verdict of death against him. Appellant came from a dysfunctional family. His father was a drug addict, and his mother was a probable suicide, involving drugs. Appellant's mother died when he was six years old. His father served time in prison and had been charged with murder. All of appellant's brothers and sisters had once been in jail at the same time, along with appellant. After his mother's death, appellant was sent to live with his aunt who abused him severely. Appellant never held anything other than a part-time job. Appellant was a very good painter and artist. He received an award for his artwork while he was in prison. Several photographs of appellant's artwork were admitted into evidence. Appellant was a follower, rather than a leader. (RT 1463-1475, 1482.)

Evangeline married appellant on June 20, 1983, when she was 17 years old and appellant was 21 years old. They married at the courthouse while appellant was in custody after he pled guilty in the Taylor rape case. She knew appellant was going to be sentenced to 10 years in prison. She also knew appellant previously had been incarcerated at the California Youth Authority ("CYA"), although she originally had been told appellant was living in Long

Beach during this time period. Evangeline had an approximate six-month relationship with appellant after he was released from CYA and before he was arrested in the Taylor case. She knew appellant could have conjugal visits while in prison, and that was a factor in her decision to marry him. They planned to get an apartment together after appellant's release from prison and appellant was going to try to get a job. They later rented an apartment, and appellant worked as a seasonal employee at Honeybaked Ham, and then was on welfare. Appellant received no moral support from his family members during this trial. Appellant had four brothers and two sisters. After his mother's death, appellant was sent to live with his grandmother, but he later lived with his maternal aunt. The aunt abused appellant when he was eight years old, and he ran away from his aunt about four years later. He then lived with his grandmother again. His grandmother told him, "You're never going to amount to nothing." According to Evangeline, appellant's grandmother "seemed to have just hate, you know, for everybody. She just didn't seem to love them at all." His grandmother failed to supervise appellant and his siblings. Evangeline was unaware that appellant had a gun after his release on parole. There were never any guns in her house. She never saw appellant sell drugs. Appellant was of average intelligence, but he was very child-like and had no self-esteem. He needed a lot of encouragement. Appellant received his high school equivalency degree while at CYA. Evangeline realized persons who were serving life terms without the possibility of parole could not have conjugal visits. (RT 1475-1490.)

2. Prison Conditions After Sentencing

James Park, a correctional consultant on adult prisons, never met or spoke with appellant. If appellant received a sentence of life without the possibility of parole, he would be sent to a Level 4 maximum security prison,

which was the highest level of security. Since the construction of Level 4 prisons nine years ago, there had been no escapes at any Level 3 or Level 4 prisons. Prisoners in maximum security prisons worked and lived under constant armed-guard supervision, and were subject to strip-searches and metal-detector searches. The cells in these prisons were "sterile and austere," and were either 60 or 80 square feet in size. The windows in these cells consisted of slits in the concrete. (RT 1491-1502.)

Prisoners with a sentence of life without the possibility of parole were initially classified as Level 4, but they could, through good behavior over time, reduce their classification to Level 3. Level 3 prisoners were subject to the same degree of security as Level 4 prisoners, but they were permitted to live, and therefore socialize, with larger groups of prisoners. Level 4 prisoners were permitted to have televisions, radios, and books. Level 4 prisoners could exercise, work on the prison newspaper, earn a high school diploma, learn a trade, and use a prison's library and religious facilities. Level 4 prisoners were allowed visits only with family members. A Level 4 prisoner could have overnight visits with his spouse. If a Level 4 prisoner refused to follow prison rules, he could be assigned to a housing unit which had 23-hours-per-day lockdown and no privileges. As a prisoner aged, his adjustment to prison generally improved. A man of age 30 would adjust well to prison life. Appellant previously had been assigned to a Level 3 unit. (RT 1502-1508, 1512, 1514.)

3. Mental Health Evidence

Dr. Claudewell Thomas, a psychiatrist, opined appellant suffered from a borderline personality disorder, which was characterized by chaotic inter-personal relationships, mood disorder, and a constant struggle to bond with other

people. Appellant had been in several foster homes, his mother died when he was six, and his immediate family was "heavily involved in poly-substance abuse." Appellant also was physically abused by an aunt, and had scars on his shoulders from that abuse. Appellant's artwork evidenced a fair amount of skill and attention to detail, as well as "some concern with [his] social environment," and "obsessive compulsive mechanisms." Appellant never received any art training and his artwork demonstrated natural talent and a fair amount of intelligence. Appellant's artwork indicated appellant had "a certain element of confusion" about gender identity and concerns regarding bodily- and ethnic identity. Appellant was a "very angry man," and was a follower rather than a leader. Appellant received no support from his family throughout his life. Dr. Thomas further opined appellant would be able to function successfully in a prison setting without causing safety risks. (RT 1516-1528.)

According to Dr. Thomas, while other people might interpret appellant's artwork differently than he did, there would probably be some areas of universal agreement, such as the obsessive-compulsive characteristics inherent in appellant's art. Dr. Thomas interviewed appellant but did not perform any tests on him. Appellant had total control of his faculties, and did not appear to be exaggerating his personal background. Dr. Thomas also interviewed appellant's wife, but none of the information obtained from appellant and his wife was independently verified. Appellant admitted to using drugs, although he previously denied drug use to prison officials. Borderline personality disorder was characterized by emotional instability "of such nature as to produce behavior that at times seem[ed] to be psychotic," whereas a person with antisocial personality disorder committed "repeated acts of a hostile destructive nature." Not everyone with borderline personality disorder committed heinous and despicable crimes. (RT 1528-1537.)

APPELLANT'S CONTENTIONS

1. The police continued to question appellant after he had requested an attorney. All subsequent statements to police were obtained in violation of his Fifth and Fourteenth Amendments rights and should have been suppressed. (AOB 20-53.)

2. Police coercion rendered all of appellant's statements inadmissible under the Fifth and Fourteenth Amendments. The trial court's determination that the statements were voluntary was reversible error. (AOB 54-69.)

3. The testimony of Margaret Williams, the key prosecution witness, was the product of police coercion, was inherently unreliable, and deprived appellant of a fair trial. (AOB 70-83.)

4. The trial court's failure to give the necessary accomplice instructions with respect to Margaret Williams's testimony denied appellant a fair trial. (AOB 84-95.)

5. The trial court erred in instructing the jury with CALJIC No. 2.11.5. Insofar as the jury would have interpreted this instruction to apply to Margaret Williams, it was highly prejudicial and denied appellant a fair trial. (AOB 96-101.)

6. Erroneous burden of proof instructions regarding prior felony convictions deprived appellant of a fair penalty trial and reliable penalty determination, in violation of the Fifth and Fourteenth Amendments. (AOB 102-110.)

7. The prosecutor engaged in prejudicial misconduct by telling the jurors that the Bible required them to impose the death penalty. (AOB 111-123.)

8. The trial court gave inaccurate and prejudicial instructions to the jury in response to its inquiry about the Governor's commutation powers.

(AOB 124-135.)

9. California's death penalty statute, as interpreted by this Court and applied in this case, violates the United States Constitution. Appellant's death sentence must be set aside. (AOB 136-160.)

10. CALJIC No. 8.88 is constitutionally flawed. (AOB 161-165.)

11. The cumulative effect of the errors in this case require that the convictions and death sentence be reversed. (AOB 166-167.)

RESPONDENT'S ARGUMENT

1. Appellant's statements to the police were voluntary, and any comments appellant made regarding counsel were ambiguous and clarified with follow-up questions resulting in a valid *Miranda* waiver.

I. Factual background regarding appellant's statements to the police.

II. The people's motion to admit appellant's statements to the police and the trial court's ruling.

III. Analysis.

2. Appellant's confession was not the result of improper police coercion.

3. The testimony of Margaret Williams was properly admitted.

A. Background.

B. William's live trial testimony was not coerced and therefore was admissible.

4. The trial court had no duty to give the jury accomplice instructions as to Williams's testimony.

5. The trial court did not err by instructing the jury with CALJIC No. 2.11.5.

6. Even though it appears the trial court improperly used the preponderance of the evidence burden of proof at the penalty phase regarding consideration of appellant's prior felony convictions as a circumstance in aggravation , any instructional error in that regard was harmless.

A. Background.

B. Even though it appears the trial court used the improper standard of proof regarding consideration of appellant's prior felony convictions as a circumstance in aggravation, any error in this regard was utterly harmless on the facts of this case.

7. The prosecutor did not engage in prejudicial misconduct .

A. Background.

B. Appellant has waived his right to raise this issue by failing to object.

C. The prosecutor's comments were not improper, but assuming error, any error was harmless.

8. The trial court properly responded to the jury's inquiry about the governor's commutation powers.

A. Relevant proceedings.

B. Analysis.

9. California's death penalty statute does not violate the provisions of the United States Constitution.

A. Penal Code section 190.2 is not impermissibly broad.

B. Penal Code section 190.3, subdivision (a), is not impermissibly vague.

C. There is no requirement that death be found to be the appropriate penalty beyond a reasonable doubt.

D. There is no requirement that the jury base a death sentence

upon unanimous, written findings beyond a reasonable doubt regarding aggravating factors.

E. Intercase proportionality review is not constitutionally required.

F. The absence of disparate sentence review does not deny equal protection and due process in relation to non-capital defendants.

G. Failing to delete inapplicable penalty factors.

H. Adjectives used in conjunction with mitigating facts do not act as unconstitutional barriers to consideration of mitigation.

I. The trial court did not err by not delineating which penalty factors "could only be mitigating".

10. CALJIC No. 8.88 is constitutional.

11. There are no guilt phase errors or penalty phase errors to accumulate to such an extent that appellant may have been prejudiced when the errors are considered together.

A. Guilt phase errors.

B. Penalty phase errors.

ARGUMENT

I.

APPELLANT'S STATEMENTS TO THE POLICE WERE VOLUNTARY, AND ANY COMMENTS APPELLANT MADE REGARDING COUNSEL WERE AMBIGUOUS AND CLARIFIED WITH FOLLOW-UP QUESTIONS RESULTING IN A VALID *MIRANDA* WAIVER

Appellant contends the police improperly continued to question him after he requested an attorney, and therefore all of his subsequent statements to the police were obtained in violation of his Fifth, Sixth, and Fourteenth Amendment rights and should have been suppressed. (AOB 20-53.) Specifically, in this argument, appellant contends only that the trial court erroneously ruled appellant's waiver of his *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1612, 16 L.Ed.2d 694] rights was voluntary. (AOB 31.) Respondent submits appellant did not invoke his right to counsel and voluntarily and repeatedly made a knowing waiver of his rights.

I. Factual Background Regarding Appellant's Statements To The Police

A. Appellant's Initial Waiver Of His *Miranda* Rights

Appellant was arrested on March 25, 1989, at about 1:30 p.m. (RT 1088-1089.) Later that day, at approximately 4:00 p.m., appellant was read his *Miranda* rights by Detectives Knebel and Salgado. (RT 1091.) The following exchange took place:

> [SALGADO]: Do you know what I mean? Ok, any time you're ready, Jack.
>
> [KNEBEL]: Ok, we want to talk to you about a homicide that

occurred last week. Ok. You have certain rights. You know your rights?

[APPELLANT]: No I don't.

[KNEBEL]: You don't know your rights?

[APPELLANT]: I don't need to know.

[KNEBEL]: (inaudible) Ok. I must warn you that, I'm reading from the admonition card, I must warn you that you have the right to remain silent. If you give up the right to remain silent anything you say can and will be used against you in a court of law. You have the right to speak with an attorney and have an attorney present during questioning. If you so desire, and cannot afford one an attorney will be appointed for you without charge before questioning. Do you understand each of these rights I've explained to you?

[APPELLANT]: Yes.

[KNEBEL]: *Do you wish to give up your right to remain silent.*

[APPELLANT]: *Yeah.*

[KNEBEL]: Do you wish to give up the right to speak to an attorney and have him present during questioning?

[APPELLANT]: You talking about now?

[KNEBEL]: *Do you want an attorney [pause] here while you talk to us.*

[APPELLANT]: *Yeah.*

[KNEBEL]: Yes you do.

[APPELLANT]: Uh huh.

[KNEBEL]: Are you sure?

[APPELLANT]: Yes.

[SALGADO]: You don't want to talk to us right now.

[APPELLANT]: *Yeah, I'll talk to you right now.*

[KNEBEL]: Without an attorney.

[APPELLANT]: Yeah.

[KNEBEL]: Ok, let's be real clear. If you [pause] want an attorney here while we're talking to you we'll wait 'till Monday and they'll send a public defender over, unless you can afford a private attorney, so he can act as your [pause] your attorney.

[SALGADO]: (inaudible)

[APPELLANT]: *No I don't want to wait 'till Monday.*

[KNEBEL]: You don't want to wait 'till Monday.

[APPELLANT]: No.

[KNEBEL]: You want to talk now.

[APPELLANT]: Yes.

[KNEBEL]: *Ok, do you want to talk now because you're free to give up your right to have an attorney here now?*

[APPELLANT]: *Yes, yes, yes.*

[KNEBEL]: Ok. Monday night where were you? . . . .

(Supp. 2 CT 74-75, emphasis added.)

B. Substance Of Appellant's March 25, 1989, Police Interview

During his first interview with the police, appellant stated he was with his friend Mark or at Margaret Williams's house during the time of the kidnaping and murder. Appellant also said the damage to his Vega had been there prior to the murder. Appellant admitted to knowing Loretta Kelly and seeing her on the night of the murder. Detective Knebel told appellant there were witnesses who were going to testify that Williams said appellant had paid someone $100 to get a can of gas to "torch" a car, and appellant was going to "go to prison . . . [o]r fry in the gas chamber." (Supp. 2 CT 75-82.) Appellant

denied owning a gun, but admitted to keeping bullets at his house for a friend. (Supp. 2 CT 82-83.) Appellant denied committing the murder, and stated that the detectives had nothing but hearsay. When Detective Salgado stated the police had evidence, appellant said, "I want to see my attorney because you're all bullshitting now." (Supp. 2 CT 84.) The following colloquy ensued:

> [SALGADO]: I know. You know we have to show more than this. You're right.
>
> [KNEBEL]: You want your attorney now?
>
> [SALGADO]: But what we wanted [pause] an opportunity he [sic] now to see if you wanted to tell the truth or not and obviously you're not ready to tell the truth.
>
> [APPELLANT]: Tell the truth about what?
>
> [SALGADO]: Well [pause] your [pause]
>
> [APPELLANT]: I haven't killed nobody.
>
> [SALGADO]: I'm not saying you killed anybody. You put her in the trunk.
>
> [KNEBEL]: Wait a minute. Do you want your attorney now or do you want to talk to us.
>
> [APPELLANT]: I'll talk to him [Salgado]. But you sittin [sic] up here telling me that I done killed somebody.
>
> [KNEBEL]: You did.
>
> [APPELLANT]: No I didn't.
>
> [KNEBEL]: (inaudible) Do you want to talk to him without the attorney?
>
> [APPELLANT]: *Oh yeah I'll talk to him.*
>
> [KNEBEL]: Alright I'll shut up.

(Supp. 2 CT 84-85, emphasis added.)

Appellant continued to deny involvement, and Detective Salgado

stated the police had evidence which appellant did not know about. Detective Salgado speculated appellant did not mean to kill Mrs. Lacey but did not want to confess because he feared returning to prison. Detective Salgado told appellant the police already had the evidence to prove he committed the crime. Appellant denied killing Mrs. Lacey and setting her car on fire. When shown a photograph of Mrs. Lacey, appellant denied recognizing her. When asked, "Why did it turn the way that it did?," appellant responded, " I don't want to talk about it," but he continued answering questions. Detective Salgado insinuated there was fingerprint evidence and some gasoline-related evidence linking appellant to the crime and told appellant that showing remorse might save him from the gas chamber at time of trial. Detective Salgado told appellant three people were going to identify him from the Versateller machine at the bank. The interview concluded with Detective Salgado reminding appellant to focus on "remorsefulness and the truth," and to alert the jailer if appellant wanted to continue their discussion. (Supp. 2 CT 85-93.)

C. Appellant's March 27, 1989, Police Interview

Appellant was interviewed a second time on March 27, 1989, at 9:00 a.m. He was not re-advised of his rights. (RT 1120-1122, 1166.) Appellant said he was with Williams and then Mark on the night of the murders. Appellant got into a fight with someone named, "Macho Man." Appellant told Detective Knebel he purchased an extremely damaged Vega in December. Appellant had replaced the tail-light on the Vega a month earlier. On the night of the murder, appellant's car had no brakes, a damaged rotor, and was parked at his home. (Supp. 2 CT 94-97.)

D. Appellant March 28, 1989, Police Interviews

When Detective Knebel went to the jail to re-interview appellant on March 28, 1989, at about 8:45 a.m., he noticed injuries, which looked like burns on appellant's left finger and ankle. Appellant was taken to Huntington Hospital, and then to the detective bureau, where his injuries were photographed. As appellant was being transported to jail, appellant asked the detective if he "could talk some more." (RT 1126.) Detective Knebel took appellant back to the detective bureau, re-advised appellant of his constitutional rights, and appellant waived his rights. The five to ten minute conversation was not tape-recorded. During the interview, appellant said Loretta Kelley drove up to him in a new car, and after he drove it, Kelley admitted the car was stolen. Kelley had money and jewelry, and gave appellant a bracelet, which he later threw in a storm drain. Appellant decided to burn the car to remove his fingerprints because he was on parole. Appellant admitted the fire caused his injuries. Appellant admitted going to Williams's home after burning the car. After the conversation, appellant agreed to come back later when Detective Salgado was present to tape-record his statement. (RT 1125-1131.)

At 1:15 p.m., appellant's statement was tape-recorded. Appellant was read his constitutional rights and waived them. (Supp. 2 CT 98.) Before any substantive questions were asked, appellant asked that the tape recorder be turned off. Off tape, appellant asked Detective Salgado, "You said you could help me. How can you help me?" Detective Salgado said appellant should tell the truth, that it would look better in court if appellant told the "whole truth." (Supp. 2 CT 98-99.) The tape was turned off for three minutes. (RT 1133-1134, 1137.)

After the tape was turned on, appellant said Kelley drove near him in a new blue car while they were both driving on Hammond. Kelley followed appellant to his house and, after parking his car, appellant got into the driver's seat of Kelley's blue car. He drove the blue car around his neighborhood and

on the freeway. At some point, Kelley demanded to drive the car and then admitted to appellant that the car was stolen. Appellant was concerned that his fingerprints were on the car, because he was on parole. Appellant drove to the AM/PM and bought some gasoline. Appellant and Kelley drove the car to an area near the Rose Bowl. Kelley sprinkled the gas and lit the car on fire before appellant was ready, and, as a result, appellant was burned on the back of his head, hand, and foot. Appellant showed the detectives his singed hair. Appellant saw a purse inside the car. Appellant then set his side of the car on fire. They went to Williams's house after the fire. Kelley showed him a "ball" of money and jewelry. There was a big gold ring with a cluster of eight or nine diamonds, a silver and diamond ring, a second silver ring, and a watch. Appellant said he took another item of jewelry, a bracelet, from Kelley without her noticing. Appellant later threw the bracelet in a storm drain when he realized it was "fake." Kelley gave him a $100 bill and some other money. Appellant assumed Kelley robbed someone and stole their car. Kelley begged him not to tell Williams anything. Appellant asked Williams for something to treat his injuries. Appellant bought drugs from Williams with the money Kelley gave him. When his wife saw the drugs, appellant told her that he was selling them. The tape recorder was stopped at 1:28 p.m. (Supp. 2 CT 100-111.)

Off tape, appellant said he wanted to add something to his taped statement. (RT 1137.) He told the detectives he first learned there was a woman inside the car when he read it in a newspaper showed to him by Williams. (Supp. 2 CT 112.) The tape recorder remained off for two minutes. (RT 1138; Supp 2 CT 113.)

On tape, at 1:30 p.m., appellant stated he stopped by Williams's home and she showed him a newspaper article about a car "being burnt and a woman was found inside the trunk." On the night of the incident, appellant saw a medium-sized black purse inside the car on the floor of the front seat, but he did

not look inside it. He put the gas he bought into an anti-freeze container that was on the back seat of the car. Appellant admitted he personally did not buy the gas. He did not pull into the gas station, but left the car on Los Robles. Appellant walked to the gas station and asked someone there to buy a "dollars worth" of gas for him. The tape recorder was turned off at 1:33 p.m. (Supp. 2 CT 113-115.)

After the tape recorder was turned off, Detective Salgado asked appellant about the gun that was found at the scene. Off tape, appellant admitted the gun was his and that he had it since his release from prison. Appellant then admitted robbing Mrs. Lacey. (RT 1153-1154; Supp. 2 CT 116.)

At 1:39 p.m., the tape recorder was turned on again. Appellant said he and Kelley robbed Mrs. Lacey in the area around his house after they ran into her near Washington and Lincoln. After the collision, Kelley got out of the car appellant was driving and took Mrs. Lacey's purse. Mrs. Lacey "was just hollering (pause) please I can get you this (pause) I can get you that." Appellant drove his car to his house, got into Mrs. Lacey's car, and drove to the bank. Appellant did not know if anyone saw him there. Mrs. Lacey said that she could get them more money if she could call someone, and Kelley agreed that Mrs. Lacey should make the call. Appellant drove to Altadena, with Kelley lying down on the back seat keeping the gun on Mrs. Lacey, who was in the front seat. After they took the money from Mrs. Lacey's friend, Kelley forced Mrs. Lacey into the trunk on a dark street after appellant opened the trunk. Kelley then shot Mrs. Lacey "through the seat." They went to the gas station and then stopped in order to burn the car. Appellant and Kelley sprinkled the car with gas. As appellant was reaching for the gun inside the car, Kelley set the car on fire and caused his injuries. Appellant and Kelley then ran to Williams's house. Appellant said, "Swear to God, I'm telling you the whole truth." Appellant denied that anyone made any promises or threats to him, and he was not forced

to make this statement. He stated he was now telling the truth "[c]ause it's bothering my brain." When Detective Salgado asked, "Do you feel better now? A little bit?," appellant responded, "Yeah." The tape recorder was turned off at 1:45 p.m. (Supp. 2 CT 117-124.)

II. The People's Motion To Admit Appellant's Statements To The Police And The Trial Court's Ruling

Prior to trial, the People filed a motion for an order admitting appellant's statements to the police into evidence. In the motion, the People argued appellant made a knowing *Miranda* waiver and gave a voluntary statement during his first police interview. The People further asserted *Miranda* warnings were not required prior to appellant making his second statement, that appellant's third taped statement was voluntary and made after a knowing waiver, and that appellant's third taped statement was admissible even if his first and second statements were not. The People also argued Detective Salgado's recommendation to tell the whole truth was not a promise of leniency. (CT 1836-1848.)

A. Circumstances Surrounding Appellant's Statements

At the Evidence Code section 402 hearing on the People's motion, the People called Detective Knebel who testified appellant was arrested for murder on March 25, 1989, and interviewed at 4:00 p.m. The arrest was made without a warrant and was based on probable cause obtained from statements made by an unidentified person and Williams. The interview lasted half an hour, was taped and then transcribed. Detective Knebel read appellant his rights from an admonition card. The tape of the interview was played for the trial court. (RT 396-403, 411.)

Detective Knebel asked appellant some follow-up questions because appellant "appeared to be confused about what it meant to have an attorney present during questioning." Detective Knebel explained to appellant that "if he wanted an attorney present, we would arrange that on the following Monday, because it was a Friday night." Appellant appeared confused at first and "then he understood." (RT 403-404.) When the detectives told appellant he was either going to prison or going to fry in the gas chamber, appellant had "very little reaction," and responded, "You got to be a fool." The detectives made two other references to the possible penalty. Appellant remained calm, denied any involvement in the crime, and gave the police an alibi. (RT 404-405.)

Prior to turning on the tape, the detectives just explained the charges to appellant and said they wanted to talk. Appellant agreed to be tape-recorded. (RT 407-408.) The detectives never asked appellant to sign the admonition card. (RT 408.) When appellant said, "I want to see my attorney because you're all bullshitting now," Detective Knebel tried to stop the conversation but Detective Salgado finished his sentence before Detective Knebel could clarify the situation. Detective Knebel then asked if appellant wanted to speak to them without an attorney and appellant answered, "Yes." (RT 408-410.)

The tape recording of appellant's second statement was played for the trial court. Detective Knebel explained he brought appellant from jail to the detective bureau to ask him about a possible traffic collision with Mrs. Lacey. No one else was present. Off tape, appellant agreed to be tape recorded. Detective Knebel did not readvise appellant of his rights. Detective Knebel did not threaten or make any promises to appellant. Appellant was "very calm and matter of fact." (RT 413-416.)

After appellant was examined at the hospital on March 28, 1989, appellant asked if he could talk to Detective Knebel. Detective Knebel agreed to talk, and took appellant into an office where investigators Richter and

Cauchon also were present. Detective Knebel asked if appellant remembered his rights, and appellant answered, "Yes," and waived his rights. As he was taking appellant back to the jail for lunch, Detective Knebel asked appellant if he wanted his statement taped, and appellant said he did. Detective Knebel said he would wait until Investigator Salgado returned to tape the statement. On the tape, he advised appellant of his rights and appellant waived them. The tape recorder was shut off and turned on again at appellant's request.[5] (RT 416-426.)

On cross-examination, Detective Knebel testified that during the March 28, 1989, 10:00 a.m. interview, he readvised appellant of his rights and appellant waived them, but he did not read them from a *Miranda* card. Appellant was never asked to sign a *Miranda* card. Appellant was not readvised of his rights each time the tape recorder was turned on and off. Neither Detective Knebel nor Detective Salgado made any promises of leniency or other promises to appellant, including that appellant would receive a sentence of no more than 18 years if he told the truth. The detectives did not read appellant any newspaper articles or police reports regarding this crime. (RT 426-435, 438-440.)

B. Appellant's Testimony

Appellant testified that, prior to the second interview on March 27, 1989, Detective Salgado told him, in the presence of other officers, including Detective Knebel, that if he named his accomplice in a taped statement, he would be given a sentence of 18 years. Appellant stated, "He promised me 18

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5. An experienced officer's decision not to tape record a defendant's statement because the defendant seemed "nervous,"and might have been "distracted by the machine" is not improper. (*People v. Mickle* (1991) 54 Cal.3d 140, 170, fn. 13.)

years, but I couldn't say nothing on the record or he couldn't do it." Detective Salgado repeated the promise the following day. Appellant never volunteered any information about a gun. Detective Salgado told him, "So if you was there, you got to tell us about the gun." The detective also told appellant that the victim had been shot in the hand. All of the information on the March 28, 1989, tape recording which implicated appellant and Kelley was told to appellant by the detectives at the time of his arrest. In his first untaped interview with the detectives, appellant requested an attorney more than once, but the officers kept talking about the case. The officers told him three witnesses identified him and there were fingerprints. The officers interviewed appellant one to ten times off-tape on March 25, 1989. Appellant told the officers "what they told me, and I am also trying to convict Loretta [Kelley] because they wanted me to give them somebody." (RT 442-457.)

On cross-examination, appellant stated he was willing to receive an 18-year sentence for something he did not do, because his marriage was destroyed, he had no trade and thought he could learn one in prison, and to get back at Kelley for her involvement with his brother. The detectives told him they were taping only parts of their conversation because the cassette player they had "was messing up." When appellant said that things were "bothering his brain," he meant that the officer's actions were the cause, not the crime. Appellant denied having anything to do with the crime, and denied that the gun belonged to him. Appellant's burns were caused by his carburetor. The descriptions of the jewelry was told to him by the officers. (RT 457-470.)

C. Argument And The Trial Court's Ruling

The defense argued appellant's statements were coerced. (RT 470.) The prosecution asserted that the defense had not addressed the alleged *Miranda*

issue and the alleged coercive effect of the officers mentioning the death penalty, but only focused upon the alleged promise of leniency. The prosecution summarized the taped statements as appellant standing by his alibi on the first tape, clarifying his alibi on the second tape, and blaming Kelley on the third tape. The prosecution further argued appellant decided it was in his best interest to show some remorse. (RT 471-472.)

The trial court ruled as follows:

> The court had the opportunity to read the transcript, listen to the officers testify and listen to the defendant testify; and looking at the entire transcript and the conversations from 3-25 to 3-28, it appears that defendant shows no evidence of psychological or physical coercion. He freely banters back and forth with the investigating officers. He carefully exonerates himself when it is appropriate. And on the stand, when he talked about the second statement, that doesn't coincide with what he said. The statement that he was with other people. The second statement, 3-27, which the court read is almost incoherent. It is about Monday, Monday night. He doesn't do, if what he says is true, what the officers told him to, to implicate somebody else.
>
> With those findings, and the court reading the moving papers of the People, I don't find that, as to the first statement, talking about the death penalty in any way forces the defendant, based on the case law; and the fact that defendant was not advised on the second statement I don't find fatal to the statement. The first statement, the second and third statement is a continuing investigation. And on the third statement again he was advised, freely and voluntarily gives up his rights. And in those phases of the interrogation where he talked about asking for his attorney, he goes right on and says he will talk to him.

> Again, I find no evidence of physical or psychological coercion. I find the defendant's statements, one, two and three, were freely and voluntarily made with no coercion on behalf of the officers, that his rights under *Miranda* are not violated in any way.

(RT 472-473.)

III. Analysis

A. Authority

An involuntary confession is inadmissible under the due process clauses of both "the Fourteenth Amendment to the federal Constitution . . . as well article I, sections 7 and 15 of the California Constitution." (*People v. Weaver* (2001) 26 Cal.4th 876, 920.) The voluntariness of a confession must be proved "by a preponderance of the evidence." (*Ibid.*; see also *Lego v. Twomey* (1972) 404 U.S. 477, 488-489 [92 S.Ct. 619, 30 L.Ed.2d 618]; and *People v. Massie* (1998) 19 Cal.4th 550, 576.) This Court must accord deference to the trial court's factual findings, "upholding all that are supported by substantial evidence," and then must "independently determine from the facts whether the challenged statement was unlawfully obtained." (*People v. Ochoa* (2001) 26 Cal.4th 398, 436.)

In *Miranda*, the United States Supreme Court held the prosecution may not use statements stemming from custodial interrogation of a defendant "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda v. Arizona, supra*, 384 U.S. at p. 444.) In addition to requiring that the defendant be read his rights, the defendant, if he so chooses, must make a voluntary, knowing, and intelligent waiver. (*Ibid.*, accord *Dickerson v. United States* (2000) 530 U.S. 428, 443 [120 S.Ct. 2326, 147 L.Ed.2d 405].) If a defendant "indicates in any manner

and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning." (*Miranda v. Arizona, supra*, 384 U.S. at p. 444.)

> The mere fact that [a defendant] may have answered some question or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

(*Miranda v. Arizona, supra*, 384 U.S. at pp. 444-445.)

After an accused requests counsel, interrogation must cease. Interrogation "consists of words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034, citing *Rhode Island v. Innis* (1980) 446 U.S. 291, 303 [100 S.Ct. 1682, 64 L.Ed.2d 297].) In analyzing a defendant's request for counsel, courts look to the "ordinary meaning" of a defendant's words. (*Connecticut v. Barrett* (1987) 479 U.S. 523, 529-530 [107 S.Ct. 828, 93 L.Ed.2d 920].) An officer may not "impose a penalty" on a defendant's right to remain silent or to speak to an attorney, and must instead "scrupulously honor" the defendant's right to cut off questioning. (*Michigan v. Mosley* (1975) 423 U.S. 96, 104 [96 S.Ct. 321, 46 L.Ed.2d 313].)

Following *Miranda*, the Court in *Edwards v. Arizona* (1981) 451 U.S. 477, 484 [101 S.Ct. 1880, 68 L.Ed.2d 378], concluded a valid waiver of a defendant's rights "cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Once an accused expresses his desire for counsel, he "is not subject to further interrogation . . . unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* at pp. 484-485.) Thus, a suspect is not "powerless to countermand his election." (*Id.* at p.

485.) .) An accused initiates further conversation "when he speaks words or engages in conduct that can be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 727, citations omitted.) However, a court must determine if a defendant knowingly and intelligently waived the right he previously invoked "under a totality of the circumstances" test. (*Edwards v. Arizona, supra*, at p. 486, fn. 9; *Smith v. Illinois* (1984) 469 U.S. 91, 95 [105 S.Ct. 490, 83 L.Ed.2d 488].) The totality of the circumstances must include the "necessary fact" that the accused, not the police, reopened the dialogue with the authorities." (*Edwards v. Arizona, supra*, 451 U.S. at p. 486, fn. 9.)

Further, law enforcement officers are not required to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. (*Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362].) While declining to adopt a rule requiring that officers to ask clarifying questions if a suspect makes an ambiguous or equivocal request for an attorney, the *Davis* Court held it would be "good police practice for the interviewing officers to clarify whether or not [the suspect] actually wants an attorney." (*Id.* at p. 461.)

> Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel.

(*Davis v. United States, supra*, 512 U.S. at p. 461.)

When an officer and a defendant give conflicting testimony as to a defendant's spontaneous initiation of a discussion, the "ultimate question goes to credibility," which is "reviewed for substantial evidence." (*People v. Waidla,*

supra, 22 Cal.4th at pp. 731-732.) So long as the officer's testimony is not "implausible," a trial court's determination of credibility in the officer's favor shall stand. (*Id.* at p. 732.)

Continued interrogation after a defendant has invoked the right to counsel does not inherently constitute coercion. Rather, if the statement made after an *Edwards* violation is voluntary, "the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (*People v. Bradford, supra*, 14 Cal.4th at pp. 1038-1040, citations omitted; accord *People v. Storm* (2002) 28 Cal.4th 1007, 1023.) In determining whether a confession was voluntary, the question is "whether defendant's choice to confess was not 'essentially free' because his will was overborne." (*People v. Massie, supra*, 19 Cal.4th at p. 576, citing *People v. Memro* (1995) 11 Cal.4th 786, 827.)

B. Given Appellant's Conflicting Responses, The Detectives Were Entitled To Ask Clarifying Questions As To Whether Appellant Was Invoking His Right To Counsel To Be Present During The Interview; Appellant Waived His Right To Counsel

The police properly advised appellant of his rights under *Miranda*. Appellant responded that he wanted to give up his right to remain silent. (Supp. 2 CT 74.) Appellant's waiver of the right to remain silent indicated appellant wanted to talk to the officers. Appellant next was asked if he wanted to give up his right to counsel, and appellant responded by asking a question, "You talking about now?" (Supp. 2 CT 74-75.) Appellant's ambiguous response indicated he was differentiating between having an attorney in the future and during the instant conversation. Detective Knebel then asked, "Do you want an attorney [pause] here while you talk to us?," and appellant answered, "Yes." The officer stated, "Yes, you do," and appellant replied, "Uh huh." Detective Knebel asked,

"Are you sure?," and appellant responded, "Yes." Officer Salgado stated, "You don't want to talk to us right *now*," and appellant said, "*Yeah, I'll talk to you right now*." Detective Knebel followed up with, "Without an attorney[?]" Appellant answered, "Yeah." (Supp. 2 CT 75, emphasis added.)

The above-referenced conversation indicates that both the officers and appellant himself were unclear as to whether appellant was waiving or invoking his rights. First, appellant expressly waived his right to remain silent. This indicated appellant was willing to speak with the officers, at least to some extent. Appellant did not immediately invoke the right to an attorney, but asked a question about whether the officers meant he could have an attorney present "now." Appellant then said he wanted an attorney three times. These assertions contradicted appellant's waiver of the right to remain silent and were ambiguous, given appellant's question, "You talking about *now*?" However, when Officer Salgado restated appellant's position by saying, "You don't want to talk to us right *now*," appellant disagreed with him and said, "Yeah, I'll talk to you right *now*." (Emphasis added.) Detective Knebel immediately clarified that if appellant so desired, the conversation would cease and an attorney would be appointed the following Monday, or appellant could retain his own attorney. With this explanation, appellant restated his desire to talk to the officers "now," and said that he did not want to wait until Monday. Appellant then waived his right to an attorney to be present during the conversation. (Supp. 2 CT 75.)

Thus, the officers merely asked clarifying questions in an attempt to discern appellant's true intent. (*Davis v. U.S., supra*, 512 U.S. at p. 459.) The officers did not threaten appellant or make any promises to him. They did not employ any "clever but improper tactics" to change appellant's mind. (See AOB 34.) Significantly, the officers did not ask appellant any "substantive" questions until "defendant's position was clarified and a valid waiver was obtained." (*People v. Clark* (1993) 5 Cal.4th 950, 991.) Where an officer does

not ask a suspect any substantive questions until the suspect's position on whether he was invoking his rights was clarified and valid *Miranda* waivers were obtained, the suspect's subsequent confession does not violate *Miranda*. (*People v. Farnam* (2002) 28 Cal.4th 107, 181.)

While Detective Knebel was not required under *Miranda* to advise appellant as to when an attorney would be appointed, it was not improper for him to truthfully inform appellant there would be a delay in the appointment. (*People v. Bradford, supra*,14 Cal.4th at p. 1046.) There is no assertion by appellant that the thought of having to wait from the late afternoon of Saturday until Monday induced him to waive his rights to an attorney, and *Miranda* contemplates there may be a delay in appointment. (*Miranda v. Arizona, supra*, 384 U.S. at p. 474; *Duckworth v. Egan* (1989) 492 U.S. 195, 204 [109 S.Ct. 2875, 106 L.Ed.2d 166].)[6]

Moreover, appellant had been in custody before and two days of incarceration without the opportunity to speak with counsel was not shocking, especially as appellant knew he was arrested on a murder charge. Appellant attempts to posit the officers' truthfulness and forthcomingness as suspicious when there is no evidence to such a conclusion. Respondent does not, as appellant contends, maintain the officers had any "duty to inform appellant as to when an attorney might be made available." (See AOB 35.) Rather, respondent submits there is nothing inherently wrong with apprizing appellant

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6. Appellant contends *Duckworth* is "not on point," because in that case, information as to when an attorney would be appointed was printed on a waiver form, which the defendant signed. (*Duckworth v. Egan, supra*, 492 U.S. at pp. 197-198.) However, at trial, the prosecution correctly relied upon *Duckworth* for the proposition that police are not prohibited from providing a defendant with accurate information regarding appointment of counsel. (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1402.) Further, appellant, despite any purported invocation, waived the right to counsel orally and a written waiver was not required. (*People v. Marshall* (1990) 50 Cal.3d 907, 924-925.)

of accurate information about appointment, especially where appellant made inconsistent statements regarding the invocation of the right to counsel.

> Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

(*Moran v. Burbine* (1986) 475 U.S. 412, 422-423 [106 S.Ct. 1135, 89 L.Ed.2d 410].)

Ultimately, appellant made a final decision to speak with the detectives without an attorney being present. Appellant was confused about his rights and, upon brief clarification, and absent any coercion, appellant emphatically reiterated that he did not want an attorney "now." (Supp. 2 CT 75.) The clarifying questions here did not invite an incriminating response nor did appellant make one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 991-993 [where the defendant made an unambiguous request for counsel, coupled with contradictory statements, clarifying questions were proper, because although he could not be subjected to further interrogation, the police could continue to speak to a suspect in custody "as long as the speech would not reasonably be construed as calling for an incriminating response."].) Thus, after appropriate clarification, appellant made a voluntary, knowing, and intelligent waiver.

Appellant relies upon *Desire v. Attorney General of California* (9th Cir. 1992) 969 F.2d 802, 804-805, which he contends provides once a suspect has invoked the right to counsel, the police "cannot ask whether he wants to talk about the case without a lawyer." [7] However, in *Desire*, questioning ceased and

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7. Of course, lower federal court decisions are not binding on this Court. (*People v. Avena* (1996) 13 Cal.4th 394, 431; *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1205.)

the officers, not the defendant, reinitiated conversation by asking if he wanted to talk about anything. Thus, the Ninth Circuit concluded, even if the confession was voluntary, the defendant "did not initiate contact [with police] and his . . . unhonored request for counsel vitiate[d] his subsequent decision to talk without counsel's presence." (*Id.* at p. 805, internal citation omitted.) *Desire* is inapposite because there the officers pretended to honor appellant's rights and made a show of halting the interrogation. Here, the officers did not reinitiate a discussion, but instead sought to clarify appellant's wishes in order to honor them.

Appellant further relies upon the case of *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995. In *Alvarez*, after being read his rights, the defendant asked three questions in a row as follows: "(1) Can I get an attorney right now, man? (2) You can have [an] attorney right now? and (3) Well, like right now you got one?" In response, the police advised the defendant that an attorney could be appointed at arraignment. (*Id.* at pp. 996-997.) The Ninth Circuit concluded these three questions, considered together, constituted an unequivocal request for counsel and were not merely "clarifying questions" regarding defendant's right to counsel. (*Id.* at p. 998.) However, it was noted in *Alvarez* that "*Miranda* duty lawyers" were available around the clock at the jail in which defendant was housed, and thus, the officers' responses were clearly disingenuous. (*Id.* at p. 998, fn. 3.) "No doubt, [accurately] advising an accused that appointed counsel is presently unavailable does not violate *Miranda*." (*People v. Lujan, supra*, 92 Cal.App.4th at p.1402.)

Moreover, despite appellant's claims to the contrary (AOB 24), he did not make any damaging admissions during his initial police interview. Appellant's disclosure that he was with Williams and Kelly at some point on the night of the crime did not necessarily "connect . . . him to the alleged events of that evening [of the murder.]" Appellant's "arrogant" attitude and total denial

of criminal wrongdoing indicates his will was not overborne and supports the conclusion his waiver was voluntary. (*People v. Massie, supra*, 19 Cal.4th at p. 576; RT 1115.)

Finally, even if there was a procedural *Edwards* violation, the record supports the trial court's determination that appellant's subsequent confessions were voluntary and therefore not rendered inadmissible by the alleged failure to honor appellant's request for counsel. (See *People v. Bradford, supra*, 14 Cal.4th at pp. 1039-1040.)

C. Appellant's Subsequent Statement Regarding Counsel During The First Interview Was Not An Invocation

During the first interview on March 25, 1989, after waiving his rights, appellant told police he was, at various times, with a friend named Mark, Williams, and in Los Angeles on the night of the murder. He also admitted to knowing Kelley and seeing her that night. Appellant also said his car had not been damaged recently. He admitted to keeping a .22 caliber bullet at his apartment, which he was holding for a friend, and denied owning a gun. (Supp. 2 CT 75-83.) After the police told appellant that Williams had implicated him, appellant denied killing anyone and said, "you got to show [pause] you got to do more than this . . ." He then stated, " I want to see my attorney cause you're all bullshitting now." (Supp. 2 CT 84.) At that point, Detective Knebel asked appellant if he wanted an attorney "now," while Officer Salgado continued to speak.[8] Officer Salgado made a comment and did not ask appellant any further

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8. Appellant characterizes Officer Salgado's statement (i.e., "and obviously you're not ready to tell the truth") as a comment on appellant's request for counsel. (See AOB 39.) However, Officer Salgado's words are more reasonably construed as a conclusion based upon *all* of appellant's questions and answers during the entire interview, than upon merely his last few words.

questions. (Supp. 2 CT 85.) Detective Knebel interrupted and asked again if appellant wanted to continue the discussion without an attorney, and appellant agreed to do so. (Supp. 2 CT 85.)

The transcript of this interview reveals that appellant, for whatever reason, had "bonded" more with Officer Salgado than with Detective Knebel, and appeared to be more receptive to him. While Officer Salgado continued talking, Detective Knebel immediately attempted to cease the conversation and to clarify if appellant really wanted to speak to an attorney, or if his statement was just one of exasperation with the alleged evidence against him.

The words used to halt an interrogation "must be construed in context," and a defendant's words can reflect "only momentary frustration and animosity" toward the police, rather than constitute an invocation of *Miranda*. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238, 1240.) In *People v. Johnson* (1993) 6 Cal.4th 1, 27, after waiving his rights, the defendant informed officers that his mother would retain "high priced legal representation," and inquired as to the possible penalties he might be facing. The defendant then said, "Maybe I ought to talk to my lawyer, you might be bluffing, you might not have enough to charge me." The officers immediately asked if the defendant wanted counsel, and defendant "simply repeated that he thought [the officers] were bluffing." The *Johnson* Court concluded, although defendant's remark was "troublesome," the officers's immediate attempt to clarify and the defendant's refusal to respond constituted sufficient evidence to support the trial court's determination the defendant did not invoke his right to counsel. (*Id.* at p. 30.)

Here, appellant responded affirmatively when asked if he wished to continue talking without counsel, an even stronger indication of waiver than found in *Johnson*. As in *Griffin v. Superior Court* (1972) 26 Cal.App.3d 672, 697, it is "evident that [appellant's] remarks were responsive but guarded

following the advisement," and that appellant's "effort was to determine how much the police knew." Thus, appellant's remark was calculated and part of his ploy to get information from the police, rather than an unequivocal request for an attorney. Appellant's statement was not "unhonored" (AOB 39-40); rather, Detective Knebel sought to clarify and respect appellant's wishes.

D. Appellant's Statement That He Did Not Want To Talk About Knowing Mrs. Lacey Was Not An Invocation

Appellant also argues that during the first interview, his statement, "I don't want to talk about it," constituted an invocation of his *Miranda* rights. (AOB 40.) This statement was made in response to Officer Salgado's questions, "What did you do this day [pause] that day with her? Why did [pause] why [pause] why did it turn the way it did?" (Supp. 2 CT 89-90.) Under *Miranda*, a suspect may answer some questions but can refrain from answering further questions until he consults with an attorney. (*Miranda v. Arizona, supra*, 384 U.S. at p. 445.) Here, however, appellant previously made clear that he did not know the victim, Mrs. Lacey, and it is obvious he was rejecting any implication that he did know Mrs. Lacey. While appellant may not have wanted to answer questions suggesting he knew Mrs. Lacey, this was not an invocation of silence or the right to counsel. Appellant immediately went on to make another emphatic denial of both knowing Mrs. Lacey and being involved in the crime. (Supp. 2 CT 90.) Thus, the statement demonstrated an unwillingness to discuss a certain topic rather than a desire to terminate the interview. (*People v. Silva* (1988) 45 Cal.3d 604, 629-630, citing *People v. Watkins* (1970) 6 Cal.App.3d 119, 124.)

E. Appellant's Second Taped Interview Was Not Obtained In Violation Of *Miranda*

Appellant contends, because he requested counsel during the first interview, the second interview, initiated by Detective Knebel, violated *Miranda* and the tape recording of the second interview should not have been admitted into evidence. (AOB 42.) However, this erroneously presumes appellant actually invoked his right to counsel during the first interview, which respondent has demonstrated he did not do. As set forth above, instead appellant made several comments, evidencing both confusion as to his rights and a possible invocation which was immediately clarified. Each statement was resolved by appellant's vehement assertion of his willingness to speak with the officers absent counsel.

While appellant was not readvised of his rights during the second interview, which occurred two days after the first (RT 1166), readvisement of rights is unnecessary where the second interrogation is "reasonably contemporaneous" with a defendant's earlier waiver of those rights. (*People v. Mickle, supra*, 54 Cal.3d at p. 170 [readvisement not required for interview occurring 36 hours after initial interview]; accord *People v. Sims* (1993) 5 Cal.4th 405, 447-448.)[9] Factors to consider in determining whether a second interview is "reasonably contemporaneous" with the first interrogation include "the amount of time which has passed since the earlier waiver of rights, any change in the identity of the interviewer, any official reminder of the prior advisement, the defendant's past experience with law enforcement, and any indication that he subjectively understands and waives his rights." (*People v. Mickle, supra*, 54 Cal.3d at p. 170.) Here, the second interview occurred less

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9. The trial court found the first, second and third statements to be part of a "continuing investigation." (RT 472-473.)

than 40 hours from the first interview. It was conducted by one of the same interviewers as the earlier interview and in the same location. Also, appellant was a 28 year-old man with prior experience with law enforcement. Moreover, as is apparent from the transcript and tape recording, appellant voluntarily agreed to be questioned and evidenced no hesitation in his responses about his whereabouts and the condition of his Vega. (Supp. 2 CT RT 94-97.) Accordingly, as found by the trial court, the second interview was properly admitted.

F. The Trial Court Properly Admitted Evidence Of Appellant's Third And Fourth Statements To Police

Appellant also contends because his requests for counsel were not honored, his subsequent initiation of further discussions with police does not render his statements voluntary under *Edwards v. Arizona*. (AOB 42-50.) This contention is meritless.

In *Edwards*, the United States Supreme Court held once a suspect requests counsel, he is not subject to further interrogation, "unless the accused himself initiates further communication, exchanges, or conversations with the police," and makes a knowing and intelligent waiver of rights. (*Edwards v. Arizona, supra*, 451 U.S. at pp. 484-485; *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044-1045.) While the suspect must initiate the conversation, the police may initiate the encounter which leads to the conversation. (*People v. Waidla, supra*, 22 Cal.4th at p. 732.) Here, when Detective Knebel was returning appellant to his cell, after going to the hospital, appellant asked if he could talk to him. Detective Knebel agreed and advised appellant of his rights, which appellant again waived. (RT 418.)

First, this is not a case governed by *Edwards*, because, even assuming arguendo appellant invoked the right to counsel, he then made a full and

voluntary waiver. And, even if *Edwards* applies here, there is no doubt that appellant initiated the conversation and then made a knowing waiver. Appellant, when testifying at the hearing on the statements, never contradicted the officer's testimony that appellant initiated this conversation. (See RT 442-470.)

Further, appellant's reliance on *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411 is misplaced.[10] In *Collazo*, the issue was whether a defendant's confession at a second interrogation "was the product of the coercive statements made by the police during the first, illegal interrogation." (*Id.* at p. 420.) Here, however, appellant did not request an attorney within the meaning of *Miranda* and there was no coercion, as set forth in further detail in Argument II, *infra*. Moreover, there was no confession during the first interview which went on to "taint" future, properly advised interviews. Further, *Collazo* overlooks the holding of *Oregon v. Elstad* (1985) 470 U.S. 298, 309 [105 S.Ct. 1285, 84 L.Ed.2d 222], which provides that absent "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," a *Miranda* violation does not "so taint . . . the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate time period."[11]

Just as a failure to give *Miranda* warnings "does not in and of itself

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10. Appellant's reliance on *United States v. Gomez* (1991) 927 F.2d 1530 is equally misplaced for the same reasons. (See *United States v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1170.) And, as set forth above, this Court is not bound by Ninth Circuit authority. (*People v. Avena, supra*, 13 Cal.4th at p. 431.)

11. Further, the defendant in *Collazo* testified he confessed because he was scared and the officer's statement caused to change his mind and decide to speak. (*Collazo v. Estelle, supra*, 940 F.2d at p. 421.) Appellant gave no such testimony here. (See RT 442-470.)

constitute coercion [citation], neither does continued interrogation after a defendant has invoked his right to counsel . . . inherently constitute coercion." (*People v. Bradford, supra*, 14 Cal.4th at p. 1039, internal citations omitted.) Thus, while the fact that a statement was obtained despite the defendant's invocation of the right to counsel is "one of the circumstances [a court] must consider, it also is not dispositive." (*Id.* at p. 1041.) The admissibility of a subsequent statement should turn "on whether it is knowingly and voluntarily made." (*Oregon v. Elstad, supra*, 470 U.S. at p. 309.) Here, appellant initiated the conversation with Detective Knebel and made a knowing waiver. Therefore, appellant's March 28, 1989, statement properly was admitted.

Similarly, *People v. Boyer* (1989) 48 Cal.3d 247, does not aid appellant. *Boyer* merely reiterates the *Edwards* rule that after a suspect requests counsel, he is not subject to further interrogation unless the accused initiates a conversation. (*Id.* at pp. 272-273.) However, in *Boyer*, the suspect "had been subjected to over an hour of intensive interrogation," and despite an explicit invocation of the right to counsel, "[f]or a significant time, his pleas [for counsel] were ignored, and the questioning continued over his objection." (*Id.* at p. 273.) Appellant's requests for counsel here were not ignored and no conversation took place over appellant's objection. Contrary to *Boyer*, appellant never was asked to "reenter the interrogation room so that [an officer] could 'tell him a couple of things,'" nor did the officers "launch. . . into a monologue on the status of the investigation." (*Id.* at p. 274.) Thus, the officers here did not "effectively invite. . . defendant to make an incriminating response." (*Id.* at p. 275.)

Further, *Arizona v. Roberson* (1988) 486 U.S. 675, 678 [108 S.Ct. 2093, 100 L.Ed.2d 704] does not assist appellant, as in that case the defendant expressly stated that he wanted an attorney "before answering any questions." Thus, the *Roberson*'s court conclusion that police-initiated questioning three

days later without counsel ever being provided to defendant about a different crime was improper is inapplicable here where appellant agreed both to speak without counsel and to continue talking to police. (*Id.* at p. 683.)

Appellant notes there was an apparent delay in his arraignment for unknown reasons[12], and while not raising that issue on appeal, contends the delay somehow "added to the pressures he was facing." (AOB 45, fn. 26.) Respondent submits, as appellant was arrested on a Saturday, the earliest he could have been arraigned was on the following Monday. (See Pen. Code, § 825.) As occurred here, where a defendant voluntarily waives the *Miranda* right to counsel, this undercuts the need to be taken before a magistrate as quickly as possible. (See *United States v. Salamanca* (D.C. Cir. 1993) 990 F.2d 629, 634.) In *People v. Turner* (1994) 8 Cal.4th 137, 175-176, this Court found a five-day delay "not unreasonable" as murder is the "most serious of all criminal charges." Further, there is no nexus between the delay and appellant's confessions, because one additional day would be unlikely to break a person's will, and appellant's confession was made before the 48-hour rule of section 825 elapsed, when taking Sunday and the hour of appellant's arrest into account. (*Id.* at p. 175.) Accordingly, this argument adds little to appellant's contention.

Finally, appellant's approach to his police interviews bears remarkable similarity to his prior experience with law enforcement. When he was arrested for Ms. Taylor's rape, appellant waived his rights and initially denied any involvement. He asked to end the interrogation, but later initiated a discussion wherein he admitted to being present but attempted to blame another person, Fulcher, for the crime. Appellant eventually admitted his participation in the rape. (RT 1454-1460.) Here, appellant denied involvement, implicated Kelley, and minimized his own role. Appellant's history of slowly revealing additional

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12. There was no evidence of any dilatory tactics by the officers.

information severely undercuts his argument that coercion, isolation, or delay compelled him to confess. (See AOB 48.) Thus, all of appellant's statements were properly admitted, and appellant's contention must be rejected.

G. Appellant Cannot Demonstrate Prejudice

Harmless error analysis applies to confessions obtained in violation of *Miranda*. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 1257 [1 11 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Lujan, supra*, 92 Cal.App.4th at p. 1 403.) The test for excusing an error as harmless is whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

> To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial . . . To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.

(*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432], disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4 [112 S.Ct. 475, 116 L.Ed.2d 385].)

Appellant contends admission of his statements, both taken individually and considered together, was prejudicial. However, during appellant's first police interview, he denied any involvement in the crime and provided several names, including Williams and Kelley, as alibi witnesses. However, he also said Kelley was unworthy of belief as she was addicted to cocaine, homeless, and also because appellant had told her false stories in the past ["I just play with Loretta [Kelley], you know, so go on."]. (Supp. 2 CT 75-76, 80-81, 86.)

In the second interview, appellant continued to provide an alibi and stated his Vega was damaged at the time he purchased it. (Supp. 2 CT 96.)[13] While, as appellant notes (AOB 51), almost any statement by a suspect potentially could be incriminating, appellant made no particularly incriminating statements during either the first or second interviews. And, even in the last interview, appellant continued for some time to deny his involvement and then to implicate Kelley as the primary wrongdoer in this case. (See Supp. 2 CT 100-103, 113-115, 118, 120.) Thus, there is no prejudice as to appellant's first and second statements. Assuming error as to the third statement, any prejudice is dissipated by Williams's testimony which independently implicated appellant.

Despite appellant's claims to the contrary, there was ample uncontradicted evidence connecting appellant to these crimes, absent his own statements. As set forth below, Williams was neither an accomplice nor unreliable, and her testimony alone was sufficient to convict appellant. Further, there were red paint marks on Mrs. Lacey's car, which matched the paint on appellant's Vega. A .22 caliber bullet found at appellant's home matched the caliber of bullets and the gun found at the scene. Appellant had burns on his body. Appellant also had Mrs. Lacey's jewelry in his possession. Thus, assuming error, given the uncontradicted nature of the evidence of appellant's guilt, admission of appellant's statements to the police was harmless, and

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13. Appellant contends he previously had told police the Vega belonged to Kelley. (AOB 52, fn. 29.) However, appellant's prior comments related to Kelley's having had a "little red car" in the past, which she let him borrow. (Supp. 2 CT 86.) This is confirmed by appellant's later statement that Kelley previously let him a drive a red Camaro. (Supp. 2 CT 101.) Thus, it does not appear appellant ever denied ownership of the Vega, which he was driving at the time of his arrest. Further, while appellant claims he admitted Williams had dropped him off somewhere the night of the crime (AOB 52), appellant certainly did not admit that she drove him somewhere after he committed the crime during his first and second interviews.

appellant's contention must be rejected. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

II.

APPELLANT'S CONFESSION WAS NOT THE RESULT OF IMPROPER POLICE COERCION

Appellant further contends his statements were the product of improper police coercion, and therefore, were involuntary and inadmissible. (AOB 54-69.) However, the trial court properly determined appellant's statements were not coerced but were voluntary.

"[T]he ability to obtain uncoerced confessions is not an evil but an unmitigated good." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 181 [111 S.Ct. 2204, 115 L.Ed.2d 158].) Admissions of guilt resulting from valid *Miranda* waivers are "more than merely desirable, they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." (*Id.* at p. 181, citing *Moran v. Burbine, supra*, 475 U.S. at p. 426.) "The business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means." (*People v. Jones* (1998) 17 Cal.4th 279, 297, citation omitted.)

Courts have prohibited "only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Jones, supra*, 17 Cal.4th at pp. 297-298, citing *People v. Ray* (1996) 13 Cal.4th 313, 340.) A statement is involuntary only if it was actually coerced by physical or psychological mistreatment, such as promises of leniency, benefits, or immunity from use of the statement. (*Miller v. Fenton* (1985) 474 U.S. 104, 109 [106 S.Ct. 445, 88 L.Ed.2d 405]. In applying the "totality of the circumstances" test to determine whether a confession is voluntary, the factors to be considered include: "the

crucial element of police coercion; the length of the interrogation; its location; its continuity, as well as the defendant's maturity; education; physical condition; and mental health." (*People v. Massie, supra*, 19 Cal.4th at p. 576, citing *People v. Williams* (1997) 16 Cal.4th 635, 660, internal citations omitted.)

Appellant contends his confession was "the product of a four-day effort by the police to break his will." (AOB 55.) Appellant contends the following police tactics constituted coercion: 1) keeping him incommunicado; 2) displaying confidence in his guilt; 3) minimizing the moral seriousness of the crime; 4) keeping him in custody for days; 5) using a "good cop-bad cop" technique against him; 6) discouraging him from contacting counsel; 7) using deceptive interrogation practices; and 8) threatening him with the gas chamber. (AOB 59-68.)

First, there is nothing in the record to support the conclusion appellant was, in fact, kept incommunicado following his arrest. (See AOB 59.) The record lacks any suggestion, and appellant fails to cite to any evidence in the record, that he was prohibited from making or receiving any calls or seeing any visitors while incarcerated. Because there is no evidence in the record appellant was rendered incommunicado, there also is no evidence his alleged isolation caused "his will [to be] overborne," particularly as appellant was a 28 year-old man with prior experience with law enforcement. (*People v. Massie, supra*, 19 Cal.4th at p. 576.)

Second, there is nothing impermissible in displaying confidence in a suspect's guilt. (See AOB 59-60.) While *Miranda* noted police manuals at the time of its decision recommended this tactic, *Miranda* did not expressly disapprove this method of interrogation, and instead stressed if "adequate protective devices," i.e., the *Miranda* warnings, had been employed, the "compulsion inherent in custodial surroundings" would have been dispelled. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 448-450, 456-458; see also *Rhode*

Island v. Innis, supra, 446 U.S. at pp. 298-299.) Here, appellant was read his rights and the principles underlying these rights was respected. Expressing belief in appellant's guilt and asking why the murder had occurred was not improper.

Third, the officers did not employ techniques which sought to minimize the moral seriousness of a crime in order to gain appellant's confession. This is not a case "where the police sought to convince the defendant that he was not morally responsible for his actions due to temper, mental illness or other similar causes." (*People v. Clark, supra*, 5 Cal.4th at p. 986, fn. 8.) Appellant was properly advised and waived his rights. During the first interview, after appellant emphatically stated he wanted to continue the interview without counsel, Officer Salgado said,

> Now what I'm [pause] what I'm saying is [pause] just let me finish. Ok. You may have robbed the woman. Ok, robbed the woman. You may have put her in a trunk. Ok. And you may have went and started a fire to, you know, cover up or whatever cause you don't want to go back to jail [pause] to prison. . .
>
> But, but, you see this woman died from choking from the smoke. So when you say 'I didn't kill the woman,' I believe you didn't mean to kill her.

(Supp. 2 CT 87.)

Officer Salgado was reciting appellant's own thought processes and explaining that just because appellant did not use his gun to inflict a mortal wound, or stab Mrs. Lacey with a knife or strangle her, appellant did, in fact, kill Mrs. Lacey. This is supported by Officer Salgado's later comment, "[T]he smoke killed her, but I know that you're involved in this . . . " (Supp. 2 CT 87.) Thus, Officer Salgado "parroted" appellant's excuses and justifications, but he also firmly emphasized that whether appellant killed Mrs. Lacey by his own

hand, appellant was responsible for Mrs. Lacey's death.

Moreover, appellant's response was to continue to deny all involvement, evidencing his will was not overborne by Officer Salgado's comments. (*People v. Massie, supra*, 19 Cal.4th at p. 576.) Further, there is no nexus between Officer Salgado's statement regarding his belief appellant did not intend Mrs. Lacey's death and appellant's eventual admission that he set the car on fire without knowing anyone was in the trunk. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1240.) Appellant's false admission followed his pattern of confessing to a crime in bits and pieces, as set forth in Argument I. And, as the admission was untrue, this further evidences appellant's will was not overborne, because appellant possessed the resources to withstand the officers's demand for the truth and to craft a lie which, if believed, may have lessened his responsibility. Contrary to appellant's assertion (AOB 61), the police did not "push. . . appellant to first admit to the less serious crimes." Appellant was arrested for murder, and nothing the officers did or said indicated they believed appellant was not guilty of murder. "[N]othing more than the fact of custody and the desire to mitigate his circumstances motivated" appellant to eventually confess. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192.)

Fourth, appellant was not kept in custody for days or subjected to continuous interrogation. *Miranda* noted continuous custody and interrogation provides a suspect "with no respite from the atmosphere of domination," and "induce[s] the suspect to talk." (*Miranda v. Arizona, supra*, 384 U.S. at p. 451.) Here, appellant was arrested Saturday at about 1:30 p.m. and interviewed at about 4:00 p.m. for about half an hour. (RT 1091; Supp. 2 CT 93.) He was not questioned on Sunday. On Monday, March 27, 1989, appellant was questioned for five to ten minutes. (RT 1119.) On Tuesday, March 28, 1989, Detective Knebel went to interview appellant for a third time when he noticed appellant had injuries which looked like burns. The detective took appellant to a hospital,

and on the way back to the jail, appellant asked to talk to him. (RT 1122-1126.) Appellant thus initiated the third verbal interview and agreed to undergo a taped fourth interview. The third interview lasted about ten minutes and the fourth was about one hour, counting both taped and off-tape portions of the conversation. (RT 1126, 1131, 1154-1155.) Therefore, in almost four days of police custody, appellant was interrogated for a total of less than two hours. This is far from the "atmosphere of domination" contemplated in *Miranda*, and appellant's confession was in no way "inevitable," as he claims. (See AOB 61.)

Further, as set forth in Argument I, while appellant was in custody for some time prior to his arraignment on March 31, 1989, there was no evidence of any dilatory tactics by the police and the officers did not speak with appellant at all after March 28, 1989. (RT 1155.) Thus, appellant's time in custody did not induce appellant to confess and his confession was completely voluntary.

Fifth, while the officers did appear to utilize a "good cop-bad cop" approach to their interrogation of appellant, there is nothing improper about this tactic. *Miranda* notes usually one officer acts friendly while the other is "the relentless investigator." (*Miranda v. Arizona, supra*, 384 U.S. at p. 452.) Although Detective Knebel certainly was the one "who knows the subject is guilty and [was] not going to waste any time," Officer Salgado was the primary interrogator and he also steadfastly maintained his belief in appellant's guilt. (*Ibid.*; Supp. 2 CT 86.) Officer Salgado concluded the first interview by saying, "David, I don't believe you." (Supp. 2 CT 93.) So, while Officer Salgado took a more sympathetic approach, he never pretended to be appellant's new best friend. Moreover, when appellant initiated another conversation, he did not tell the jailer he wanted to talk to Officer Salgado, as that officer had suggested. (Supp. 2 CT 93.) Rather, appellant initiated the conversation with Detective

Knebel. Appellant later reminded Officer Salgado of his offer to help[14] and obviously had more rapport with him, but appellant voluntarily talked with both officers and the "good cop-bad cop" approach did not influence appellant's confession.

Sixth, the officers never discouraged appellant from seeking counsel. Rather, Detective Knebel on two occasions sought to clarify whether appellant was asserting his right to counsel. Appellant claims he agreed to talk to Officer Salgado instead of Detective Knebel, "since Knebel was the one taking the hard line with appellant." (AOB 64.) However, it was Detective Knebel who repeatedly informed appellant that he could stop the conversation and counsel would be appointed. (Supp. 2 CT 75, 84-85.) Thus, appellant had no reason to favor the officer over the detective when the detective was giving him ample opportunities to assert his rights. Further, appellant did nothing but lie during the first interview, so he obviously was not "psychologically conditioned" into taking the officer's advice to tell the truth. (*Miranda v. Arizona, supra*, 384 U.S. at p. 454.)

Seventh, appellant maintains the officers obtained his ultimate confession by using deception or trickery. (AOB 64-66.) During the first interview, the officers informed appellant Williams told two other girls that he had paid someone to buy gas to set Mrs. Lacey's car on fire. (2 Supp. CT 81-82.) This was a true statement. They next told appellant, "We also have other evidence, ok, other evidence that I can't tell you what it is specifically. . . ," and later said, "Do you realize that we have certain evidence that you don't even know about that puts you there?" (Supp. 2 CT RT 86, 90.) The officers insinuated there was some gasoline-related evidence which linked appellant to

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14. Both during the first and third taped interviews, Officer Salgado told appellant that he could help himself by telling the truth. (Supp. 2 CT 87, 99.)

the crime, as well as fingerprint evidence. (Supp. 2 CT 90-9 1.) They told appellant there were three witnesses from the Versateller who could identify him. (Supp. 2 CT 92.) At trial, Detective Knebel admitted the officers, at that time, had not interviewed any witnesses and did not have an identification of appellant or any fingerprint evidence. (RT 1116.) Detective Knebel testified the officers mentioned fingerprints and witnesses in an attempt

> [t]o persuade the defendant to tell the truth. It is used as a tool because defendants sometimes think they left fingerprints behind and they sometimes think people can identify them, even thought they can't.

(RT 1116.)

"Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary." (*People v. Farnam, supra*, 128 Cal.4th at p. 182, citing *People v. Musselwhite, supra*, 17 Cal.4th at p.1240.) Where the deception is "not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted." (*Ibid.*, citing *In re Walker* (1974) 10 Cal.3d 764, 777; accord *People v. Jones, supra*, 17 Cal.4th at p. 299 [deception permissible where a detective "implied at various times that he knew more than he did or could prove more than he could .") In *Farnam,* this Court determined the police's falsely informing a defendant that his fingerprints had been found on a victim's wallet did not render the defendant's subsequent confession involuntary. (*People v. Farnam, supra*, 28 Cal.4th at p. 182.)

And, in *Dominick, supra*, the defendant was told by police truthfully that his accomplice was in custody and falsely that the victim had identified him. (*People v. Dominick, supra*, 182 Cal.App.3d at pp. 1189-1190.) The reviewing court concluded the officers's "subterfuge" was "not the same as coercive conduct," reiterating that whether the officers's statement was false did "not in any way change the actuality of the defendant's state of mind with

respect to voluntariness." (*Id.* at p. 1192.) Even numerous and repeated deceptions by the police do not necessarily invalidate a confession. (*People v. Thompson* (1990) 50 Cal.3d 134, 167.)

Here, the officers gave appellant false information in an attempt to get him to tell the truth. However, none of the information was of the type "reasonably like to procure an untrue statement." (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1240.) Moreover, appellant did not make any immediate admissions or confession. Therefore, appellant was not motivated by the deception, and his eventual confession was voluntary. (*Ibid.*)

Eighth, appellant contends the police made improper threats of capital punishment. (AOB 66-68.) Confessions "induced by the threats of prosecution for a capital crime" should not be admissible. (*People v. Avena, supra*, 13 Cal.4th at p. 420, citing *People v. Thompson, supra*, 50 Cal.3d at p. 169.) During the first interview, Detective Knebel told appellant, "And you're going to go to prison . . . [o]r you're going to fry in the gas chamber." (Supp. 2 CT. 82.) Officer Salgado told appellant, "[A]nd when they find you guilty the only thing that's going to save you [pause] save you from, you know, spending the rest of your life in prison [pause]," and Detective Knebel interjected, "Or the gas chamber." Officer Salgado continued, ". . . [O]r the gas chamber is for you, right now, to tell us the truth about this. . ." (Supp. 2 CT 88.) Detective Knebel later told appellant that if he did not show remorse and continued to deny everything then a jury would think he was not "worth saving, give . . . him the gas chamber." (Supp. 2 CT 92.) Finally, when appellant apparently did not respond to Detective Knebel's statement three witnesses could identify him from the Versateller, Officer Salgado said, "Well . . . that's what going to send you to the gas chamber." (Supp. 2 CT 93.)

Telling appellant he was facing the death penalty was not improper. This was a heinous, inhumane crime. Appellant knew he had been charged with

murder, and special circumstances eventually were charged against him. Appellant had received a 10-year sentence for rape previously, and he knew this crime was much worse. As a convicted felon, appellant could appreciate the gravity of the crime and the seriousness of the punishment if convicted.

Where police point out the "realities of [a defendant's] position and the courses of conduct open" to him, this does not constitute coercion. (*People v. Andersen* (1980) 101 Cal.App.3d 563, 583.) Further, an officer's statement that "a showing of remorse is a factor which mitigates punishment" is "no more than a truthful legal commonplace with which all persons familiar with criminal law would agree." (*Id.* at p. 579.) Similarly, in *People v. Williams, supra*, where a defendant was told that if he cooperated, he might not receive the death penalty, the officer's comments did not render the confession involuntary, "because those comments were not the motivating cause of defendant's admissions." (*People v. Williams, supra*, 16 Cal.4th at p. 661.) Encouraging a defendant to tell the truth and advising him that this was his opportunity to express remorse also does not constitute coercion, because this type of statement is not "sufficiently compelling to overbear" a defendant's will. (*Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 494-495.) When "a benefit pointed out by the police to a suspect is merely one that which flows naturally from a truthful and honest course of conduct, the subsequent statement will not be considered involuntarily made." (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17.) At all times, the officers told appellant truthfully that the death penalty was applicable to him, and exhorted him to tell the truth, pointing out that telling the truth might favorably impress a jury. This was not improper and there is no evidence that the threat of the "gas chamber" induced appellant to confess.

Further, appellant's reliance on *People v. Hinds* (1984) 154 Cal.App.3d 222, is misplaced. In *Hinds*, a 19-year old suspect, who was both

"immature and relatively [criminally] unsophisticated," was not read his rights until he insisted on the officers doing so, and then the admonition was "barely possible to hear." (*Id.* at pp. 230, 238.) The defendant also was inaccurately advised, "Anything you say doesn't necessarily held (sic) against you." (*Ibid.*) The *Hinds* court held the "egregious *Miranda* violations . . . alone require reversal." (*Id.* at p. 237, fn. 3.) Thus, although the defendant in *Hinds* was given a "thinly-veiled threat of the death penalty," this one factor, standing alone, was not the cause of the reversal. (*Id.* at p. 238.) As pointed out by this Court, the "gross misconduct" present in *Hinds* is easily distinguishable. (*People v. Kelly* (1991) 51 Cal.3d 931, 953-954.)

Appellant further contends the trial court made no factual findings and failed to consider the totality of the circumstances in concluding his statements were not the product of coercion. (AOB 68-69.) This is patently incorrect. The trial court did focus on appellant's responses, but that was entirely proper as coercion is to be determined from the perspective of the suspect, and obviously, his own statements would best illuminate his perspective. (*Illinois v. Perkins* (1990) 496 U.S. 292, 296 [110 S.Ct. 2394, 110 L.Ed.2d 243].) The trial court also carefully considered the officers's actions and statements, as evidenced by its comments on the officers's mention of the death penalty and that appellant was not readvised during the second interview. (RT 472.) Moreover, at trial, appellant's primary argument was that the officers made improper promises of leniency (RT 442-457), and the trial court appropriately found appellant's statements during his interviews contradicted the statements he made during the hearing. The trial court stated it had considered the transcripts of all interviews, and the testimony of Detective Knebel as well as appellant's testimony. (RT 472.) Thus, the totality of the circumstances was fully considered. The trial court properly concluded that appellant's will was not overborne and he "freely and voluntarily" made a valid waiver of his rights.

And, as set forth more fully in Argument I, assuming error arguendo, admission of appellant's statements was harmless, because of the uncontradicted evidence of appellant's guilt, including Williams's testimony and the combined effect of the physical evidence against him. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

III.

THE TESTIMONY OF MARGARET WILLIAMS WAS PROPERLY ADMITTED

Appellant contends the admission of Margaret Williams's trial testimony was improper, as it was the product of coercion, and violated his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 70-83.) Respondent submits the trial court properly admitted Williams's uncoerced trial testimony.

A. Background

Margaret Williams was arrested on March 25, 1989, after the police received information she allegedly had purchased gas for appellant and served as a lookout for him while he burned Mrs. Lacey's car. (RT 1087-1088.) During a tape-recorded interview later that same day, after Williams waived her rights, the police informed her that two witnesses had seen her at the Taco Bell talking to Kelley about someone giving Williams $50 to "go get gasoline to burn up a car that had a lady in it." (Supp. 2 CT 36-38.) After Williams denied this, the officers repeatedly said she was going to be in trouble if she did not tell the truth. (Supp. 2 CT 39, 47, 49-50, .) Thereafter, the officers made references to the Bible regarding being a good citizen and truthfulness, accused Williams of lying, said she was going to be booked for first-degree murder and put in jail without bail "no matter what," and insinuated they had a murder warrant in her name. (Supp. 2 CT 43, 45, 47, 49, 51, 54-55.)

Williams then admitted appellant and Kelley came over to her house with money and jewelry that appellant said he "got . . . from some lady." Williams said Kelley was paid $50 by appellant to be a lookout. The officers then told Williams she was "not in any trouble at all." (Supp. 2 CT 56-57, 59.) Williams went on to describe the jewelry, and stated appellant said he hit some

lady's car. (Supp. 2 CT 58.) Williams later told her friend, Jeanette Morris, at Taco Bell, that appellant had paid someone $100 to get some gas. (Supp. 2 CT 60-61.) Williams dropped appellant and Kelley off at two different places at around 2:00 a.m. (Supp. 2 CT 63.) However, Williams did not directly admit to knowing whether appellant robbed and killed Mrs. Lacey.

On March 28, 1989, at 8:30 a.m., Williams was interviewed again, but the interview was not tape-recorded. After waiving her rights, Williams said appellant confessed to robbing Mrs. Lacey and that he "burned the bitch up." Appellant said Kelley shot Mrs. Lacey twice in the head. Williams also gave more detailed descriptions of the jewelry and told the officers appellant had burns on his left hand and ankle from the car fire. (Supp. 2 CT 65.)

At the preliminary hearing, on December 4, 1989, Williams was called to testify for the prosecution. (CT 66.) Prior to Williams's answering any substantive questions, defense counsel requested that counsel be appointed for her and immunity be granted. The prosecution stated, "It is the People's position that [Williams] was not involved [in the crime], and there is no likelihood of prosecution for her for anything in regard to this case." Counsel was appointed for Williams. (CT 67-73, 85-86, 91.) Williams was granted transactional immunity. (CT 269-271.)[15] Williams's counsel stated she was testifying "voluntarily without being coerced." (CT 280.)

Williams's preliminary hearing testimony was essentially the same as her statements to the police, except that she provided substantially more detail at the hearing. According to Williams, appellant had a T-shirt wrapped around one of his hands when he walked into her home, put grease on his burned hand, and smelled of gasoline. Appellant said he and Kelley, "robbed a bitch," and

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15. At trial, Williams testified the only condition of the immunity was that she was obligated to tell the truth. (RT 1223.)

then "burnt the bitch up." Appellant injured his hand while setting the car on fire. He had money and jewelry with him. Appellant ran into Mrs. Lacey's car, forced her into the passenger seat, and drove around. He later picked up Kelley and made Mrs. Lacey withdraw money from a bank. Appellant also said Mrs. Lacey called a friend who delivered more money. Appellant told Williams that he paid someone $100 to get gas and paid Kelley $50 to be a lookout. Williams then dropped off appellant and Kelley. (CT 280-293.) Williams read about Mrs. Lacey's murder in the newspaper before being arrested. (CT 411-417, 441-444.)

On cross-examination, Williams testified to the officer's interrogation tactics, and stated she was "continually threatened" by the police during both the first and second interviews. (CT 301-307.)[16] The reason Williams finally spoke to the officers was because she wanted to get out of jail and go home to her children. (CT 307.) She did not want to talk as she "didn't want to have anything to do with" the case, because she did not want to put her mother and children in jeopardy. (CT 309-310.) Williams was not given an opportunity to call her mother until after she gave her second statement. (CT 314.) Williams believed if she cooperated, she could go home. (CT 319.)

Williams also testified she was subpoenaed in December 1989. When she called the deputy district attorney about the subpoena, Williams said, "I don't feel I know anything that would help." Williams came to court on December 4, 1989, and was interviewed by the deputy district attorney. Williams told the prosecutor, "You don't need me," and that she "didn't want to have anything to do with it." She was "emotionally upset" and cried "a little." Her mother and Detective Knebel were present during the interview.

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16. In response to voir dire by the prosecution, Williams later testified the officers did not threaten her at the time of the second interview and the officers were "more nicer" then. (CT 314-315.)

Neither the deputy district attorney nor the officer made any promises or threats to her. Williams did not feel she was going to be arrested during the interview and voluntarily answered the questions. She told the truth because "that is all [she] knew." (CT 330-341.)

Williams would not have come to court if she had not been subpoenaed, and if she had a choice, she would not have talked to the prosecutor. She did so because she did not want to get involved in a murder charge or be put in jail again. (CT 347-348.) Williams was told that if she did not honor the subpoena, a warrant would be issued and she would be sent to jail. (CT 349.) After discussing the matter with her attorney, she was willing to testify, but she would not have testified if she had a choice. (CT 350-352.) Williams stated the police had "power on the streets," and she still was afraid of the police in "some way." While Williams did "not really" feel that the police would leave her alone if she cooperated, she felt the police would "bother" her if she failed to cooperate. (CT 353-354.)

The defense objected to admission of Williams's testimony on the grounds it was the product of coercion. (RT 269-279, 298-300, 323-327, 354-362.) The prosecution argued any past coercion would not make live testimony inadmissible. (CT 362-366.) The preliminary hearing court ruled "there was coercion . . . of Ms. Williams when she was interviewed by Mr. Knebel and Salgado. But I find there was sufficient attenuation of that coercion both in time and in the attitude of the . . . witness." (CT 367-368.) The preliminary hearing judge noted there were significant differences between coercion of a defendant and a witness, and between use of a coerced statement and live testimony. (CT 366-367.)

Prior to trial, the prosecution filed a motion for an order admitting Williams's testimony. (CT 1856-1863.) In the motion, the prosecution asserted it was not relying upon Williams's statements to police, but rather, "solely on

her live testimony at the preliminary hearing," and what was anticipated to be her freely given testimony at trial. (CT 1858, 1860.) At the hearing, the prosecution did not contest the preliminary hearing court's ruling Williams was coerced, and argued there was sufficient evidence of attenuation between the statements to police on March 25, 1989, and the statements made during Williams's December 4, 1989, interview with the deputy district attorney and her preliminary hearing testimony on December 7 and 8, 1989. (RT 392.) Appellant's trial counsel asserted there was insufficient evidence of attenuation as Williams's testimony was the same at the time of the coercion and subsequently. (RT 389-391.) The trial court ruled the first statement was coerced, but that "the attenuation was completed both as to the time and the attitude between the witness' initial statement in March and when she was no longer in custody." (RT 394.)

B. William's Live Trial Testimony Was Not Coerced And Therefore Was Admissible

In *LaFrance v. Bollinger* (1st Cir. 1974) 499 F.2d 29, 35, where a witness claimed his out-of-court statement used for impeachment against him at trial was the product of coercion, it was determined trial courts have a duty to conduct an inquiry and exclude a statement "if found to have been constitutionally coerced." The due process requirements of a fair trial clearly extend to matters dealing with a witness's credibility, particularly as that credibility is often "critical to the accused's case." (*Id.* at pp. 34-35.) In *LaFrance*, the coerced statement itself was introduced into evidence at trial. In contrast, Williams's statements to the police and to the prosecutor, as well as her preliminary hearing testimony, were not introduced at trial. (*People v. Douglas* (1990) 50 Cal.3d 468, 501.)

A defendant bears the burden of proving a witness's testimony was

involuntarily obtained. (*People v. Douglas, supra*, 50 Cal.3d at p. 500.) There is only a limited exclusion for coerced third-party testimony. (*Ibid.*, citing *People v. Leach* (1985) 41 Cal.3d 92, 104 [There is no need for "prophylactic rules directed at our fear of convicting the innocent . . . by means of evidence obtained in violation of due process, when the victim of the violation is not the defendant."].) Because the exclusion is based on the idea "coerced testimony is inherently unreliable, and that its admission therefore violates a defendant's right to a fair trial, this exclusion necessarily focuses only on whether the evidence actually admitted was coerced." (*Ibid.*) There is a significant difference between suppression of reliable trial testimony following an earlier coerced statement and suppression of the coerced statement itself. (*Id.* at p. 501, citations omitted.) "[F]ew, if any [courts] have ordered suppression of trial testimony that was not itself shown to be unreliable or coerced." (*Ibid.*)

Moreover, a grant of immunity is an important consideration in assessing whether trial testimony is coerced. In *Douglas*, this Court noted the witness had testified under a general grant of immunity after "consultat[ion] with counsel and after negotiations between counsel and the prosecution." (*People v. Douglas, supra*, 50 Cal.3d at p. 502.) As in *Douglas*, the immunity agreement here required only truthful testimony and was not conditioned on consistency of testimony with earlier out-of-court statements. (*Ibid.*) Further, Williams testified "under oath" her testimony was "made freely and voluntarily and [was] not compelled by the earlier statements. . ." (*Ibid.*; RT 1222-1224; CT 351) The *Douglas* Court noted live testimony by a witness, even if its reliability was "somewhat suspect," enabled defendants to challenge reliability by means of cross-examination, impeachment, and independent evidence. (*Id.* at pp. 502-503, citations omitted.)

The People bear the burden of proving attenuation. (*People v. Superior Court (Sosa)*) (1982) 31 Cal.3d 883, 894.) In *People v. Johnson*

(1989) 47 Cal.3d 1194, 1227, this Court ruled 10 days time was sufficient attenuation between a witness's coerced out-of-court statement and his subsequent testimony, particularly when there was no further contact by police with the witness and the witness had the benefit of counsel. These factors, among others, evidenced the witness's decision to testify "was an exercise of his free will and was not a consequence of any further exploitation of the initial" statements. (*Ibid.*)

Defendants can assert the violation of their own right to a fair trial and to due process by alleging a witness's trial testimony would be affected by earlier coercion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 966; *People v. Badgett* (1995) 10 Cal.4th 330, 345.) However, a motion limited to the claim that a third-party witness's trial testimony was the "fruit" of his or her earlier involuntary statement is an insufficient basis for a motion to exclude. (*People v. Jenkins, supra*, 22 Cal.4th at p. 966; *People v. Badgett, supra*, 10 Cal.4th at p. 346.) "The primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings." (*People v. Badgett, supra*, 10 Cal.4th at p. 347.) Nonetheless, a witness's trial testimony is "not *necessarily* unreliable simply because the witness was subject to improper pressures in making an earlier, out-of-court statement." (*Id.* at p. 348, italics in original.) "Rather, the defendant may prevail only by demonstrating fundamental unfairness at trial, normally by establishing that evidence to be produced at trial was made unreliable by coercion." (*People v. Jenkins, supra*, 22 Cal.4th at p. 966.)

> [N]o 'statement obtained by torture or by other conduct belonging only in a police state' . . . was admitted at trial. The trial court determined that the police did not coerce [the witness] physically, and the assertedly coerced statement was not admitted at all. Accordingly, we are not called upon to decide whether evidence produced by

> outrageous police misconduct, but not otherwise shown to be unreliable or subject to the ongoing effects of coercion, should be excluded in order to vindicate the integrity of the judicial system.

(*People v. Jenkins, supra*, 22 Cal.4th at p. 968, internal citation omitted.)

Moreover, an offer of leniency, including immunity, in return for cooperation does not render a third party statement involuntary or eventual trial testimony coerced. (*People v. Badgett, supra*, 10 Cal.4th at p. 354.) The terms of the immunity agreement under which a witness actually testifies at trial is determinative. (*Id.* at p. 358.)

Recently, in *People v. Lee* (2002) 95 Cal.App.4th 772, 782, 787, the Court of Appeal reiterated a coerced statement of a third party cannot be introduced at trial, but that the "rule is different" when a defendant claims the evidence at trial was the "end product" of third party coercion. The *Lee* court found there was a significant difference between an interrogation "designed to produce the truth as [the witness] knew it versus one designed to "produce evidence to support a version of events the police had already decided upon." (*Id.* at p. 785.) It is improper to "assum[e] that pressures that may have been brought to bear at an earlier point ordinarily will taint the witness's testimony." (*Id.* at p. 787, citing *People v. Badgett, supra*, 10 Cal.4th at pp. 347-348.) Thus, a defendant "must show some connection between the coercion and the evidence to be excluded which makes the evidence unreliable." (*Id.* at p. 788, citing *People v. Jenkins, supra*, 22 Cal.4th at p. 966.)

Here, appellant has posited two possible "connections" between the coercion and Williams's trial testimony. Respondent submits both are insufficient to demonstrate unreliability. Appellant's primary argument is that

Williams's coerced statement is virtually the same as her trial testimony.[17] However, there is no authority which holds trial testimony may not be similar in substance to the coerced testimony. For Williams, there was only one "truth," and she told it on several occasions, both under coercion and not. Second, appellant attempts to argue that because Williams did not want to testify at trial there somehow were lingering effects of the initial coercion. But there is a difference between a witness's coerced trial testimony and a witness's subpoenaed testimony. As noted by the preliminary hearing court, many witnesses do not wish to testify but go on to testify truthfully, absent any coercion other than the inherent power of a subpoena. (CT 368.) A witness may testify reluctantly, but still do so voluntarily and truthfully. Williams, who had the benefit of an immunity agreement and advice of counsel, testified she was doing so voluntarily. (CT 280.)

Further support for the reliability of Williams's testimony is found in appellant's own statements, which corroborated Williams testimony that he and Kelley came to her house with money and jewelry and that he had burn injuries. (Supp. 2 CT 106-107.) Williams did not simply tell the police what "they wanted to hear" (AOB 76), she told police things only someone who had talked to appellant would have or could have known. Even if Williams, during the initial interview, truly believed she would be "free to go if she would only assign blame to someone else" (AOB 79), she then could have named anyone in the world. She did not have to implicate appellant, who, after all, was her child's uncle. (RT 1204.) She certainly could have identified Kelley, whom she

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17. Appellant notes the preliminary hearing court stated, while ruling attenuation had been demonstrated, the live "testimony arguably could have come from the original coercion." (AOB 74; CT 368.) Respondent submits the only reason the testimony "arguably" could arisen from the original coercion is because the live testimony was similar to the prior statements.

apparently did not like. (RT 1207; CT 405-409.) Just because Williams was no fan of the police and wanted nothing to do with this case does not mean her trial testimony was the product of improper government coercion. Moreover, whether Williams understood the nuances of the immunity agreement is irrelevant, as both the preliminary hearing judge and the trial court noted she never actually was a suspect and there was no evidence against her. (RT 393; CT 370.)[18] At trial, Williams testified she knew she was immunized from prosecution for murder or put in jail, so any allegation that she "did what she had to do to avoid prosecution for murder" (AOB 79), is unreasonable. (RT 1223.) Accordingly, Williams's trial testimony was properly admitted and appellant's contention must be rejected.

And, assuming arguendo it was error to admit Williams's testimony, any error was harmless beyond a reasonable doubt, as appellant's own statements were the most powerful evidence in this case. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

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18. Thus, Williams never was a "potential defendant." (AOB 81.)

IV.

THE TRIAL COURT HAD NO DUTY TO GIVE THE JURY ACCOMPLICE INSTRUCTIONS AS TO WILLIAMS'S TESTIMONY

Appellant further contends the trial court's failure to instruct the jury with accomplice instructions as to Williams's testimony deprived him of a fair trial. (AOB 84-95.) Respondent submits, as there was no substantial evidence Williams was an accomplice, the trial court had no duty to give the jury accomplice instructions regarding her testimony.

Appellant's sole basis for contending Williams was an accomplice is that the informant, John Wright's daughter, purportedly told Detective Knebel that Williams said she was paid some money to both get some gasoline and be a "lookout" while someone burned up a car. (RT 1087-1088.) During Williams's first police interview, the officers said two witnesses saw Williams at a Taco Bell and that Williams had told them she bought gas for "Loretta's man because he was going to burn up . . . a car that had a woman in it that he had robbed." (Supp. 2 CT 13.) One of these witnesses was Williams's friend, Jeanette Morris, and the other was a woman named Cheryl, who was Morris's friend. (Supp. 2 CT 13, 22.) Presumably, either Morris or Cheryl was Wright's daughter and the informant. However, Williams told police Cheryl was inside Taco Bell when she told Morris about appellant paying people to serve as a lookout and to buy gas, and that she never spoke to Cheryl about this incident. (Supp. 2 CT 28.) Williams admitted only to telling Morris that appellant said he paid money to Kelley to be the lookout and to another person for gas. (Supp. 2 CT 24-25, 27-28., 59-60)

The defendant bears the burden of proving, by a preponderance of the evidence, a witness is an accomplice. (*People v. Frye* (1998) 18 Cal.4th 894, 967-969.) Penal Code section 1111 defines an accomplice as "one who is liable

to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."[19] In order to qualify as an accomplice, a person must be chargeable with the crime as a principal and not merely as an accessory after the fact. (*People v. Garceau* (1993) 6 Cal.4th 140, 183; *People v. Sully* (1991) 53 Cal.3d 1195, 1227.) Thus, to be an accomplice, one must act

> with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging, or facilitating commission of, the offense.

(*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.)

> [W]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice, the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice.

(*People v. Zapien* (1993) 4 Cal.4th 929, 982, citing *People v. Bevins* (1960) 54 Cal.2d 71, 76.)

Sufficient evidence is that which is "reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Here, there was no credible evidence which would have supported the giving of accomplice instructions. Appellant points to four areas of "undisputed" evidence (AOB 87-88) which allegedly mandated instruction. Appellant is wrong. First, Williams denied telling an informant she was paid to

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19. Section 1111 further provides, "A conviction cannot be held upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

be a lookout and buy the gas. What she did admit to was telling Morris that appellant paid Kelley to be the lookout and someone else to get gas. (Supp. 2 CT 24-25, 27-28, 59-60.) There was no evidence presented which placed Williams at the crime scene or the gas station. Just because the police initially thought Williams might be involved and arrested her does not constitute evidence that she had knowledge of appellant's criminal purpose or took any criminal action.

Second, while Cory testified he heard more than one voice outside his window just before the explosion (RT 1098-1101), both appellant and Kelley apparently were present, which accounts for two voices. While it is unknown if more than two people were there, again, there is no evidence establishing Williams was at the crime scene. To the contrary, she told police Kelley shot Mrs. Lacey twice in the head. (Supp. 2 CT 65.) If she had been there, Williams would have known Mrs. Lacey was shot once in the hand. This also diminishes appellant's third argument that just because Mrs. Lacey was shot in the hand, if Williams had been there, she would have known someone was in the vehicle (AOB 88), because Williams did not know Mrs. Lacey was shot in the hand.

Finally, while Williams admitted to driving appellant and Kelley home, this admission makes her at most an accessory after the fact, which does not qualify her as an accomplice. (*People v. Garceau, supra*, 6 Cal.4th at p.183; *People v. Sully, supra*, 53 Cal.3d at p.1227.) The only knowledge Williams possessed about this case was what appellant and Kelley told her after the crime had occurred. Moreover, appellant never implicated Williams as an accomplice. Instead, he confirmed Williams's statement that he paid someone, a bystander near the gas station, to buy the gas. (Supp. 2 CT 115.) Thus, the trial court's duty to instruct the jury with accomplice instructions was never triggered.

Appellant further argues the instructional error was prejudicial, presuming that if Williams's testimony was found inadmissible, somehow his

own statements and the remaining physical evidence was insufficient to convict him. However, assuming arguendo instructional error, reversal is not required unless it is reasonably probable a result more favorable to appellant would have been reached, absent the error. (*People v. Miranda* (1987) 44 Cal.3d 57, 101; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant's confession alone would have convicted him. The jury knew Williams was more than "a citizen merely coming forward to see that justice was done" (AOB 95), because they also knew Williams had a relationship with appellant and did not want to testify. Further, the physical evidence and eyewitness testimony, taken together, were substantial evidence of appellant's culpability and corroborated Williams's testimony.

The failure to instruct on accomplice testimony is harmless where there is sufficient corroborating evidence in the record. The requisite corroboration may be established entirely by circumstantial evidence. (*People v. Arias* (1996) 13 Cal.4th 92, 143; *People v. Zapien, supra*, 4 Cal.4th at p. 982.) Such evidence may be "slight and entitled to little consideration when standing alone." (*People v. Miranda, supra*, 44 Cal.3d at p. 100.) The key inquiry is whether "the evidence *tends* to connect the defendant with the crime so that the jury may be satisfied that the accomplice is telling the truth." (*People v. Douglas, supra*, 50 Cal.3d at p. 506, emphasis in original.)

Appellant's burns constituted evidence of his guilt. Although the burns were not diagnosed at trial by an expert, Williams observed appellant with burns and saw him treating them with grease. (RT 1209-1210.) Detective Knebel also saw what appeared to be burns on appellant's body. (RT 1122-1123.) The jury was shown photographs of appellant's injuries. (RT 1135; Peo. Exs. 59A-C.) And, of course, appellant admitted he was burned when Kelley started the fire before he was ready. (Supp. 2 CT 105, 122.)

While appellant accurately notes the expert on paint comparisons,

James Bailey, never testified the samples he examined came from appellant's and Mrs. Lacey's vehicles, such an inference, when combined with the other evidence, was entirely reasonable.[20] Bailey testified the red paint found on Mrs. Lacey's car was similar to the paint on appellant's car, and could have come from his Vega. (RT 1181.) Mrs. Lacey's car was brand- new and there was no evidence of any other collisions. There was no evidence of any other car being involved in this case, only appellant's whose car just happened to be red.

The ballistics evidence indicated the bullet recovered from Mrs. Lacey's hand was "consistent with" a .22 caliber bullet and a .22 caliber bullet was found at appellant's home. (RT 1177-1178, 1186.) Appellant notes, "Presumably, many other people have that same type of ammunition." (AOB 93, fn. 42.) True or not, the record is clear that appellant did.

As to the eyewitnesses, Zima saw a man and a woman at the Versateller withdrawing money from Mrs. Lacey's account. (RT 1053, 1230.) It was reasonable for the jury to infer appellant was that man. Runnels did not see the perpetrator but observed the driver of the car had long, shoulder-length hair. (RT 1080.) Appellant had shoulder-length hair at the time of his arrest. (RT 1089.)

Appellant further asserts Williams's description of the jewelry did not exactly match Napoleon Lacey's description. Mr. Lacey testified his wife wore a lot of jewelry every day: "a bracelet, probably an inch and a half wide . . . with diamond studs," "several rings, one with a heart . . . ," "extensive necklaces," "a watch and a necklace . . . and some pin jewelry . . ., "and her wedding ring, which was white gold with a diamond stud. (RT 1045.) Williams saw appellant

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20. Detective Knebel testified he caused both cars to be "impounded for evidence," and caused the highway patrol to perform an investigation. Bailey was employed by the Los Angeles County Sheriff's Department. (RT 1089-1090, 1180.)

with "diamond rings [and a] gold bracelet" (RT 1210), specifically a half-inch thick nugget-type bracelet, two rings, one with a cluster of diamonds on it and one with "just a couple of diamonds or something like that," and a gold, "thin rope necklace." (RT 1215-1216.) Although the descriptions do not match perfectly, the jury could reasonably infer the bracelets described by both witnesses were the same item, and the thin rope necklace was one of Mrs. Lacey's "extensive necklaces." Mr. Lacey stated he received some of his wife's jewelry back from the police and that none of the items he testified about had been returned. (RT 1045-1046.) Thus, as Mrs. Lacey wore an extensive amount of jewelry, it is reasonable Williams was testifying about items that Mr. Lacey had already received back from the police. Further, Williams only saw the items briefly. Moreover, a photograph of Mrs. Lacey with some of her jewelry was introduced, as well as a sketch of her jewelry prepared by police with the assistance of the Lacey family. (RT 1048-1049, 1160; Peo. Exs. 52, 65.) Thus, the jury had the opportunity to determine if any of that jewelry was, in fact, the jewelry described by Williams.

Moreover, there is evidence of another item of jewelry: the bracelet appellant took from Mrs. Lacey and later threw away, which was recovered by Detective Knebel. This bracelet was similar to a bracelet depicted in the police sketch and was identified by Mr. Lacey as belonging to Joanne Lacey. (RT 1130, 1155-1160; Supp. 2 CT. 108-109; Peo. Ex. 65.) Thus, the evidence supports the conclusion appellant possessed Mrs. Lacey's jewelry and Williams saw him with it. Accordingly, there is ample evidence supporting appellant's convictions, and appellant's contention must be rejected.

V.

THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY WITH CALJIC NO. 2.11.5

Appellant further contends the trial court erred, and deprived him of the right to a fair trial, by instructing the jury with CALJIC No. 2.11.5, insofar as the jury could have interpreted that instruction pertained to Williams. (AOB 96-101.) Respondent submits the trial court correctly instructed with CALJIC No. 2.11.5, as it pertained to Kelley, and the jury could not reasonably have applied this instruction to Williams's testimony, as Williams was not an accomplice to or participant in this crime.

CALJIC No. 2.11.5, as given in this case, provided as follows:

> There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the crime for which the defendant is on trial.
>
> There may be reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendants on trial.

(RT 1352; Supp. 1 CT 26.)

The Use Note to CALJIC No. 2.11.5 provides, "This instruction is not to be used if the other person is a witness for either the prosecution or the defense," and case law confirms CALJIC No.2.11.5 should not be given when a "non-prosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility." (*People v. Williams, supra*, 16 Cal.4th at p. 226, citation omitted.)

First, appellant has waived his right to raise this issue on appeal. During trial, appellant failed to object to the giving of this instruction. (*People*

v. Scott (1994) 9 Cal.4th 331, 354.) Appellant either requested or agreed to this instruction, without also requesting modification that it was to be limited to Kelley only. (See RT 1289-1290.) Accordingly, appellant has waived any assignment of error. (*People v. Sully, supra*, 53 Cal.3d at p. 1218, citing *People v. Lang* (1989) 49 Cal.3d 991, 1024 ["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."].)

Further, appellant's argument is based on a clearly erroneous premise: that Williams was an accomplice or participant.[21] As set forth in Argument VI, there is no substantial evidence Williams did anything other than drive Kelley and appellant home after the crime. From the onset of this case, the prosecution maintained Williams was not "involved" with the crime, and would not be prosecuted "for anything in regard to this case." (CT 69.) After hearing Williams's testimony, the preliminary hearing court noted,

> . . . [Williams] is in no way subject to prosecution for these charges; that from everything I read, the prior motions and the pre-motions, the police never had any case against her, and after hearing her statements and knowing the facts of this prelim, there is no case against her. . .

(CT 370.)

Similarly, the trial court found the police "never really believed she was in fact a suspect." (RT 393.) At trial, appellant implicated Kelley, but not Williams. Neither the prosecution or the defense argued at closing that

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21. Though most of the case law discusses this instruction as pertains to an accomplice, in *Williams*, this Court noted CALJIC No. 2.11.5 can apply to any person who "was or may have been involved in the crime." (*People v. Williams, supra*, 16 Cal.4th at p. 226.)

Williams was a possible accomplice or participant, but both discussed Kelley's role at length. (RT 1291-1342.)[22] Thus, there was no reason for the trial court to modify the instruction so as to limit it to Kelley, because Williams could not reasonably be considered an accomplice or participant.

Moreover, this Court consistently has held instruction with CALJIC Nos. 1.01 [consider instructions as a whole] and 2.20 [consider full range of factors affecting witness credibility], obviates any error in the giving of CALJIC No. 2.11.5, under both the *Chapman* and *Watson* standards, as the potential for juror misunderstanding of this instruction was "minimal." (*People v. Carrera, supra*, 49 Cal.3d at p. 313; accord *People v. Williams, supra*, 16 Cal.4th at p. 227; *People v. Cain* (1995) 10 Cal.4th 1, 35; *People v. Cox* (1991) 53 Cal.3d 618, 666-668.) Here, the trial court gave such instructions. (Supp. 1 CT 16, 28-29.) Therefore, appellant was not prejudiced by the trial court's instruction with CALJIC No. 2.11.5, and his contention must be rejected.

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22. Further, the prosecution never "suggest[ed] in [her] arguments that the jury could not consider the grant . . . of immunity in assessing [Williams's] credibility," and the defense argued the immunity agreement bore on Williams's credibility. (*People v. Carrera* (1989) 49 Cal.3d 291, 313, fn. 11.)

VI.

EVEN THOUGH IT APPEARS THE TRIAL COURT IMPROPERLY USED THE PREPONDERANCE OF THE EVIDENCE BURDEN OF PROOF AT THE PENALTY PHASE REGARDING CONSIDERATION OF APPELLANT'S PRIOR FELONY CONVICTIONS AS A CIRCUMSTANCE IN AGGRAVATION , ANY INSTRUCTIONAL ERROR IN THAT REGARD WAS HARMLESS

Appellant further contends erroneous burden of proof instructions regarding consideration of his prior felony convictions as a circumstance in aggravation deprived him of a fair trial and reliable penalty determination, in violation of the Eighth and Fourteenth Amendments. (AOB 102-110.) Respondent submits, while it appears the trial court improperly used the preponderance -of-the-evidence burden of proof standard, rather than the beyond-a-reasonable-doubt standard, regarding consideration of appellant's prior felony convictions as a circumstance in aggravation, any such error was utterly harmless on this record.

A. Background

After the conclusion of the guilt phase, appellant, outside the presence of the jury, admitted he sustained a prior serious felony conviction and a prior prison term for the 1983 rape of Ms. Taylor in Los Angeles Superior Court Case No. A564356. (RT 1394-1395.) All counsel stipulated there was a factual basis for appellant's admission. (RT 1395.) Outside the presence of the jury, the trial court admitted into evidence People's Exhibit 74, consisting of certified documents from the Los Angeles Superior Court and a record of conviction from the California Department of Corrections regarding the 1983 rape and burglary convictions. (RT 1393, 1395.) During the penalty phase, in the

presence of the jury, the trial court, without objection, again admitted People's Exhibit 74 into evidence. (RT 1448-1449.)

In the presence of the jury, the prosecutor introduced into evidence People's Exhibit 75, consisting of certified documents from the Los Angeles Superior Court in Case No. A560982 and certified documents from the California Youth Authority. (RT 1449.) The prosecutor stated the documents in People's Exhibit 75:

> indicate[d] that [appellant] was convicted of the crime of attempted residential burglary, a felony, in April of 1981 and was sentenced to the California Youth Authority. The certification from the California Youth Authority indicate[d] that the records have been destroyed as they're only kept for a period of time.

(RT 1449.)

Defense counsel made no objection, and the trial court admitted People's Exhibit 75 into evidence. (RT 1450.)

The prosecutor also stated the parties had agreed to stipulate to admission of People's Exhibits 76 and 77, the unredacted tape recording and accompanying transcription of a portion of appellant's March 25, 1989, police interview. After appellant's counsel confirmed the stipulation, the trial court admitted People's Exhibits 76 and 77 into evidence. (RT 1449-1450, 1452-1453.) The prosecutor then read the following portion of appellant's previously redacted interview into the record:

> [SALGADO]: How long did you stay up? How long were you up? Did your time at? Six years in?
>
> THE DEFENDANT: Five and a half.
>
> [SALGADO]: Five and a half? *So you got sentenced to what, 11 years?*
>
> THE DEFENDANT: *Ten years. . .*

[SALGADO]: What did you get that time for?

THE DEFENDANT: What do you mean?

[SALGADO]: What did you do?

THE DEFENDANT: *What I do? Burglary, rape, grand theft.*

[SALGADO]: Where was that at?

THE DEFENDANT: Alta Dena.

[KNEBEL]: Where in Alta Dena?

THE DEFENDANT: Glen Rose and Loma Alta.

[KNEBEL]: At a house?

THE DEFENDANT: A house. . . I took a deal for ten years. . .

[SALGADO]: . . . Did you break in? Did you wait outside or what?

THE DEFENDANT: We broke in. Then he got busted and told.

[SALGADO]: Who was he?

THE DEFENDANT: Shelby. . . .

(RT 1451-1452, emphasis added.)

During the prosecution case, the prosecution presented the testimony of victim Taylor regarding the circumstances of appellant's 1983 rape and burglary. (RT 1405-1419.) Crime partner Fulcher testified to the details of the Taylor rape, as well as the fact appellant pled guilty to the 1983 crimes and was sentenced to 10 years in prison. (RT 1423-1431.) The prosecution also presented Sergeant Robinson, who testified appellant pled guilty to the rape and burglary. (RT 1402-1405.) The prosecution further presented evidence that appellant admitted the rape and burglary to Sergeant Lawson. (RT 1454-1460.)

During the defense presentation of penalty phase evidence, appellant's wife testified on cross-examination she was aware "in June of 1983 [appellant] pled guilty to the rape of Reina [sic] Taylor and the burglary of her residence," and she married him after he pled guilty and had been sentenced. (RT 1476.)

Appellant's wife also acknowledged she was aware appellant had been previously incarcerated at CYA, and that she engaged in a relationship with appellant after his release from CYA and before the Taylor rape. (RT 1477-1479.) Appellant's wife further testified appellant received his high school equivalency degree while incarcerated at CYA. (RT 1488.)

During penalty phase closing argument, the prosecutor argued appellant was not a "novice to criminality," as he had been convicted of the 1981 and 1983 crimes. The prosecutor noted appellant earned a GED while incarcerated in the California Youth Authority and that he had time to develop his artistic talent there. (RT 1552.) The prosecution further argued,

> . . . [A]nd when he comes out of the California Youth Authority after all this time has been invested in this young man to reform, what does he do? He hooks up with Shelby Fulcher and says, Hey man, this lady over there got a Mercedes; must have some money. Let's go in there. It's nighttime. She's there. So what if she's there? Let's go. Let's go.
>
> And what does he do? He takes a stick and he beats her. No resistance. This woman does not resist, but he's beating her anyway and attempts to sodomize her. And then, what are you, some kind of virgin? Then he does all of this horrible violence against this woman who is defenseless. And what do we do with that? We say okay, we'll give you a deal. We'll give you an opportunity again. . . .

(RT 1552-1553.)

Defense counsel did not contradict or refute the evidence of appellant's prior convictions and prior criminal activity during penalty phase closing argument. (RT 1568-1574.) Indeed, the defense elicited this information during its defense case.

At the close of the penalty phase, the trial court instructed with

CALJIC No. 8.85, which informed the jury of the factors it could take into consideration in determining the penalty in pertinent part as follows:

> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings. . .

(RT 1576-1577; CT 2012; Pen. Code, § 190.3, factors (b)-(c).)[23]

The trial court did not instruct the jury with CALJIC No. 8.86, which requires a jury to be satisfied "beyond a reasonable doubt" a defendant has in fact been convicted of the prior convictions, before that jury can consider the prior convictions as an aggravating circumstance. Instead, the trial court instructed the jury with a special instruction, entitled CALJIC No. 2.50.1 [Evidence Of Other Crimes By The Defendant Proved By A Preponderance Of The Evidence] which actually was a combination of CALJIC Nos. 2.50.1 and 8.86[24], as follows:

> Within the meaning of the preceding instruction [CALJIC 8.85], prior felony convictions for which the defendant purportedly has been convicted must be proved by a preponderance of the evidence. You

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23. Section 190.3 further provides, "[I]n no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted."

24. CALJIC No. 2.50.1 provides the prosecution has the burden of proving by a preponderance of the evidence that a defendant has committed crimes other than those for which he is on trial.

must not consider such evidence for any purpose unless you are satisfied that the defendant was convicted of the crimes purported in the documents of conviction.

The prosecution has the burden of proving these facts by a preponderance of the evidence.

Evidence has been introduced for the purpose of showing that the defendant has been previously convicted of three (3) felony crimes:

Attempted Residential Burglary in violation of Penal Code Section 664/459;

Residential Burglary in violation of Penal Code Section 459 and Forcible Rape in violation of Penal Code Section 261.2.

A juror may consider any evidence of a prior felony conviction as an aggravating circumstance if the juror is convinced by the preponderance of evidence that said conviction has been proven.

It is not necessary for all jurors to agree. If any juror is convinced by the preponderance of the evidence that conviction occurred, that juror may consider that conviction as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(RT 1578-1579; CT 2015-2016.)[25]

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25. Respondent notes appellant never objected to the jury instructions given in this case. (RT 1449-1450.) Nor did appellant object to the sufficiency, format, or nature of the evidence admitted to prove his prior convictions and criminal activity. Accordingly, appellant has waived any assignment of error. (*People v. Scott, supra*, 9 Cal.4th at p. 354; *People v. Burton* (1989) 48 Cal.3d 843, 862-863.) Failure to object or to request a limiting instruction waives any claim a jury was improperly permitted to consider evidence of nonviolent offenses at the penalty phase. (*People v. Avena, supra*, 13 Cal.4th at p. 426; *People v. Scott, supra*, 9 Cal.4th at p. 354; *People v. Visciotti* (1992) 2 Cal.4th 1, 71-72; *People v. Pinholster* (1992) 1 Cal.4th 865, 959.) Moreover, the

B. Even Though It Appears The Trial Court Used The Improper Standard Of Proof Regarding Consideration Of Appellant's Prior Felony Convictions As A Circumstance In Aggravation, Any Error In This Regard Was Utterly Harmless On The Facts Of This Case

It appears the trial court erred by instructing with the hybrid instruction combining CALJIC Nos. 2.50.1 and 8.86, as CALJIC No. 2.50.1 is appropriately given only in the guilt phase of a trial. (*People v. McClellan* (1969) 71 Cal.2d 793, 804; accord *People v. Medina* (1995) 11 Cal.4th 694, 763.) At the penalty phase, a jury must find prior felony convictions, as well as prior criminal acts involving violence, to be true beyond a reasonable doubt before these factors can be considered in aggravation. And, a trial court has a sua sponte duty to so instruct. (*People v. Millwee* (1998) 18 Cal.4th 96, 161, fn. 30; *People v. Medina, supra*, 11 Cal.4th at p. 763; *People v. Davenport* (1985) 41 Cal.3d 247, 280; *People v. Robertson* (1982) 33 Cal.3d 21, 53-54.) Thus, it appears the trial court failed to sua sponte instruct on the requisite burden of proof as to appellant's prior convictions, as the trial court utilized a preponderance-of- the-evidence standard, rather than the beyond-a-reasonable-doubt standard.

The potential for prejudice from the failure to give a reasonable doubt instruction as to other crimes is "especially serious because that type of evidence may have a particularly damaging impact on the jury's determination'"of penalty. (*People v. Davenport, supra.*, 41 Cal.3d at pp. 280-281, citation omitted.) However, the failure to instruct sua sponte that other criminal activity

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general rule that "*any* claim regarding the admissibility of evidence will not be reviewed on appeal unless there was a specific objection on the ground raised is applicable in capital cases." (*People v. Pinholster, supra*, 1 Cal.4th at p. 960, emphasis added.) Thus, appellant has waived his right to claim this issue on appeal.

and prior convictions cannot not be considered in aggravation unless proved beyond a reasonable doubt is harmless error where the defense presents no evidence to contradict the prosecution's witnesses. (*People v. Heishman* (1988) 45 Cal.3d 147, 181.) The *Heishman* Court noted the defendant's admission of the convictions also was significant in dispelling any prejudice. (*Id.* at p. 182.) Similarly, in *People v. Brown* (1988) 46 Cal.3d 432, 448, this Court found *Robertson* error to be harmless where the evidence of "prior violent activity offered as an aggravating circumstance was proved so overwhelmingly by direct testimony that defense counsel did not refute it at final argument."

Here, appellant's 1983 convictions for rape and burglary were proved "overwhelmingly," by *uncontradicted* evidence presented during both the prosecution and defense cases. (*People v. Burton, supra*, 46 Cal.3d at p. 448.) First, the prosecution introduced appellant's record of conviction for both crimes into evidence (RT 1448-1449), which, on its face, established the prior convictions. (*People v. Ray* (1996) 13 Cal.4th 313, 351.) Second, appellant's wife testified that appellant pled guilty to the rape and burglary of Taylor and was sentenced to state prison. (RT 1476.) Third, Ms. Taylor testified to the circumstances of the crimes, Fulcher testified appellant had pled guilty, and Sergeant Lawson testified appellant confessed to the crimes. (RT 1405-1418, 1429-1430, 1454-1460.) *Appellant "presented no evidence to contradict this testimony."* (*People v. Heishman, supra*, 45 Cal.3d at p. 181, emphasis added.) Fourth, outside the presence of the jury, appellant admitted suffering the rape conviction. (RT 1394-1395.) Fifth, the jury received evidence of appellant's first police interview, in which appellant admitted to raping and burglarizing Ms. Taylor, a critical fact appellant overlooks (AOB 106). (RT 1451-1452.) *Appellant's counsel did not refute any of this evidence at closing argument.*

(*People v. Brown, supra*, 46 Cal.3d at p. 448; RT 1568-1574.)[26] Thus, there was overwhelming uncontradicted proof beyond a reasonable doubt that appellant was convicted of the 1983 rape and burglary of Ms. Taylor. The jury could have come to no other conclusion even if the trial court used a beyond-a-reasonable-doubt instruction, rather than a preponderance-of-the-evidence instruction.

Since appellant's 1983 convictions "advanced as an aggravating factor were proved by direct, uncontradicted testimony that defense counsel found no basis for attacking at final argument," the instructional error could not have "affected the penalty verdict and was thus harmless under any standard of prejudice." (*People v. Heishman, supra*, 45 Cal.3d at p. 182; accord *People v. Coleman* (1988) 46 Cal.3d 749, 782 [the crimes "were clearly proved by testimony . . . and defendant introduced no evidence denying or contradicting" the prosecution's evidence.].)

Further, although it appears admission of appellant's 1981 conviction or adjudication for attempted residential burglary was error, respondent submits any error in this regard was patently harmless. While appellant correctly notes juvenile adjudications are not admissible under section 190.3, factor (c), as prior felony convictions (AOB 107), prior violent juvenile criminal activity is admissible as a factor in aggravation, pursuant to Penal Code section 190.3, factor (b), which permits evidence of any criminal activity involving force or violence. (*People v. Burton, supra*, 48 Cal.3d at p. 862.) However, burglary is not a violent crime. (*Id.* at p. 862.) As there was no evidence adducing that appellant's 1981 criminal activity was violent, it appears this activity should not

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26. Rather than denying the prior convictions, defense counsel elicited testimony from appellant's wife that appellant had been incarcerated while introducing appellant's artwork into evidence, and also referenced the artwork in his closing argument. (RT 1467-1474, 1538, 1570; Def. Exhs. C-P.)

have been admitted. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-775.)

However, this Court has never held that the admission of nonstatutory aggravating evidence alone constitutes reversible error. (*People v. Pinholster, supra*, 1 Cal.4th. at p. 962; *People v. Wright* (1990) 52 Cal.3d 367, 426.) *Boyd* error is harmless where the "improperly admitted evidence could not have prejudiced defendant in light of the other, properly admitted aggravating evidence," when, as here, such evidence "simply pales in comparison to the facts of the [instant] crimes. . . , and his substantial criminal history." (*People v. Wright, supra*, 52 Cal.3d at pp. 427, 429; accord *People v. Lewis* (2001) 25 Cal.4th 610, 663 [defendant's prior nonviolent juvenile criminal activity "constituted such a minor portion of the case-in-aggravation as to render its admission harmless."].) Similarly, appellant's "conclusory claim that the admission of this evidence violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" (AOB 110) must be rejected. (*People v. Pinholster, supra*, 1 Cal.4th at p. 963, fn. 20.)

Moreover, the prosecution does not "exploit the inadmissible evidence" by making "only passing reference to [it] to support the thesis that . . . defendant was an experienced criminal." (*People v. Burton, supra*, 48 Cal.3d at p. 864.) A passing reference to inadmissible evidence, such as the prosecutor's reference here (RT 1552), "could not have made a difference." (*Ibid.*) Given the properly admitted evidence of appellant's prior criminal history and the circumstances of the instant offenses, there "simply [is] no reasonable possibility the jury's penalty verdict was affected by the inadmissible evidence." (*Id.* at p. 864.) Thus, it is clear in light of the record that the admission of appellant's juvenile criminal activity was "nothing more than icing on a very rich cake," and appellant's contention should be rejected. (See *People v. McDaniels* (1980) 107 Cal.App.3d 898, 905; accord *People v. Lewis, supra*, 25 Cal.4th at p. 663; *People v. Wright, supra*, 52 Cal.3d at pp. 427, 429.)

VII.

THE PROSECUTOR DID NOT ENGAGE IN PREJUDICIAL MISCONDUCT

Appellant contends the prosecutor's biblical references during penalty phase closing argument constituted prejudicial misconduct. (AOB 111-123.) Respondent submits appellant has waived his right to raise this issue, and alternatively, the prosecutor's comments were neither misconduct nor prejudicial.

A. Background

During the penalty phase closing arguments, the prosecutor made reference to the Bible by saying,

> And don't think that you should have any religious scruples to not impose the death penalty. The Bible unambiguously commands that murderers be put to death. In Genesis it says: "Whoever sheds the blood of man shall his blood be shed, for in His image did God make man." And also in Genesis it clearly states: Man, not God is who is going to impose the penalty. When it says by man, it means, the murder[er]'s blood be shed. And in Exodus it says: "He who fatally strikes the man shall be put to death." And I'm sure that refers to women as well. It goes on to say: "And you shall not take reparations for the soul of the murderer who deserves to die but he shall be put to death."
>
> So Ladies and Gentlemen, even the Bible for those of you who may have some religious scruples does not say that you should not use your own moral beliefs in making [the] determination here.

(RT 1566.)

Appellant's counsel failed to object to the prosecution's argument.

During the defense closing argument, appellant's counsel, in an effort to save appellant's life, also made several biblical references by comparing appellant to a "sparrow;" calling him "a child of a lesser God;" by stating that life was "eternal" and life is "always onward upward and God-ward;" by relating the story of the prodigal son; and by quoting the Bible: "Vengeance is mine sayeth the Lord." (RT 1569-1574.)

B. Appellant Has Waived His Right To Raise This Issue By Failing To Object

Appellant has waived his right to claim this issue on appeal because he failed to object to the prosecutor's remarks. In *People v. McDermott* (2002) 28 Cal.4th 946, 1001, this Court refused to even consider the defendant's arguments regarding claimed instances of prosecutorial misconduct based on biblical references to which she failed to object to at trial. (Accord *People v. Slaughter* (2002) 27 Cal.4th 1187, 1209; *People v. Wash* (1993) 6 Cal.4th 215, 259-260.) The *McDermott* Court further noted trial counsel shall not be excused from "the legal obligation to object to prosecutorial misconduct," absent circumstances amounting to a "constant barrage of . . . unethical conduct [by the prosecutor], including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods," coupled with a trial court's "consistent fail[ure]" to curb these excesses. (*People v. McDermott, supra*, 28 Cal.4th at p. 1001, citing *People v. Hill* (1998) 17 Cal.4th 800, 821.) There is no basis in the instant case for excusing counsel's failure to object.

Also, contrary to appellant's assertion (AOB 121, fn. 52), there is no ineffective assistance of counsel here as the reason defense counsel choose not to object is apparent: Appellant's counsel wanted to, and did, rely on the Bible

himself, in an effort to convince the jury to spare appellant's life. (*People v. Slaughter, supra*, 27 Cal.4th at p. 1210.) Moreover, an appellant cannot demonstrate ineffective assistance of counsel for failure to object to nonprejudicial prosecutorial misconduct. (*People v. Roybal* (1998) 19 Cal.4th 481, 521, fn. 18.) Accordingly, appellant has forfeited this issue by failing to object at trial.

C. The Prosecutor's Comments Were Not Improper, But Assuming Error, Any Error Was Harmless

The primary vice in referring to the Bible and other religious authority is that such argument may 'diminish the jury's sense of responsibility for its verdict and

> . . . imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions.'

(*People v. Wash, supra*, 6 Cal.4th at p. 261, citing *People v. Wrest* (1992) 3 Cal.4th 1088, 1107.)

"What is objectionable is reliance on religious authority as supporting or opposing the death penalty." (*People v. Wash, supra*, citing *People v. Sandoval* (1992) 4 Cal.4th 155, 194.) Thus, in *Wash*, demonstrating the legitimacy of capital punishment and implying a defendant "deserved death under God's law," was deemed improper. (*Id.* at p. 261.) However, the error was determined to be harmless, as the biblical references "came in the course of a long argument, the bulk of which was properly and specifically focused on the factors in aggravation and mitigation." (*Ibid.*)

In *Wash*, despite the biblical references, the prosecutor "urged a sentence of death based upon [the] defendant's moral culpability for the crimes in light of the statutory factors." (*People v. Wash, supra*, 6 Cal.4th at p. 261.) Thus, any objectionable remarks could not "reasonably have diminished the

jury's sense of responsibility, or displaced the court's instructions." (*Ibid.*)

This Court has stated, "[W]e do not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.
(*People v. Sandoval, supra*, 4 Cal.4th at p. 194.) In *Sandoval*, the prosecutor argued the jury, if it imposed death, was "not playing God, [but was] doing what God says." (*Id.* at p. 193.) This was held to be a paraphrase of a biblical passage "that is commonly understood as providing justification for the imposition of the death penalty," but was found to be harmless error. (*Ibid.*)

Further, "merely exhort[ing] jurors who might harbor strong religious views that they must not resort to religious canons to decide the appropriate penalty" is not improper. (*People v. Arias* (1996) 13 Cal.4th 92, 180.) A prosecutor may mention religion but must advise the jury "secular law govern[s] over any religious beliefs." (*Ibid.*) Thus, in *Bradford, supra*, it was not error for a prosecutor to argue "imposition of the death penalty was not usurping God's authority but legitimately carrying out California law." (*People v. Bradford, supra*, 14 Cal.4th at p. 1063.)

In *Roybal, supra*, this Court determined comments "invit[ing] the jury to find support for a death verdict in the religious text" constituted "clear misconduct," but were not prejudicial under the circumstances. (*People v. Roybal, supra*, 19 Cal.4th at p. 521.) There, the prosecutor's remarks focused primarily on the brutal circumstances of the crime and his "brief allusions to biblical law amounted to little more than commonplaces, to emphasize his point that the jurors should instead judge defendant primarily by his acts," rather than extend him mercy. (*Ibid.*)

Here, the prosecutor did not advocate the jury make the penalty determination based upon biblical principles. Rather, the prosecutor briefly mentioned the Bible to establish that the Bible did not prohibit those religiously-

inclined jurors from imposing the death sentence. Contrary to appellant's claim, the prosecutor did not argue "death was the only proper punishment for murder" (AOB 116), but that death was the appropriate punishment for appellant, because "the circumstances in aggravation [were] so compelling." (RT 1548.) At no time did the prosecutor advise the jury to apply a "higher law" or to disregard California law and the trial court's instructions. The prosecutor's primary argument was that defendant had "earned" the death penalty, because of the horrific cruelty and callousness inherent in the circumstances of this crime, and urged the jury to find the aggravating circumstances outweighed any mitigating factors. (RT 1542-1547.)

Further, the prosecutor rejected the biblical notion that "an eye for an eye" applied in this case, because that premise implied things could be made equal and nothing was going to bring Mrs. Lacey back to life. (RT 1565.)[27] Thus, the prosecutor was not "promoting" the Bible over state law, and said nothing which reasonably would have provoked the jury into disregarding the trial court's instructions. The prosecutor never implied appellant "deserved death under God's law." (*People v. Wash, supra*, 6 Cal.4th at p. 261.) Nor did she provide "justification for the imposition of the death penalty." (*People v. Sandoval, supra*, 4 Cal.4th at p. 193.) The biblical reference was made simply to ensure that any religious jurors would *not* apply a higher law in a mistaken belief that the higher law forbade imposition of the death penalty. Accordingly, the prosecutor's comments did not constitute error.

And assuming error, any error is patently harmless. Here, the prosecutor's comments were not "part of a pattern of 'serious, blatant and

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27. Moreover, persons familiar with the Bible or those who "accepted the Bible as literal truth" (AOB 121), would have recognized the Bible also presents arguments against capital punishment, as evidenced in part by the defense's own references to the Bible.

continuous misconduct at both the guilt and penalty phases of trial' that, *together with other errors*, require[s] reversal of the judgment." (*People v. Slaughter, supra*, 27 Cal.4th at p. 1211, emphasis in original, citing *People v. Hill, supra*, 17 Cal.4th at p. 844.) As in *Wash*, the prosecutor asked for the death penalty based upon appellant's "moral culpability for the crimes in light of the statutory factors." (*People v. Wash, supra*, 6 Cal.4th at p. 261.) As in *Roybal*, the prosecutor's remarks focused primarily on the brutal circumstances of the crime and emphasized appellant should be judged "by his acts." (*People v. Roybal, supra*, 19 Cal.4th at p. 521.) Thus, considering the context of the prosecutor's remarks, as well as "the court's standard sentencing instructions and defense counsel's own reliance on biblical text," appellant was not prejudiced by any misconduct, and his contention must be rejected. (*People v. Ervin* (2000) 22 Cal.4th 48, 100.)

VIII.

THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S INQUIRY ABOUT THE GOVERNOR'S COMMUTATION POWERS

Appellant contends the trial court erred in responding to the jury's inquiring about the Governor's commutation power because the response did not indicate that four members of this Court would be required to concur in the exercise of the Governor's commutation power, given appellant was a twice convicted felon. (AOB 124-135.) This issue is meritless for three reasons: (1) appellant waived the issue by failing to raise it in the trial court; (2) appellant agreed to and acquiesced in the trial court's response to the jury's inquiry; and (3) this Court has expressly rejected the merits of appellant's claim.

A. Relevant Proceedings

Shortly after the jury commenced penalty deliberations, the trial court received a two-part question from the jury:

> Inquiry of the court, the question says, "Part One: When the defendant is given the death sentence, can the Governor or anyone else over turn and/or overrule the decision thus giving the defendant the opportunity for parole?"
>
> "Part Two: When the defendant is given a life without the chance of parole -- they used -- can the Governor or anyone else over turn and/or overrule the decision thus giving the defendant an opportunity for parole?"

(RT 1589.)

After receiving the above inquiry, the trial court and counsel for both the People and appellant agreed on the response to be given. The record reflects the following:

> Counsel, after conferring with the court, the court is going to cite, *by agreement of counsel*, People versus Witt and People versus Ramos, leading cases. The court sheppardizes and is aware of both case law and both cases. People versus Ramos is Cal. Rptr 3rd series 37, page 159. And from People versus Witt where they cite the Ramos case and its Cal.Rptr 3rd series 51, page 656. *And counsel and court agree* that the court will read the Governor's commutation and [sic] powers apply to both sentences, to a [sic] one, death or two, life without the possibility of parole. [Sic] Would be a violation of a juror to consider a violation of such a commutation or the appropriate sentence.
>
> Also, there's a motion, quickly, that you want to bring.
>
> MR. LLOYD: Yes, your honor. I would also respectfully request that the court further instruct the juror that life without the possibility of parole means exactly that, in addition to what I've already agreed to.
>
> THE COURT: Thank you. That will be overruled.
>
> The court and counsel have both given that instruction during the course of the trial and case law. The court knows it would be improper at this time to give the instruction.

(RT 1589-1590, emphasis added.)

Thereafter, the trial court, after reading the question on the record, instructed the jury as follows:

> And the court will read from the case book and also from *counsel and the court have gone over this*. This is the answer for you: "The Governor's commutation powers applies to both sentences, to wit, one death or two life without the possibility of parole. Be a violation of your duty as a juror to consider the possibility of such commutation in

determining the appropriate sentence."

Applies to both. Okay. All right.

(RT 1591, emphasis added.)

B. Analysis

"The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring." (Cal. Const., art. V, § 8, subd. (a).) Relying on this provision of the California Constitution, appellant contends that because he had been convicted of three felonies, the Governor alone could not have commuted his sentence and thus the trial court's instruction in response to the jury's inquiry misstated the law as applied to appellant. (AOB 124-135.) As stated by appellant:

> The trial court's response denied appellant fundamental fairness and rendered appellant's sentence unconstitutional in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, by providing the jury with incomplete and misleading information, which prevented it from undertaking the kind of individualized sentencing determination required in capital cases.

(AOB 125-126; see AOB 124-135.)

Appellant is incorrect.

First, appellant's claim is waived because he never raised the issue in the trial court. A review of the applicable pages of the Reporter's Transcript (RT 1588-1591) makes clear that appellant never objected to the instruction or suggested the instruction was misleading because it failed to note four members of this Court must concur before the Governor could exercise his commutation power in appellant's case. As such, the claim is waived. (*People v. Scott, supra,*

9 Cal.4th at p. 354.)

Second, not only did appellant not object to the instruction, he conferred with the trial court and "agreed" to the instruction. (See RT 1589, 1591.) Given that appellant agreed to and acquiesced in the instruction, he cannot now be heard to complain of error. (See *People v. Hart* (1999) 20 Cal.4th 546, 655-656.)

Third, even if appellant's claim is somehow properly raised on this appeal, this Court has recently considered and rejected the identical claim in *Hart*. As noted in *Hart*:

> [W]e reject defendant's contention that the trial court's comments to the jury on this point constitute reversible error. In view of this court's prior decisions, we believe that once a juror inquired as to the actual meaning of a sentence of life without possibility of parole, the trial court did not err in explaining that although the Governor has the power to commute both a sentence of death and a sentence of life without possibility of parole, it would be inappropriate for the jury to approach the case "from any other perspective other than death means death and life without possibility of parole means exactly that. . . ." (See, e.g., *People v. Hunter* (1989) 49 Cal.3d 957, 983-984 [264 Cal.Rptr. 367, 782 P.2d 608]; *People v. Hovey* [(1988)] 44 Cal.3d 543, 583-584 [approving similar responses to such inquiries].) Further, although the trial court's comments would have been more complete and fully accurate had they noted that, in the case of a "twice-convicted" felon such as defendant, the Governor may not grant clemency without the favorable recommendation of four or more justices of this court, we do not believe that this omission rendered the trial court's comments so incomplete or misleading as to be constitutionally deficient under the federal constitutional standard

established in *California v. Ramos* (1983) 463 U.S. 992, 1010-1012 [103 S.Ct. 3446, 3458-3459, 77 L.Ed.2d 1171], or that the omission, even if error, was prejudicial under the *Chapman* standard. (*Chapman v. California, supra*, 386 U.S. 18, 24 [87 S.Ct. 824, 828].)

> The crucial point and overall thrust of the trial court's comments was to inform the jurors that *any speculation* on the part of a juror that life without the possibility of parole meant anything other than precisely that *would be inappropriate*, and thus the comments properly informed the jurors that they were not to consider the commutation power at all in arriving at their sentencing determination. In light of this message, the circumstance that the trial court's comments did not explain the existence of a limitation on the Governor's commutation power is insignificant. The comments were sufficient to advise the jurors not to consider the speculative possibility of commutation. The specific details of commutation process (that the jurors were not to consider) bore no relevance to the jury's task. Under these circumstances, we conclude there is no reasonable possibility that the incompleteness of the trial court's comments affected the result.

(*People v. Hart, supra*, 20 Cal.4th at pp. 656-657, footnotes omitted; see also *People v. Whitt* (1990) 51 Cal.3d 620, 657 [no error in refusing to give such an instruction].)

This Court's holding in *Hart* is dispositive of appellant's claim.

IX.

CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE PROVISIONS OF THE UNITED STATES CONSTITUTION

Appellant claims that California's death penalty statute, as interpreted by this Court and as applied at his trial, violates various provisions of the United States Constitution. Appellant acknowledges that this Court has ruled contrary to his position on each of the following issues, but nonetheless urges reconsideration of these rulings. (AOB 136-160.) Appellant's contentions are without merit. Respondent will address these contentions separately as set forth below.

Because of the need for certainty, predictability, and stability in the law, this Court does not lightly overturn prior opinions. (*People v. Mendoza* (2000) 23 Cal.4th 896, 924.) A key consideration in determining the role of stare decisis is whether the decision being reconsidered has become a basic part of a complex and comprehensive statutory scheme. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1214-1216.)

As set forth below, the controlling authority challenged by appellant is well-reasoned, part of a statutory scheme regarding capital cases, and recently decided. Most importantly, appellant cites no new reasons supporting a change in the law. Therefore, the existing law must be found applicable for the reasons set forth in existing authority. And, it is entirely proper to reject appellant's claims by case citation, without additional legal analysis (e.g., *People v. Fairbanks* (1997) 16 Cal.4th 1223, 1255-1256.)

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant contends Penal Code section 190.2 violates the Fifth, Sixth, Eighth and Fourteenth Amendments in violation of the federal Constitution

because it fails to "meaningfully narrow" the pool of murderers to those most deserving of consideration of the death penalty. Accordingly, appellant claims his death sentence is invalid. (AOB 137-140.) Similar claims have been rejected by this Court and should be rejected here for the same reasons.

The constitutional requirements which a State must satisfy before imposing a death sentence were succinctly summarized in *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306 [107 S.Ct. 1756, 95 L.Ed.2d 262]:

> In sum, our decisions since *Furman* [*v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, *the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.* Moreover, a societal consensus that the penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

(Emphasis added.)

Once these limits have been satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 309 [110 S.Ct. 1078, 108 L.Ed.2d 255].)

While it is incumbent upon a State to narrow the class of death-eligible defendants, there is no exclusive "right way for a State to set up its capital

sentencing scheme." (*Spaziano v. Florida* (1984) 468 U.S. 447, 464 [104 S.Ct. 3154, 82 L.Ed.2d 340].) Accordingly, the United States Supreme Court has found that the narrowing function may take place at either the guilt *or* the penalty phase in a capital case. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244-245 [103 S.Ct. 546, 98 L.Ed.2d 568], rehg. den. (1988) 485 U.S. 944.)

In California, before a defendant is eligible for death, he must be convicted of first-degree murder and at least one special circumstance must be found true beyond a reasonable doubt. (Pen. Code, § 190.1.) "A single valid special circumstance finding is sufficient to determine that defendant is eligible for the death penalty." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1102.) The United States Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 87, 79 L.Ed.2d 29].)

This Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment. (*People v. Ochoa, supra*, 26 Cal.4th at pp. 459, 462; *People v. Catlin* (2001) 26 Cal.4th 81, 179; *People v. Cunningham, supra*, 25 Cal.4th at p.1041; *People v. Welch* (1999) 20 Cal.4th 701, 767; *People v. Jones, supra*, 15 Cal.4th at p. 196; *People v. Arias, supra*, 13 Cal.4th at p. 186-187; *People v. Sanchez* (1995) 12 Cal.4th 1, 60-61; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) Contrary to appellant's assertions, the special circumstances are not over inclusive either by their number and terms, or by the manner in which they have been construed. (*People v. Ray, supra*,13 Cal.4th at p. 356.) In particular, this Court has specifically upheld the special circumstance found true by the jury here, the felony-murder special circumstance, against constitutional attack because it provides a meaningful

basis for narrowing death eligibility. (See, e.g., *People v. Ochoa, supra*, 26 Cal.4th at p. 459; *People v. Frye, supra*,18 Cal.4th at pp. 1029-1030; *People v. Majors* (1998) 18 Cal.4th 385, 432.) Moreover, this Court has similarly rejected appellant's claim when presented under the rubric of the Fifth and Fourteenth Amendments as well. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1050; *People v. Ray, supra*, 13 Cal.4th at p. 356.)

In support of this claim, appellant cites to and relies on a 1997 New York University law review article purporting to present "empirical evidence" demonstrating section 190.2's failure to perform the constitutionally mandated narrowing function. (AOB 139.) Because this article forms no part of the record on appeal, it is not properly before this Court. (See *In re Carpenter* (1995) 9 Cal.4th 634, 646 [Under California law, jurisdiction on appeal " is limited to the four corners of the record on appeal."].) Moreover, appellant has not requested this Court to take judicial notice of the article. Thus, reliance on the article is misplaced.

Appellant offers no persuasive reason for this Court to depart from this unwavering line of precedent here. Having committed a murder during the course of a robbery and burglary, appellant "falls within the 'subclass' of convicted murderers upon whom capital punishment is properly imposed." (*People v. Ray, supra*, 13 Cal.4th at p. 357.) Accordingly, appellant's challenge to California's death penalty scheme must be rejected.

B. Penal Code Section 190.3, Subdivision (a), Is Not Impermissibly Vague

Section 190.3, subdivision (a), states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was

convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Appellant requests this Court to reconsider the issue of whether Penal Code section 190.3, subdivision (a), is impermissibly vague in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution. (AOB 140-146.) Specifically, appellant contends that subdivision (a), which directs the jury to consider the circumstances of the crime as aggravating factors, has been applied in a "wanton and freakish" manner such that "every feature of any murder, even features exactly at odds with those of other murders, have been found to be 'aggravating' within the statute's meaning." (AOB 140-146.) The issue is without merit.

As appellant concedes (see AOB 141), the United States Supreme Court has specifically addressed the issue of whether section 190.3, subdivision (a), is constitutionally vague. In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750,], the Supreme Court commented on subdivision (a), stating,

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

This Court has been presented with ample opportunity to revisit the vagueness issue raised by appellant since the holding in *Tuilaepa*. However, this Court has consistently rejected the claim and followed the ruling by the United States Supreme Court. (See, e.g., *People v. Kipp* (2001) 26 Cal.4th

1100, 1137-1138; *People v. Lewis, supra*, 25 Cal.4th at p. 677; *People v. Mendoza* (2000) 24 Cal.4th 130, 192; *People v. Ochoa, supra*, 1 9 Cal.4th at p. 478, fn. 13; *People v. Millwee, supra*,18 Cal.4th at p. 164; *People v. Ray, supra*, 13 Cal.4th at p. 358.) There is no need for this Court to revisit this issue.

C. There Is No Requirement That Death Be Found To Be The Appropriate Penalty Beyond A Reasonable Doubt

California's

> death penalty law does not provide for any allocation of the burden of proof. Instead, as the jury is expressly instructed, the penalty is to be determined by a weighing of the applicable sentencing factors.

(*People v. Medina, supra*, 11 Cal.4th at p. 782.)

Nevertheless, appellant contends that the trial court committed reversible error in failing to set forth the "reasonable doubt" standard of proof at the penalty phase. Appellant maintains the trial court should have instructed the jury that the prosecution had the burden to prove all aggravating circumstances true beyond a reasonable doubt, and that death was the appropriate verdict beyond a reasonable doubt. (AOB 147-150.) This contention is without merit as this Court has previously rejected this position. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 394; *People v. Jenkins, supra*, 22 Cal.4th at p. 1053.)

As this Court has repeatedly explained, in capital cases, the sentencing function is inherently moral and normative rather than factual and is *not susceptible to quantification under a burden of proof.* (See *People v. Jenkins, supra*, 22 Cal.4th at p. 1054; *People v. Welch* (1999) 20 Cal.4th 701, 767; *People v. Sanchez, supra*, 12 Cal.4th at p. 81.) Accordingly as this Court has consistently held, neither the 1978 death penalty statute itself, nor the federal or state Constitutions, require that aggravating factors must outweigh mitigating factors beyond a reasonable doubt or that death must be found to be the

appropriate penalty beyond a reasonable doubt. (*People v. Ochoa, supra*, 26 Cal.4th at p. 462; *People v. Catlin, supra*, 26 Cal.4th at p. 178; *People v. Jenkins, supra*, 22 Cal.4th at p. 1053; *People v. Barnett* (1998) 17 Cal.4th 1044, 1178 [citing cases].) Neither the due process or equal protection clauses of the Fourteenth Amendment, nor the cruel and unusual punishment clause of the Eighth Amendment, nor their respective parallel provisions in the California Constitution require that such determinations be made beyond a reasonable doubt. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1101.)

Additionally,

> the trial court is not required, under either the federal or the state Constitution, to give an instruction stating that if the jury has a doubt which penalty to impose, it must give defendant the benefit of the doubt and return a verdict of life imprisonment without possibility of parole . . . .

(*People v. Cunningham, supra* 25 Cal.4th at p. 1041.)

Appellant offers no new or persuasive reason for this Court to abandon its settled jurisprudence concerning such questions, and the cases he cites to and relies upon in urging a different conclusion are readily distinguishable from the instant one. In support of his claim that his right to due process was violated by the failure to require his jury to make such penalty determinations beyond a reasonable doubt, appellant cites the out-of-state case of *State v. Wood* (Utah 1981) 648 P.2d 71, 80-82. (AOB 149.) There, the Utah Supreme Court construed Utah's capital sentencing statute in light of the legislative purposes stated in related Utah statutes and concluded that, in Utah, the decision to impose the death penalty must be based on the reasonable doubt standard. *Wood*, however, does not provide, or even purport to provide, assistance to appellant. Instead, as the Utah court expressly emphasized, "we address neither the federal nor the state constitutional issues because the case can be decided on

the preferred grounds of statutory construction." (*State v. Wood, supra*, 648 P.2d at p. 82.)

Moreover, this Court recently reconsidered its position in light of *Apprendi v. United States* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and again concluded a reasonable doubt instruction was not required at the penalty phase: "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (*People v. Ochoa, supra*, 26 Cal.4th at p. 454.) This Court reasoned:

> We reject this contention, and conclude *Apprendi* does not extend to require a jury to find beyond a reasonable doubt the applicability of a specific section 190.3 sentencing factor.
>
> In *Apprendi*, the United States Supreme Court decided which sentencing bases must be determined (1) beyond a reasonable doubt (2) by a jury. *Apprendi* itself excluded from its scope "state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." [Citation omitted] . . . .
>
> As the *Apprendi* court explained, a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. "'[I]n California, [the requisite fact] is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence.'"

(*Id.* at pp. 453-454.)

Indeed, "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Id.* at p. 454, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14.) Accordingly, "a penalty determination of death does not

result in a sentence that exceeds the statutory maximum prescribed for the offense of first degree murder with a special circumstance." (*People v. Ochoa, supra*, 26 Cal.4th at p. 454.)

Based upon this Court's reasoning in *People v. Ochoa, supra*, appellant's contention must be rejected.

D. There Is No Requirement That The Jury Base A Death Sentence Upon Unanimous, Written Findings Beyond A Reasonable Doubt Regarding Aggravating Factors

Appellant contends that California's death penalty law violates his right under the United States Constitution by its (1) failure to require written jury findings on aggravating factors; (2) failure to require the jury to find beyond a reasonable doubt the aggravating factors and that the aggravating factors outweigh the mitigating factors; and (3) failure to require jury unanimity on aggravating factors. (AOB 147-154.) These contentions are without merit.

This Court has repeatedly rejected these claims. (*People v. Frye, supra*, 18 Cal.4th 894 ["Written findings on aggravating factors are not required nor must the People prove aggravating factors or the appropriateness of the death penalty beyond a reasonable doubt"]; *People v. Bolin* (1998) 18 Cal.4th 297, 345-346 [jury need not make express findings on aggravating circumstances or find beyond a reasonable doubt that death is the appropriate penalty]; *People v. Williams, supra*, Cal.4th at pp. 276-277 ["written findings of the existence of aggravating factors are not required"; neither the existence of aggravating factors, nor that aggravation outweighs mitigation, constitutionally needs to be proven beyond a reasonable doubt"]; *People v. Samayoa* (1997) 15 Cal.4th 795 [jury need not "make written findings of aggravating factors. . ., find any aggravating factor (other than unadjudicated criminal activity) true beyond a reasonable doubt, find beyond a reasonable

doubt that the aggravating factors outweigh the mitigating factors, or find beyond a reasonable doubt that death is the appropriate penalty"]; *People v. Carpenter* (1997) 15 Cal.4th 312, 421 [jury need not make written findings; "jury need not agree unanimously as to aggravating circumstances, find them proven beyond a reasonable doubt, or find beyond a reasonable doubt that aggravating factors outweigh mitigating factors and that death is the appropriate penalty"]; *People v. Jones* (1997) 15 Cal.4th 119, 196 [jury is not required to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors and that death is the appropriate sentence; jury is not required to agree unanimously that a particular aggravating factor was proved beyond a reasonable doubt; jury need not make written findings specifying the particular aggravating factor upon which it relied]; *People v. Crittenden* (1994) 9 Cal.4th 83, 156 [jury need not make written findings]; *People v. Cox* (1991) 53 Cal.3d 618, 690 ["No constitutional imperative requires written findings or jury unanimity as to aggravating circumstances, proof beyond a reasonable doubt of aggravating circumstances, or proof beyond a reasonable doubt that aggravating factors outweigh those in mitigation or that death is the appropriate remedy"].)

And, for the reasons mentioned in the previous subsection, appellant's reliance on *Apprendi* (AOB 152-154) is misplaced. (See *People v. Ochoa, supra*, 26 Cal.4th at p. 454.)

Appellant's claims should thus be rejected because he provides no persuasive reason for this Court to reconsider its previous rulings.

E. Intercase Proportionality Review Is Not Constitutionally Required

Appellant contends California's death penalty law violates the United States Constitution by its failure to require intercase proportionality review of appellant's death sentence. (AOB 154-156.) This contention is without merit.

The United States Supreme Court has rejected the claim that the United States Constitution requires intercase proportionality. (*Pulley v. Harris, supra*, 465 U.S. 51-54 [re 1977 statute]; *People v. Barnett, supra*, 17 Cal.4th at p. 1182; *People v. Wright* (1990) 52 Cal.3d 367, 448-449.) This Court has also rejected this claim. (*People v. Anderson, supra*, 25 Cal.4th at p. 602; *People v. Frye, supra*, 18 Cal.4th 894 ["Intercase proportionality review is not required]; *People v. Carpenter, supra*, 15 Cal.4th at p. 421 [proportionality review of defendant's death sentence is not required]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 80 ["appellate proportionality review" is not required]; *People v. Cox* (1991) 53 Cal.3d 618, 690 [intercase proportionality review is not required]; see also *People v. Ochoa, supra*, 26 Cal.4th at p. 458; *People v. Catlin, supra*, 26 Cal.4th at p. 178; *People v. Cunningham, supra*, 25 Cal.4th at p. 1042.)

Appellant's claims should be rejected because he provides no persuasive reason for this Court to reconsider its previous rulings.

F. The Absence Of Disparate Sentence Review Does Not Deny Equal Protection And Due Process In Relation To Non-Capital Defendants

Appellant contends that the failure to provide him with intercase proportionality review denied him equal protection and due process of law as guaranteed by the Fourteenth Amendment of the federal Constitution because a disparate sentence review is afforded to non-capital inmates under the determinate sentence law as set out in Penal Code section 1170, subdivision (f). (AOB 156-157.) This claim has been repeatedly rejected by this Court, and should be here. (*People v. Crittenden, supra*, 9 Cal.4th at p. 83; *People v. Cox, supra*, 53 Cal.3d at p. 618; *People v. Bell* (1989) 49 Cal.3d 502, 550; *People v. Burton, supra*, 48 Cal.3d at p. 873; *People v. Allen* (1986) 42 Cal.3d 1222,

1286-1288.)

G. Failing To Delete Inapplicable Penalty Factors

Appellant contends the trial court precluded a fair and reliable penalty verdict by failing to delete assertedly "irrelevant" factors (e) and (f) from the instructions given to the jury. (AOB 158.) Appellant maintains that since the defense did not present any evidence as to either factor (e) or (f), they should have been deleted and their inclusion in the instruction created "a real risk the jury would aggravate appellant's sentence" based on those irrelevant factors. (AOB 158.) As noted by this Court in *People v. Ghent* (1987) 43 Cal.3d 739, 776-777: "The problem with defendant's analysis is that deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant." This Court has repeatedly rejected the claim that a trial court violates the Eighth and Fourteenth Amendments to the federal Constitution by failing to delete assertedly inapplicable mitigating factors from the instructions. (*People v. Anderson, supra*, 25 Cal.4th at p. 600; *People v. Osband* (1996) 13 Cal.4th 622, 705; *People v. Memro, supra*, 11 Cal.4th at p. 880; see also *Williams v. Calderon* (9th Cir. 1995) 52 F.2d 1465, 1481.) Appellant has presented this Court no reason to revisit this issue.

H. Adjectives Used In Conjunction With Mitigating Facts Do Not Act As Unconstitutional Barriers To Consideration Of Mitigation

Appellant asserts that the use of "restrictive" adjectives in the list of potential mitigating factors (e.g., the words "extreme" and "substantial" in section 190.3, subdivisions (d) ["extreme mental or emotional disturbance"] and (g) ["extreme duress or . . . substantial domination of another person"]) impermissibly acted as unconstitutional barriers to consideration of mitigation

by his jury in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 158-159.)

This contention is without merit.

This Court previously had held that the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague. (*People v. Arias, supra*, 13 Cal.4th at pp. 188-189; *People v. Stanley, supra*, 10 Cal.4th at p. 842.) Moreover, as this Court noted:

> the catch-all language of section 190.3 factor (k), calls the sentencer's attention to "[a]ny other circumstance which extenuates the gravity of the crime," and therefore allows consideration of any mental or emotional condition, even if it not "extreme." Similarly, factor (k) allows consideration of duress that is less than "extreme" and domination that is less than "substantial."

(*People v. Arias, supra*, 13 Cal.4th at p. 189, citations omitted.)

Appellant also contends "factors (d) and (h) both impermissibly restrict[ed] the described conditions to the time of the offense, implying that unless they existed at that time, they could not be considered as mitigating evidence." (AOB 159.) Appellant's claim, however, that the "jury would believe that evidence relevant to such factors could not be given mitigating weight if they did not influence the commission of the crime" (AOB 159) is clearly refuted by the instructions given the jury.

> That in determining which penalty is to be imposed . . . you shall consider, take into account and be guided by the following factors, if applicable:
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that

> the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(CT 2013-2014; RT 1578.)

Thus, appellant's claim the jury was inhibited from considering mitigating factors should be rejected.

I. The Trial Court Did Not Err By Not Delineating Which Penalty Factors "Could Only Be Mitigating"

Appellant contends that the court's failure to instruct the jury that the factors stated in Penal Code section 190.3, subdivisions (d), (e), (f), (g), (h), (j) and (k) were relevant only as potential mitigating circumstances, deprived him of his Eighth and Fourteenth Amendment rights to a fair and reliable penalty determination. (AOB 159-160.) Respondent disagrees and submits that, by failing to request such an instruction in the trial court, appellant has waived this claim on appeal. Further, appellant has waived his constitutional claim because he did not assert that constitutional ground at trial. (See *People v. Earp* (1999) 20 Cal.4th 826, 893; *People v. Carpenter, supra*, 15 Cal.4th at p. 385.) Assuming arguendo the claim was properly preserved for appellate review, this Court should reject it as it consistently has when presented with such claims in the past.

In essence, appellant argues not that the trial court's penalty instructions were inaccurate, but that the court should have given a further clarifying instruction stating that certain of the factors listed in CALJIC No. 8.85 could only be treated as mitigating. Appellant, however, made no request for such an instruction in the trial court. If he believed that the court's instructions were unclear or incomplete or in need of elaboration, it was

appellant's obligation to request such additional or clarifying language. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142, 1192; *People v. Bell* (1989) 49 Cal.3d 502, 550.) His failure to do so bars appellate review of the issue. (*People v. Arias, supra*, 13 Cal.4th at p. 171; *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1142, 1189-1192; *People v. Johnson* (1994) 6 Cal.4th 1, 52; *People v. Andrews* (1989) 49 Cal.3d 200, 218; *People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) Where, as here, no request is made, the court is not under a duty to give an amplification or explanation sua sponte. (*People v. Hamilton* (1988) 46 Cal.3d 123, 146.) The standard instructions correctly and adequately explained the applicable law to the jury, and the court was not required to rewrite them sua sponte. (*People v. Kelly* (1992) 1 Cal.4th 495, 535.)

In any event, even had appellant preserved this claim for this Court's review, as this Court has repeatedly held, the claim is meritless. (*People v. Catlin, supra*, 26 Cal.4th at p. 178 ["The trial court need not instruct the jury as to which factors under section 190.3 are aggravating and which are mitigating."]; *People v. Cunningham, supra*, 25 Cal.4th at p. 1041 [noting previous rejection of such claims]; *People v. Ochoa, supra*, 19 Cal.4th at p. 458; *People v. Williams, supra*, 16 Cal.4th at pp. 268-269; *People v. Bradford, supra*, 15 Cal.4th at p. 1383; *People v. Osband* (1996) 13 Cal.4th 622, 705; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191; *People v. Raley* (1992) 2 Cal.4th 870, 919.) As this Court explained in *People v. Williams, supra*, 16 Cal.4th at pp. 271-272, the trial court's instructions did not label as aggravating any conduct that should actually militate in favor of a lesser penalty. (Cf. *Zant v. Stephens* (1983) 462 U.S. 862, 885 [103 S.Ct. 2733, 77 L.Ed.2d 235].) Rather, they refrained from labeling the enumerated factors as either "mitigating" or

"aggravating." (*People v. Williams, supra*, 16 Cal.4th at p. 272.)

This Court's consistent rejection of such claims also finds support in United States Supreme Court authority on analogous questions. As this Court observed in *People v. Williams, supra*, 16 Cal.4th at p. 269, the United States Supreme Court found a similar claim "foreclosed by our cases" in *Tuilaepa v. California, supra*, 512 U.S. 967 because, as the Court explained, "A capital sentencer need not be instructed on how to weigh any particular fact in the capital sentencing decision." (*Id.* at p. 979.) As the high court noted in the same vein in *California v. Ramos* (1983) 463 U.S. 992, 1009, fn. 22 [103 S.Ct. 3446, 77 L.Ed.2d 1171],

> the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing "scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute."

(*People v. Zapien, supra*, 4 Cal.4th at p. 990.) Thus, as this Court explained in *People v. Rodriguez* (1986) 42 Cal.3d 730, 778, "the 1978 California law would not contravene the Eighth Amendment even if it set *no* standards for the sentencing of defendants already deemed death-eligible."

As appellant offers no persuasive reason for this Court to revisit its longstanding rejection of such claims, the instant claim should similarly be rejected.

X.

CALJIC NO. 8.88 IS CONSTITUTIONAL

The trial court instructed the penalty jury pursuant to CALJIC No. 8.88 (formerly CALJIC No. 8.84.2) as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the each defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of

> death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You shall now retire and select one of our number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(CT 2029-2030; RT 1585-1587.)

Appellant contends the instruction contains numerous flaws which violate appellant's rights under the Sixth, Eighth and Fourteenth Amendments. (AOB 161-165.) For example, appellant contends the instruction is constitutionally defective because it fails to (1) specify that the prosecution has the burden of persuading the penalty jury it must be convinced of the penalty determination beyond a reasonable doubt; (2) require a finding beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances; and (3) require unanimous jury findings regarding the truth of various aggravating circumstances, and to require a "statement" of reasons supporting a death verdict. (AOB 162.) Respondent has demonstrated in the previous Argument that California's death penalty statute is constitutional without these requirements. As such, the instruction is not defective in those respects.

Appellant also contends CALJIC No 8.88 is constitutionally defective in violation of the Eighth and Fourteenth Amendments because the term "so substantial" is vague and the term "warrants" is "broad and permissive, and misleads the jury into believing it may impose death even when not the appropriate penalty . . . ." (AOB 162.) A similar claim was raised and rejected

by this Court in *People v. Arias, supra*, 13 Cal.4th at pp. 170-171:

> we have repeatedly held that the language of former CALJIC No. 8.84.2 [currently CALJIC No. 8.88], taken directly from our majority opinion in *People v. Brown* (1985) 40 Cal.3d 512, 541-542, footnote 13 [220 Cal.Rptr. 637, 709 P.2d 440], is not inadequate or misleading. By advising that a death verdict should be returned only if aggravation is "so substantial in comparison with" mitigation that death is "warranted," the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty. (E.g., *People v. Breaux* [(1991)] 1 Cal.4th 281, 315-316; *People v. Sully, supra*, 53 Cal.3d 1195, 1244-1245.) Hence, there was no need for the additional instruction defendant now suggests. (See, e.g., *People v. Rodrigues, supra*, 8 Cal.4th 1060, 1192.)

Thus, based on *Arias*, appellant's claim must be rejected.

Appellant raises one additional point which should be addressed. Appellant claims the definition of "mitigation" in CALJIC No. 8.88 failed to advise the jury of the full scope of evidence which could be considered in determining the appropriate penalty. By limiting the definition of "mitigation" solely to the circumstances of the crime, the trial court failed to provide the penalty jury with an adequate understanding of what constitutes mitigating evidence and undermined the reliability of the ensuing death verdict. As stated by appellant,

> The failure properly to instruct appellant's jury regarding the full scope of mitigating evidence was tantamount to an explicit instruction to the jury not to consider mitigating evidence if not directly related to the crime.

(AOB 165.)

This claim must be rejected for several reasons.

First, *Arias* makes clear that CALJIC No. 8.88 is constitutional and properly informs "the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias, supra*, 13 Cal.4th at p. 171.) Second, CALJIC No. 8.88 makes clear that "mitigation" does not have to relate solely to the crime:

> A mitigating circumstance is *any* fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

(CT 2029; RT 1586, emphasis added.)

Finally, that the jury was not confused about the fact mitigation did not have to relate to the crime, is further supported by CALJIC No. 8.85, which provides, in part:

> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime *and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death*, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(CT 2013; RT 1578, emphasis added.)

Thus, appellant's claim the jury was instructed that any mitigating evidence had to be limited solely to the circumstances of the charged crime is meritless.

XI.

THERE ARE NO GUILT PHASE ERRORS OR PENALTY PHASE ERRORS TO ACCUMULATE TO SUCH AN EXTENT THAT APPELLANT MAY HAVE BEEN PREJUDICED WHEN THE ERRORS ARE CONSIDERED TOGETHER

A. Guilt Phase Errors

Appellant contends the cumulative effect of the errors outlined in Arguments I through V denied him "a fair and reliable guilt determination." (AOB 166-167.) As respondent has demonstrated, none of appellant's contentions have merit. Moreover, appellant has failed to establish prejudice as to any of the claims he raises. Accordingly, his contention of cumulative error must be rejected. (*People v. Kipp, supra,* 26 Cal.4th at p. 1132; *People v. Lewis, supra,* 25 Cal.4th at p. 678; *People v. Staten* (2000) 24 Cal.4th 434, 464.)

B. Penalty Phase Errors

Appellant contends that the cumulative effect of the penalty phase errors in Arguments VI through XI alone, or in combination with the guilt phase errors, resulted in "an unfair and unreliable sentence of death. (AOB 167-168.) Respondent has demonstrated that there was no error at the guilt phase so there is nothing to accumulate with any penalty phase error.

As for the penalty phase, respondent has demonstrated that, except for the apparently erroneous standard of proof instruction regarding the jury's consideration of appellant's prior convictions, there was no error at the penalty phase, and therefore there is nothing to accumulate. Respondent has demonstrated in Argument VI that given the facts of the instant case (including appellant's admission to one of the prior convictions) and the arguments of

counsel at the penalty phase that any consideration of appellant's prior felony convictions in the penalty determination was utterly harmless. Even assuming, arguendo, the prosecutor's biblical references were improper, it was absolutely non-prejudicial, alone or in combination with the apparent instructional error, given appellant's own reliance on the Bible in his penalty phase argument urging the jurors to spare his life. Thus, appellant's claim of cumulative error must fail. (*People v. Kipp, supra*, 26 Cal.4th at p. 1141; *People v. Lewis, supra*, 25 Cal.4th at p. 678; *People v. Staten, supra*, 24 Cal.4th at p. 464.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: October 8, 2002

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **People v. David Earl Williams (CAPITAL CASE)**

Case Nos.: **Cal. Supr. Ct. No. S029490; L.A.S.C. No. A 579310-01**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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 OCT 1 0 2002, I placed a copy of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on OCT 1 0 2002, at Los Angeles, California.

C. DAMIANI

Signature

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