IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **KERRY LYN DALTON,** Defendant and Appellant.	S046848 **CAPITAL CASE**

San Diego County Superior Court No. CR135002
The Honorable Michael D. Wellington, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant and her associates all abused methamphetamine. In a trailer in the back country near San Diego on Sunday, June 26, 1988, appellant led the torture and murder of her former roomate, Irene Melanie May, the young mother of three. Melanie's body was never found.

Appellant, her boyfriend Mark "TK" Tompkins and her friend, Sheryl Ann Baker, were charged with the murder in 1992. (1 CT 1.) In 1994, TK pled guilty to first degree murder with a prior violent felony conviction. Baker pled guilty to second-degree murder and agreed to testify in appellant's 1995 trial. TK refused to testify.

Appellant was convicted and sentenced to death. This appeal is automatic.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County on November 13, 1992, appellant, Mark Lee Tompkins, and Sheryl Ann Baker, were charged with conspiracy to murder Irene Melanie May (count 1: Pen. Code, § 182, subd. (a)(1)) and the murder of Irene Melanie May on or about

June 26, 1988 (count 2: Pen. Code, § 187). Two special circumstances were alleged: the killing was intentional (1) while lying in wait (Pen. Code, § 190.2, subd. (a)(15), and (2) with infliction of torture (Pen. Code, § 190.2, subd. (a)(18)). The information also alleged appellant had a prior conviction within the meaning of Penal Code section 1203, subdivision (e)(4), precluding probation; two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b); and a serious felony enhancement within the meaning of Penal Code sections 667, subdivision (a), and 1192.7, subdivision (c)(18); and appellant and her codefendants personally used a dangerous or deadly weapon within the meaning of Penal Code section 12022, subdivision (b), in the commission of the murder. (1 CT 48-52.)

The trials of the three defendants were severed on July 14, 1993. (11 CT 2120.) About a year later, Baker entered a plea to second-degree murder and Tompkins entered a plea to first-degree murder with an admission of a serious felony prior conviction. (10 CT 2062; 11 CT 2120.) On December 22, 1994, an amended Information was filed adding five overt acts.[1/] (5 CT 999.)

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1. It is alleged that the following overt acts were committed in this state by one or more of the defendants for the purpose of furthering the object of the conspiracy:

OVERT ACT NO. (01): On or about June 25, 1988, appellant, Sherryl Baker and Mark Thompkins took IRENE MELANIE MAY to Joanne Fedor's trailer in Live Spring Oaks park.

OVERT ACT NO. (02): On or about June 26, 1988, and after spending the night of June 25, 1988 at the Fedor residence with IRENE MELANIE MAY, KERRY LYN DALTON and MARK LEE TOMPKINS did wait for Joanne Fedor to leave her residence.

OVERT ACT NO. (03): On or about June 26, 1988, MARK LEE TOMPKINS did take Joanne Fedor to La Cima Honor Camp to visit Robert Collier.

A jury was sworn and presentation of evidence began on February 6, 1995. (11 CT 2155, 2159.) On February 21, 1995, appellant moved under Penal Code section 1118.1 to dismiss counts 1 and 2, the Penal Code section 12022, subdivision (b), allegation as to both counts, both special circumstance

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OVERT ACT NO. (04): On or about June 26, 1988, KERRY LYN DALTON did restrain IRENE MELANIE MAY in a chair.

OVERT ACT NO. (05): On or about June 26, 1988, KERRY LYN DALTON and SHERYL ANN BAKER did inject IRENE MELANIE MAY with a hypodermic syringe containing battery acid.

OVERT ACT NO. (06): On or about June 26, 1988, KERRY LYN DALTON administered electric shock to IRENE MELANIE MAY

OVERT ACT NO. (07): On or about June 26, 1988, KERRY LYN DALTON did cause SHERYL ANN BAKER to beat IRENE MELANIE MAY with a metal skillet.

OVERT ACT NO. (08): On or about June 26, 1988, MARK LEE TOMPKINS did stab IRENE MELANIE MAY with a knife.

OVERT ACT NO. (09): On or about June 26, 1988, KERRY LYN DALTON did take a shower and dispose of her bloody clothes.

OVERT ACT NO. (10): On or about June 26, 1988, SHERYL BAKER cleaned blood from inside the trailer MARK LEE TOMPKINS did remove and dispose of the body of IRENE MELANIE MAY so that it was never located.

OVERT ACT NO. (11): On or about June 26, 1988, MARK LEE TOMPKINS disposed of the body so that it was never located.

OVERT ACT NO. (12): On or about June 26, 1988, MARK LEE TOMPKINS did return to Fedor's trailer to pick up KERRY LYN DALTON and SHERYL ANN BAKER.

OVERT ACT NO. (13): On or about June 26, 1988, KERRY LYN DALTON and MARK LEE TOMPKINS did leave the Fedor residence together.

allegations and overt acts 1, 2 and 6. The court struck the Penal Code section 12022, subdivision (b) allegation as to the metal skillet and electrical cord on both counts and also found that the evidence did not support overt acts 1 and 6. It granted the motion to strike those allegations. (11 CT 2180; 38 RT 3665, 3672-3675, 3678.)

On February 24, 1995, the jury found appellant guilty of both conspiracy and murder and found true both special circumstances. (11 CT 2188-2190.)

On March 2, 1995, the penalty phase began. (11 CT 2197-2199, 2204-2206.) The jury returned a death verdict. (11 CT 2212-2213.)

On May 23, 1995, the court denied appellant's motion for new trial and the statutory motion to modify the verdict. Appellant was sentenced to death. (11 CT 2215.)

STATEMENT OF FACTS

Sherri Fisher met Melanie May (hereafter Melanie) when Melanie was homeless and invited her to stay at her place.[2/] (33 RT 3224.) On June 24, 1988, Melanie called her social worker, Nina Tucker to let her know she was living with a friend in Lakeside, California. (35 RT 3361, 3367.) Tucker, who had removed Melanie's three children from her custody about a week earlier, had been assigned to Melanie's case since December of 1987. (35 RT 3367-3362.) Tucker found Melanie very responsible regarding her children and believed Melanie loved them. (35 RT 3370.) Melanie had made all of her court appearances, set up and kept monthly meetings at her home, and called Tucker "very frequently." (35 RT 3364-3365.) In this June 24, 1988 telephone call, Melanie said she wanted to change her lifestyle and agreed to call Tucker

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2. During this period in 1988, Fisher was using meth one to three times a month by injecting it. (33 RT 3232.)

again on Monday. (35 RT 3367.) Tucker never heard from Melanie again.[3] (35 RT 3367-3369.)

Melanie left Fisher's apartment with Sheryl Baker and Fisher never saw Melanie again. (33 RT 3225, 3224.) After pleading guilty to second degree murder in this case, Sheryl "John-Boy" Baker, testified that she knew Melanie and Bobby May and their three children. (33 RT 3092-3094, 3098, 3095.) Baker and others helped Melanie put her possessions in storage following an eviction while her husband (hereafter May) was in jail. (33 RT 3097-3098.) Appellant arrived at Melanie's apartment complex with two other people, but the manager would not allow appellant on the property. Appellant "was very angry" and told Baker some of the furniture in the apartment belonged to her and she wanted it. Appellant also said she might have some jewelry hidden in the apartment's light sockets. (33 RT 3100.) Baker replied she would look for appellant's things and give them to her. Appellant and her two friends left and the others continued moving Melanie's possessions until the storage unit closed at 5:00 p.m. At that time, Melanie and one of her helpers went in search of drugs.[4] (33 RT 3101.)

While waiting, Baker took the opportunity to call appellant and tell her that she did not find any of her property. (33 RT 3102-3103.) Within minutes of the phone call, appellant and her boyfriend, Mark "TK" Tompkins (hereafter TK) arrived at the convenience store where Baker, Melanie and the others were waiting for the drugs. (33 RT 3103.) Appellant and TK asked Baker to help them steal a car and she agreed. (33 RT 3103, 3107.) Hoping appellant

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3. Tucker attempted to find her. After talking with Melanie's friend, Joanne Fedor, Tucker filed a missing person's report for Melanie with the Spring Valley Sheriff's Station. (35 RT 3368-3370.)

4. Appellant and all of her friends and acquaintances, including the victim, abused methamphetamine, generally intravenously. (30 RT 2580-2581; 33 RT 3114.)

and TK would forget about the jewelry and furniture because of the car theft project, Baker asked Melanie to come along. (33 RT 3105-3106.) Melanie was concerned because she was afraid of appellant, but joined Baker. They were in a friend's truck and followed appellant and TK's truck. (33 RT 3106.)

At about 11:30 p.m. on Saturday, June 25, 1988, JoAnne Fedor was driving home with two of her young children, when an electrical fire started behind the dash of her truck and she pulled off the highway about 20 miles from her trailer in Live Oak Springs.[5/] (30 RT 2565-2567.) Fedor pulled wires until the smoke and burning stopped, then sat in the truck. Someone knocked on her window and she "panicked" until she saw it was appellant, whom she knew. (30 RT 2567.) Appellant asked what was wrong. (30 RT 2569.) In case another fire broke out, she offered to take the children and follow Fedor home. (30 RT 2570, 2572.)

Fedor's children got into appellant's truck, and TK and appellant followed Fedor while the truck Melanie and Baker were in, followed them. Fedor could see the headlights of their truck following her, then the lights disappeared. (30 RT 2570-2573.) Fedor again "panicked," stopped and backtracked, but did not find appellant's truck. Thinking they took the freeway, Fedor raced home, but they were not there, so she called 911 about midnight. (30 RT 2573-2575.)

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5. Live Oak Springs Mobile Home Park is about 60 miles east of San Diego off Highway 8, on a dirt road, two- to three-miles from the freeway. (30 RT 2584.) Fedor's mobile home had been a drug lab in Lakeside when she bought it. (30 RT 2609.) She rented space 25. (35 RT 3472.) The park had 26 trailers and was adjacent to cow pastures and two Indian Reservations. (35 RT 3478, 3487.)

Fedor was using crystal methamphetamine at least two to three times a day during this period by any method she could, including with a hypodermic needle. (30 RT 2568.)

At about 2:30 a.m., appellant and TK arrived with Fedor's children, followed by another truck with three adults: Irene Melanie May, Sheryl Baker, and someone Fedor did not know, named "Bob." (30 RT 2575-2576.) Appellant was upset that Fedor had called the "cops." (30 RT 2577-2578.) Fedor informed 911 authorities that her children were back.[6] (30 RT 2576.)

Before trying to sleep, Fedor told appellant and her friends they could stay until morning, but that she must get up in an hour to visit her boyfriend in honor camp. Fedor took her children to her bedroom and tried to sleep. She heard appellant and Melanie arguing. (30 RT 2578-2580, 2591.) She heard appellant say Melanie was a snitch who had sold appellant's property.[7] Appellant's voice was very angry and Melanie May's voice sounded as though she was "scared to death." (30 RT 2580.) At about this time, appellant dumped Melanie's purse and found some of appellant's jewelry in it and started treating Melanie "like a slave." Melanie told Baker she was very scared. Appellant was "really mad." (33 RT 3115-3116.)

Fedor asked appellant's group several times to be quiet so she could sleep. A neighbor complained and Fedor told them again that the noise had to stop. They were using drugs and were angry when they found out they had used the same needle as Melanie, who had hepatitis. (30 RT 2580-2581.)

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6. Several hours before dark, San Diego County Sheriff Richard Bauman was dispatched to a Lakeside home to investigate the kidnaping of two or three children who were with appellant. Just before he walked up to the door, the call was canceled because the reporting party had her children back. (31 RT 2888-2890.)

7. Melanie and appellant had some "history." Appellant had been arrested, got out of jail unexpectedly and went to Melanie's residence, where she had left her things--only to find Melanie having a yard sale of appellant's possessions. (30 RT 2579-2580.)

When Fedor woke up on Sunday morning, they were all still there.[8] (30 RT 2582.)

Appellant treated Melanie like a slave: ordering her to wash dishes, clean the trailer, make breakfast and dress Fedor's children. (30 RT 2582.) Melanie was drying a knife and wanted to use it on appellant because was scared to death. She asked Fedor how she could get away. (30 RT 2585.) Melanie also kept saying she could not breathe, and eventually Sheryl Baker and TK went to a nearby store for medication and "911 was called." (30 RT 2587.) TK and appellant were upset about the 911 call and asked who made it. Fedor was blamed. (30 RT 2589.) Appellant and TK decided to have TK go outside the trailer, tell responding paramedics the call had been for him and that he was okay. (30 RT 2590.)

On June 26, 1988, Lona Agnew, a volunteer for Boulevard Fire and Rescue, was paged to trailer space 25 for a possible asthma attack. (31 RT 2706 (30-31).) She contacted a short white male ("Bob," also called George by some witnesses) and went inside where a woman who did not live there was painting her fingernails at the kitchen table. A taller long-haired white man (TK), said there was no problem. (31 RT 2710 (34-46).) TK told her what he and appellant had agreed he would say. (RT 5588.) Of the four people in the trailer, it was appellant who almost always told the others what to do or not do. (30 RT 2614-2615.)

Fedor was getting dressed to go visit her boyfriend at an honor camp near Julian and as Agnew was leaving, Fedor asked through the trailer window

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8. When Fedor woke up, there were two trucks at the trailer. (30 RT 2662.) She had called to see if the second truck had been reported stolen. (30 RT 2665.)

Fedor did not see what happened to the second truck but appellant and TK told her not to touch it and it disappeared about a day later. (30 RT 2662.)

if she had a bronchial inhaler for "her son." (30 RT 2588, 2591.) Agnew replied she would have to see the patient and Fedor said, "No," they just needed an inhaler. (31 RT 2714 (38-39).)

Agnew felt something was wrong and reported what had happened to her chief. The two of them returned to Fedor's trailer together and the tall man did most of the talking. He said no one needed medical assistance so they left and the chief canceled the ambulance that had been dispatched.[9] (31 RT 2714 (40), 2718 (42-45).)

Fedor called the child abuse hotline that morning because Melanie was supposed to take her two children to Child Protective Services for a visit with their father.[10] (30 RT 2590-2591.) Someone brought a wallet into the trailer. Appellant and Baker went through it and someone yelled, "this guy's name is Scott," and they wondered if he was a cop.[11] (30 RT 2593.)

The Murder On Sunday, June 26, 1988 At Fedor's Trailer and Other June Events

Fedor had taken drugs Sunday morning, but did not want to get "too wasted" since she was going to the honor camp and would speak to deputy sheriffs. (29 RT 2494-2495.) TK was going to Lakeside with Baker and Bob

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9. At 10:27 a.m. on June 26, 1988, San Diego Emergency Medical Services responded to a 911 call for a respiratory problem, but the call was canceled at 11:21 a.m. while they were en route. (31 RT 2701 (26), 2898 (23-25).)

10. Robert May (hereafter May), 28 years old at the time of trial (31 RT 2778 (105)), had married Irene Melanie May after she had had one child, and they had two children together (31 RT 2782 (107)). The oldest was 5 years old when Melanie was murdered. (31 RT 2813-2814.)

11. There was no context to this conversation. They could have been talking about Bob, whom they did not know well, but essentially the incident demonstrates fear of being caught.

and said they would drop off Fedor and her children at the camp and pick them up again, since Fedor's truck was not working properly. (30 RT 2591-2592, 2595-2596.) After getting into the truck, Fedor started to run back into the trailer for something she forgot and TK stopped her at the front door. Only Melanie and appellant were inside the trailer. TK said, "If I were you, don't go in there. Don't go in there." "They" did not let Fedor go in. (30 RT 2592.) The four of them drove off with Fedor's children, leaving appellant and Melanie alone at the trailer. (30 RT 2593.)

TK dropped off Fedor and the children at the honor camp, drove to Lakeside and left Baker to make a phone call. TK returned in a panic, honking the horn. He said they had to return to the trailer because something had happened. (33 RT 3123-3124.) On the drive back, TK told Baker to "go with the flow" and she felt he was trying to prepare her for something. (33 RT 3125.) Bob was in the yard when they returned and appellant was in the trailer. Baker and TK went inside and saw Melanie in the kitchen tied to a chair with a sheet over her head. Appellant said something had happened when they were gone and they were going to kill Melanie. (33 RT 3125-3126.)

Appellant and TK talked for about 15 minutes, then appellant told Baker they "were going to shoot her (Melanie) up with battery acid.[12/] Appellant said it would be really quick and easy and . . . be over with." (33 RT 3127.) Appellant took Baker to the bathroom where there were four or five syringes that appellant said were filled with battery acid. Appellant told Baker she had to be part of the killing because TK wanted to kill her. Baker had to help so that she would be guilty too, then appellant and TK would not have to kill her because she would not tell on them. (33 RT 3127-3128.)

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12. Fedor had all kinds of junk including car batteries around her trailer. (30 RT 2613-2614.)

Appellant demanded Baker actually say out loud that she would help with the killing. (33 RT 3128.) Appellant took the sheet off Melanie's head and told her she would be given a sedative to calm her down. (33 RT 3128-3129.) Appellant told Baker to inject Melanie, but Baker could not find a vein. Appellant "was getting very mad and very angry." Baker was shaking and could not hit a vein in Melanie's arm or behind Melanie's knee. Appellant took the syringe and tried it herself. (33 RT 3129.) Appellant put battery acid in the back of Melanie's leg, but Melanie did not die. Appellant said they would have to do something to end her suffering. She handed Baker a black cast iron frying pan and told her to hit Melanie. (33 RT 3130.) Baker hit Melanie on the head, and the pan broke, but there was no blood. (33 RT 3131.) Bob and TK were outside. TK came in and was angry because the women could "not handle anything." He called them "stupid bitches." (33 RT 3130, 3132.)

After TK and appellant talked, they decided to stab Melanie. TK prepared to stab her, and appellant said, "No, I want Sheryl's (Baker's) hand on it too." (33 RT 3132.) They stabbed her in the chest, and then Baker removed her hand by the time TK stabbed Melanie in the throat. (33 RT 3133.) Baker remembered a screwdriver being there, but, at trial, did not remember how it was used. (33 RT 3134.) She was scared to death she might be next and wanted to leave the place. (33 RT 3134.)

TK and Bob (George) wrapped Melanie's body in a rug they got from the trailer and put her in the back of Bob's (George's) truck. (33 RT 3134-3135.) Neither of them said where they were going, but appellant said they were getting rid of the body and would burn it. (33 RT 3136.)

Appellant told Baker to take a shower while she cleaned up the kitchen. (33 RT 3135.) After taking her shower, Baker collected some of the items that were used to kill Melanie, including a breaker bar, screwdriver and the pan.

Appellant started going through Fedor's things and made a mess. (33 RT 3136-3137.)

TK did not return to the honor camp to pick up Fedor at the end of visiting hours at 3:30 p.m., as they had arranged. Fedor and her children eventually hitch-hiked home. (30 RT 2595-2596.) When Fedor returned to her trailer, Sheryl Baker was on her hands and knees washing the kitchen floor with a bottle of Pert shampoo, and appellant was in Fedor's bedroom. (30 RT 2597.) Fedor noticed the furniture in her room had been rearranged. Her waterbed was up on its side like a bookshelf, her newly acquired lazy boy chair, a big pillow, some clothing, towels and all of the bedding were gone. Fedor asked appellant where all her things were. (30 RT 2598.)

Appellant said she'd been playing with a knife, cut herself and got blood all over the trailer so her friends took the things to wash them and also took Melanie back to Lakeside. Appellant asked for something to wear so she could shower. Fedor gave appellant some of her clothes to wear and did not see appellant's clothes.[13] (30 RT 2598-2599.) When Fedor took a trash can to the trailer park dumpster, she pulled out a pillow that was full of blood.[14] It was too much blood to come from playing with a knife. The pillow was dripping wet so Fedor asked herself what was happening. (30 RT 2600.) When Fedor asked Baker what was going on, Baker went inside the trailer to talk with appellant. Fedor heard appellant get mad at Baker. (30 RT 2601.)

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13. Baker did not see what appellant did with her clothes. Appellant put different clothes on and was "freaking out at TK for putting on the same pants after he took a shower" when he got back from disposing of the body. (33 RT 3138.)

14. The transcript references "towel," but the prosecutor asked where the "pillow" came from and Fedor responded it was from her bedroom and later added this was the last time "that I've seen the pillow." (30 RT 2600-2601.)

After appellant showered, Fedor noticed the bar of soap was full of blood. (30 RT 2601.) TK returned and talked with appellant. Baker and appellant got in the back of the truck and appellant yelled to Fedor that they were going to the store. (30 RT 2602-2603.) Once they left, Fedor looked around her trailer and tried to put things back in their place. Lifting a chair, she found a pocket knife and screwdriver under it. The screwdriver had blood, pieces of hair and part of a skull on it. (30 RT 2603-2604.) The chandelier over Fedor's bed had been cut off. The cord was still plugged in. The wire was peeled back and burned at the edge. Several extension cords were in the shape of an eight, like someone had been tied, hand and foot. (30 RT 2605-2607.) There was blood spatter inside Fedor's thermal, standup heater and on the kitchen paneling. (30 RT 2607.) Fedor called the sheriff. (30 RT 2608.)

Deputy Dave Wilson was in bed when he got Fedor's call, but he went to the trailer that night. (31 RT 2738 (65-66), 2746 (70).) As the only deputy for the rural area, he knew Fedor from previous occasions because she had reported five burglaries and her daughter had run away. (31 RT 2738 (62, 64).) Fedor told him what she saw and he thought it was one of her drug-induced stories.[15] (30 RT 2608-2609.) Fedor had put the screwdriver, knife and a bloody pillow in her truck but Deputy Wilson would not allow her to go outside to show them to him.[16] (30 RT 2609-2610.) Fedor had used

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15. Fedor was "very excited, wouldn't complete her sentences . . . very paranoid acting." (31 RT 2746 (71).) She reported a burglary with a trash can and chair slip cover taken. (31 RT 2750 (75-76).) She also said she found a blood-soaked pillow on her bed. He did not see anything on the bed and she did not show him any blood. Deputy Wilson looked under the trailer and on the bed of a truck with his flashlight and wrote Fedor off as a "crazy doper." He returned home and went back to bed. (31 RT 2776-2777.)

16. "Mikey" Hissom played a joke and took the screwdriver from Fedor's tailgate and put it in a freezer. (30 RT 2612.) The knife was also put in the refrigerator with the screwdriver as a "sick joke" and disappeared. (30

methamphetamine about 12 hours before Deputy Wilson came to her trailer. (30 RT 2641.) She forgot to mention the soap to him because the hair on the screwdriver was "the real big thing to me then." (30 RT 2643.) While she and the deputy were in her bedroom and Fedor was telling him her jewelry was missing, appellant called. Fedor was speaking with appellant, when TK suddenly took the phone and said, "What's that noise? The cop radio?" Fedor signaled to the deputy to turn his walkie-talkie down and he did so. Fedor told TK it was one of her kids playing with the radio. She also told TK she had been burglarized. "They" told Fedor "not to bother the blue truck, not to talk to anybody or tell anybody." (30 RT 2610-2611.) Deputy Wilson asked who called, but Fedor would not answer. She was again afraid. Fedor said she feared for her safety and that of a friend who had been at her trailer earlier. She was crying. (31 RT 2750-2751.)

When the deputy asked if Fedor wanted to file a burglary report, she said no because she had already gotten the telephone call from appellant telling her not to tell anybody. (30 RT 2644-2645.) Deputy Wilson said he would be back the next day but he never returned. (30 RT 2609, 2611.)

A couple of hours after Melanie and Baker had left Fisher's apartment, appellant came by and asked for Melanie's belongings. (33 RT 3228.) Appellant did not say why she wanted them. (33 RT 3229.) Fisher gave her a purse and some papers. (33 RT 3229.)

RT 2650.) The bar of soap and one of the extension cords that Fedor had stored when she moved was stolen. (30 RT 2651.) Only the heater remained. (30 RT 2663.)

Lacy's boyfriend, Patrick Wood, testified he later found the screwdriver in his freezer in a paper bag and threw it out. (32 RT 3043.) He surmised that the hair, blood and skin on it might have come from a deer they had killed and fried. (32 RT 3048-3049.)

Fedor drove to the house of her friend, Lacy Grote, after she had waited all morning for Deputy Wilson on Monday. (30 RT 2612.) Fedor told Grote, Grote's boyfriend (Patrick Wood), and Mikey Hissom about the screwdriver. Chris Dalton knew about the screwdriver too. It eventually disappeared and Fedor "freaked out." (30 RT 2612-2613.)

Jeanette Bench was at Grote's house when Fedor drove up, got out of her car "hysterical" and showed them a screwdriver. (32 RT 3019.) Bench thought it was a Phillips, about 12 inches long. (32 RT 3020.) There was something on the metal shaft of the screwdriver that looked like dried blood and skin. It appeared to have hair on it too. (32 RT 3020-3023.)

Fedor testified that she never saw Melanie again.[17] (30 RT 2615.) After this incident, Fedor got a dog because she was afraid to live by herself. (30 RT 2630.)

On a Sunday in June of 1988, (perhaps June 26), when picking up her son, Fred, Cathy Eckstein, saw ". . . red spots all over the place" in Fedor's trailer. (31 RT 2854 (183, 179-181).) The nickel- and dime-sized spots looked like dried blood. They were on the walls, floor, carpeting and some blankets

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17. At this point of her testimony, with no question pending, Fedor asked the judge: "Does she [appellant] have to stare at me the whole time?" The court advised her not to look at appellant. Fedor then stated, "Your Honor, she molested my kids." (30 RT 2615-2616.) The court responded that her comment was stricken and the court admonished the jury, "to the jury, if you heard her last comment, disregard it. It is stricken." (30 RT 2616.)

After the jury went on break, appellant requested a mistrial based on the remark. (30 RT 2616, 2620.) The judge denied the motion and instructed the witness not to volunteer information. She responded, "My kids are messed up in the head, they want her to be punished," but the sheriff's department had informed her that they could not prove the molestation. The judge observed that was the very reason she could not mention it in front of the jury. (30 RT 2621.)

in the bedroom. (31 RT 2847 (183).) Eckstein saw a bar of soap with teeth marks on it and an extension cord with two loops. (31 RT 2846 (183).)

Fred Eckstein was helping Fedor fix up her trailer. He saw blood spots in the living room in June of 1988 and extension cord tied up in a knot like something was bound in them. (31 RT 2870 (194-196).) Some of the stains were five inches wide and the edges were turning color. (31 RT 2878 (205).) A recliner that Fred had re-upholstered was not there and he never saw it again. (31 RT 2874 (197-198).) Fedor showed Fred a screwdriver, but he paid no attention to it. (31 RT 2870 (197).) Within "a couple of days," Fred replaced the living room carpet in the trailer because it "stunk" and was "real pungent," like fish that had been left out all day.[18/] (31 RT 2874 (198-199).)

On Monday, Fedor's 12-year-old daughter, Alishia, returned home to the trailer, saw trash everywhere, all the furniture had been moved, some of the carpet had been pulled up and the cord of a lamp in her mother's room had been cut, although it was still plugged in. (30 RT 2666-2671.) There was blood on the floors of the bedroom and the "pop-out" room. (30 RT 2671-2673.) On a truck, Alishia saw a big screwdriver that she believed was yellow, with blood and hair on it. (30 RT 2674.)

About three days later, Baker returned to Fisher's apartment hysterical and crying. (33 RT 3226.) Baker talked about a murder. (33 RT 3227.) She said the victim would not die and it took a long time. (33 RT 3228.) Baker was nervous and said she had to get "out of here" so Fisher suggested her mother

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18. The odor was in Fedor's bedroom too. At an earlier court proceeding Fred had described the old carpet as smelling like a dead cat. (RT 199.)

take Baker to the high desert.[19] (33 RT 3236.) Baker left, with Fisher's mother and others. (33 RT 3236-3237.)

After going to Yucca Valley overnight, Baker returned to San Diego the next morning. (33 RT 3239.) When Baker left Marsha Fisher's house, she left behind the birth certificates for Melanie's children. (33 RT 3239-3240.) Months later, May came looking for his wife and said he had gone several places hoping to find her so he could put her to rest. (33 RT 3240, 3242.) He said he heard Marsha might have some birth certificates, papers and clothing that might belong to his wife. (33 RT 3240.) Marsha showed him where she had thrown the papers out on her porch. He asked for them and she gave the papers to him. (33 RT 3241.)

After Sherri Fisher was interviewed by the police about this case, she saw appellant at Lindo Lake Park in Lakeside. Appellant told Fisher to say she did not know Melanie, Melanie never lived with her and she was never to say that name again. (33 RT 3230.) Later, Fisher met Robert May and knew that he tried to find his wife for a couple of years. (33 RT 3229-3230.)

Investigation And Events After June 1988

Irene Melanie May, her husband and three children had received Welfare aid from April 9, 1986 to June 30, 1987. The case was re-opened in October of 1987. Melanie filed her April 1988 report. The May children were reunited with the parents on April 19, 1988 and were removed again on June 10, 1988.[20]

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19. Fisher's mother (Marsha) who had heard "good speed" (meth) would cure her heroin habit, was at Sherri Fisher's apartment for a week or two in June, 1988. Marsha lived in Yucca Valley. (33 RT 3234-3235.)

20. Child Protective Services got information Melanie left home for three days. When social worker Tucker arrived at the trailer to remove the children, they were with a babysitter, and Robert May was hiding and appeared to her to be under the influence. (35 RT 3374, 3379-3382.) The children were

(31 RT 2822 (146).) Melanie was in court on June 15, 1988, but did not appear on June 30, 1988, and her attorney never saw her again, despite efforts to find her. (31 RT 2822 (148).) Melanie did not file her Welfare Department report for May, 1988[21/] and her case was closed in June because the Department lost contact with her. (31 RT 2890 (217-128, 220-221).)

On August 17, 1988, Fedor showed social worker Darlene Burns some dark spots on her rug that looked like blood to the social worker. (34 RT 3304-3305.) Burns called the sheriff. On her September 7 home call, Fedor gave Burns a knife and heater which the social worker took to the sheriffs' station.[22/] (34 RT 3306-3308.)

In September of 1988, after Fred had changed the living room rug, Fedor let police take samples and pieces of rug and padding from throughout the trailer. (30 RT 2651-2652; 31 RT 2874 (198).) They came back and took more samples in November of 1988. (30 RT 2653.) Fedor moved in early March of 1989 and left the trailer behind. (30 RT 2654.)

Robert May knew appellant for 10 years and had lived with appellant in Lakeside with his wife, Melanie. (31 RT 2786 (111-112).) After their children had been removed by the Department of Social Services for a second time in June of 1988, May and Melanie completed parenting classes hoping to get them back. (31 RT 2790 (118-119), 2794 (115-117).) He and Melanie argued on the street, however, and police took him to jail on June 17, 1988. Then, his wife

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dirty and smelly. (35 RT 3374.)

21. The May report was mailed to aid recipients at the end of that month to be returned between June 1 and June 10. (31 RT 2898 (222).)

22. In July 1988, Fedor said she wanted to know what had happened in her house and gave her heater with blood on it to her Child Protective Services worker. The worker said she would take it to the sheriff's office and told Fedor to concentrate on her children and stay out of it. (30 RT 2646.)

went missing. (31 RT 2786 (113), 2790 (114).) When May was released from jail, he began dating Phyllis Cross.[23] (31 RT 2791.)

Appellant made a passing comment that Melanie was dead. (31 RT 2850 (176-178).) Later, appellant said Melanie was in Riverside and she would take May and his girlfriend (Cross) to Melanie. She told them to meet her at a specified time and restaurant, but never showed up. (30 RT 2642 (48, 46, 169-170).) May tried to arrange another time to meet appellant. (31 RT 2846 (173).) At trial, May denied TK ever threatened him.[24] (31 RT 2804.)

When Patricia Collins lived in El Cajon, appellant had taken her to a garage sale at a Lakeside apartment complex where appellant was not allowed. Collins bought a dresser for appellant from Melanie, whom she had never met before. (33 RT 3205-3207.) A couple days later, appellant went to Collins' apartment, offering to sell her a black leather jacket. Appellant was scared, nervous and said she needed money and a place to stay. (33 RT 3208.) Appellant told Patricia Collins that Melanie was not dead, but had left with her "sancho." "Sanchos" are boyfriends women have while their husbands are locked up. (33 RT 3219).

A couple of months later, both appellant and Collins were in the San Diego County jail and Collins asked why appellant "did it." Appellant said

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23. Phyllis Cross never met or saw Melanie May. She met Robert May in mid-June, 1988, shortly after his wife was missing and they lived together almost three years. He was looking for his wife the entire time. (31 RT 2838 (162-165).) TK told May to stop looking for Melanie. (31 RT 2844.)

24. May knew TK and testified he saw him a few months before the trial in the yard of Donovan Prison, but TK never threatened him or pointed a gun at his head telling him to back off on this case or he would end up dead--nor did May tell anyone that had happened. (31 RT 2802 (128-129).) In his testimony, May denied looking for his wife or her body. (31 RT 2786 (113), 2790 (114).) He also denied giving the police documents he found in a friend's apartment after his wife's death. (31 RT 2798 (122), 2802 (127-128).)

Melanie was a rat and deserved to die. (33 RT 3209-3210.) Another time appellant visited Collins in jail and said if it looked like Collins would be blamed for Melanie's murder, appellant would turn herself in. On a third occasion, appellant was mad at TK for taking credit for killing someone that he did not kill. Appellant also said she did not want to get caught but did not think there would be a case because there was no body. (33 RT 3211-3212.) Collins contacted the police and called Sheryl Baker two or three times in taped conversations. (33 RT 3213.) She knew Baker and appellant about nine years. (33 RT 3205.)

Attorney Kandy Koliver represented Irene Melanie May in juvenile court from June of 1987 until her whereabouts were unknown in 1988. Melanie's three children were Jeremy, who was born February 11, 1987; Robert, who was born October 15, 1985; and Jillian, who was born March 1, 1983. (31 RT 2810 (137), 2814 (139).) Melanie May did everything that she was told to do to try to get her children back because "her children seem to be first and primary in her life, the most important people in her life." (31 RT 2822 (147-149).) Melanie was always present for her home visits, office appointments and court appearances (31 RT 2822 (149-150), 2814 (140-141), 2818 (143-145)) and the attorney saw no indication of drug usage during their meetings (31 RT 2826). Melanie missed the hearing that had been set for June 30, 1988. (31 RT 2816-2818.)

Using Luminol, a lab technician took photos in the trailer on August 12, 1991. (32 RT 2933-2934, 3938.) The living room and master bedroom immediately reacted "very bright" to the spray. (32 RT 2942.) Because it became dark, he secured the trailer and returned on August 24, 1991 to collect evidence. The technician cut stains out of the rug for analysis. (32 RT 2944-2945.) Blood was collected from the south wall and ceiling of the living room

and a green lamp. (32 RT 2949-2951.) Luminol also indicated blood smears toward the baseboards of the living room and bedroom. (32 RT 2951-2952.)

No tests can date the age of a blood stain. (32 RT 2964, 3000.) Literature indicated Luminol will react with 10-year-old stains. (32 RT 2963.) The trailer had been occupied between 1988 and 1991, but even in fresh crime scenes, evidence is often disturbed by efforts to save the victim. (32 RT 2955, 2967.) It was not possible to do DNA-PCR analysis because of the age and amount of blood collected. (32 RT 2976.) A serologist ran species origin test of the stains but was unable to determine species or sex of the donor. (32 RT 3002.) Some of the six stains were type O blood and others were type A. (32 RT 2998.) Appellant is blood type O, and the victim had A-type blood. It was also stipulated that Baker was O and T.K. Thomson was A. (32 RT 2930-2931.)

In 1992 (32 RT 3058), appellant told Laurie Carlyle that Pat Collins and Sheryl Baker could cause appellant problems because she, her ex-boyfriend (TK) and "John Boy"[25/] had murdered Melanie May in Live Oak Springs (32 RT 3055-3056; 33 RT 3089). Carlyle did not know where Live Oak Springs was. (32 RT 3055.) Appellant also said they used "battery acid" and the body was at the bottom of a well in an Indian Reservation somewhere. Carlyle reported all this information to authorities and never sought anything in return. (32 RT 3064-3065.)

In 1992, appellant "came at" Jeanette Bench, who had seen the screwdriver with the hair, skin and dried blood on it--but a Deputy stopped her.[26/] (32 RT 3030.) Without saying anything appellant walked by Bench's

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25. Sheryl Baker was known as "John Boy." (33 RT 3089.)

26. Appellant and Bench were both in jail awaiting trial. Bench told detective Cooksey appellant said Bench was a "dead woman" who did not know anything about the case. (35 RT 3406.) She also told the detective May

window and spat on it in November 1993. (32 RT 3029-3030.) In December, 1994, appellant called Jeanette Bench a "lying bitch" and said "I ought to have you killed" or "I ought to kill you." (32 RT 3027-3028.) Bench was scared. She reported the incident to authorities at the jail and was moved. (32 RT 3028.)

On March 4, 1992, Detective Cooksey interviewed Sheryl Baker on video which was played for the jury. (37 RT 3603-3606; transcript is Peo. No. 37A.) Among other things, Baker said Melanie begged, "please don't kill me. I'm sorry" and that she made noises after Baker hit her on the head with the pan.[27] (8 CT 1558.) What bothered Baker the most was that she "didn't know it was going to happen, and I feel like I took her there, you know." (8 CT 1530.)

A former cellmate of TK testified that in August, 1992 (32 RT 3064-3065), TK said he "tortured the hell out of . . . Melanie in a small trailer in Live Oak Springs in June of 1988 while Melanie's husband was in custody (32 RT 3073-3074, 3078-3079). He mentioned a screwdriver, knife and heavy kitchen skillet and said "he was really into violence." (32 RT 3074, 3078.) TK said he used an electric cord to give Melanie "shock treatment," gave her a "hot shot," and when "he got tired of it," stabbed her. (32 RT 3078.) He said he cut the body in pieces and deposited it on an Indian Reservation to be safe, because he felt it would be harder to get a search warrant. (32 RT 3076-3078.)

In October of 1992, Judy Brakewood, who had known appellant and TK when they were living together in Lakeside, California, read a newspaper article

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said he had been threatened by TK. (35 RT 3404.)

27. The defense responded by asking Baker's July 5, 1994 interview be played wherein she said she thought Melanie was dead when she and TK returned to the trailer. Baker also claimed to faint at the sign of blood and denied cleaning up any blood. (37 RT 3596-3598; 20 CT 4148-49, 4154, Exh. K1.)

about this case and contacted Detective Cooksey.[28] (33 RT 3251-3252, 3257.) She reported that Steve "Streaker" Nottoli had called her around midnight in May or June, 1988, for drugs. She drove to a 7-11 market in Spring Valley to meet him. He was in the driver's seat of a dark green van with a "girl" that Brakewood did not know. (33 RT 3252-3253, 3262, 3269.) The van had only one driver's and one passenger's seat, so she sat in the back with the girl. Appellant returned to the van and sat in the passenger seat. (33 RT 3254-3255.) Nottoli said they had shot up a girl with battery acid and burned her. (33 RT 3255.) Coming in at the tail end of the conversation, appellant was exuberant and excited. She said, "Yep, we really fucked that girl up." (33 RT 3255.) At the time, Brakewood did not know anyone had been killed or who they were talking about.[29] (33 RT 3268.) After the conversation, they all injected drugs. (33 RT 3273.) Brakewood was a legal secretary running the office of an El Cajon attorney at the time of this conversation. (33 RT 3270, 3274-3275.) Although she had dated Nottoli in 1987, when she testified in 1994, Brakewood had probably not seen him since 1988. (33 RT 3259-3260, 3275.)

During the 1994 trial, an investigator ran a complete computer records check for current information on Melanie, using various combinations of her maiden and married names, social security number and her February 8, 1965, date of birth. (31 RT 2910 (225-237).) It showed that Melanie had been arrested in San Diego on June 6, 1988. (31 RT 2927.) After that, there were no contacts in the 50 states or Puerto Rico. (31 RT 2914 (238).) The system has no capacity to search Mexico or Canada. (31 RT 2914 (240-241).) The

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28. A *Union-Tribune* article which appeared on October 28, 1992, mentioned battery acid and that was familiar to Brakewood. (33 RT 3257-3258, 3252.)

29. Nottoli had said something about the location of the body, but that was before appellant was present. (33 RT 3257.)

nationwide search showed no contacts with Melanie through the day before the investigator's testimony. (32 RT 2927-2928.)

Dr. Brian Blackborne, a physician since 1962, headed the department that investigated all violent and unexplained deaths in San Diego County. As a board certified pathologist, his expertise is in diagnosis, rather than treatment of disease. (34 RT 3283-3284.) Although he had personally autopsied 4,500 people, Melanie's body was never found to be presented to him. (34 RT 3285.) He testified as a pain expert.

A person senses pain through nerve endings, especially on the skin. Little nerves go up the spinal cord to the brain, and the brain actually appreciates the pain. Receptors in the skin first pick up the pain, pressure, intense heat or cutting sensation. (34 RT 3286.) From his education and personal experience, Dr Blackbourne testified that all corrosive acids produce coagulation or death of the tissue or the local cells. Having autopsied both people who had ingested acid and people who had acid splashed in their face, the doctor testified that battery acid is a corrosive, sulfuric acid which actually kills cells it reaches. He was also familiar with the literature on acid and the damage it can cause to eyes, (34 RT 3287.) "Strong acid, like battery acid," begins to burn immediately upon contact. (34 RT 3287-3288.)

If battery acid were injected into a vein, there would be a burning sensation, then the small muscles would hurt or sting, then the veins would take the acid into the blood stream and the larger muscles would feel pain. (34 RT 3288-3289.) An injection of battery acid on its own, would not be lethal unless enough acid got into the blood stream to affect the acid-base balance of the whole body. (34 RT 3290.) However, the acid would kill the muscle tissue and immediate area around it, and it would continue to burn as it went up the veins. (34 RT 3289-3290.) It would cause "Charlie-horse type of pain," that would be treated in a hospital with a pain-killer such as morphine. (34 RT 3290.)

Muscle damage would be apparent if an incision were made into the muscle. (34 RT 3290.)

Normal household electrical current is 110. (34 RT 3293.) Even 110 volts would cause a burn if sustained for minutes. (Voltage over 110 will produce burns with instant contact.) (34 RT 3292.) Dr. Blackburn had autopsied about 25 people who died of electrical injuries. If electricity goes from the finger to the elbow, it would just cause burns at those two locations, but if it proceeded to the heart or brain, it would cause death. (34 RT 3291.) Electrical pain would be immediate, and a person might scream; then, secondary to shock, the person would lose consciousness. (34 RT 3293.) Loss of consciousness can also be caused by an injury to the head or lack of oxygen to the brain from traumatic injury such as a gunshot, stab wound or severe blow to the head. (34 RT 3298.) The brain just shuts down, so it does not perceive pain or cold. The person is unconscious. (34 RT 3297-3298.)

If a person was subjected to both battery acid and electricity, each would be an "additive . . . one source of pain on top of another source of pain." (34 RT 3293-3294.)

People may die of asthma attacks, hepatitis or methamphetamine overdose. (34 RT 3297.) The doctor is denied the opportunity to find the cause of death when he does not have a body to autopsy. (34 RT 3297.) If an external examination revealed redness, swelling, a burn or needle puncture mark, a pathologist would open up the skin to see if there was damage to the vein or muscle. An injection of one cc. battery acid would have predominantly local effects, but would cause pain.[30/] (34 RT 3294-3295.)

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30. Drug addicts generally use a 1 cc. or 10 cc. combination syringe. (34 RT 3288.)

Defense

Criminalists did not find blood on September 14 or November 16, 1988 when they examined the trailer. (36 RT 3523, 3442.) Between 1988 and 1991 when Luminol exposed blood in the trailer, Fedor moved out and another family (Vanderhoffs) lived there. Then in-laws of another family (Carter) and finally the owner's son. Law enforcement had the son move out so they could run tests inside the trailer. (35 RT 3481-3482.) The owner did not know when Fedor or the other families moved in or out.[31/] (35 RT 3485.)

In September 1991, Fedor said she was not sure she had actually seen a screwdriver. (38 RT 3653.)

Nottoli, who was in custody at the time of this trial and had eight to ten felony convictions, testified he did not see Brakewood after they returned from a trip to the East Coast, just before Christmas in 1987. (37 RT 3627-3630.) He was known as "Streaker," but had a white van. (37 RT 3637.) Nottoli never used methamphetamine in a green van with appellant, Brakewood and another woman, never said he shot up a girl with battery acid or burned her, and never heard appellant say, "We really fucked her up." (37 RT 3630-3631.) He admitted having a physical relationship with appellant once or twice in 1987 or 1988. (37 RT 3632.)

Appellant's friend, Pamela Aitcheson, used drugs intravenously until 1991 and had two felony convictions. (37 RT 3615-3616, 3624, 3626.) She knew Pat Collins to have a bad reputation for honesty. (37 RT 3621.)

A psychologist treating chemically dependent people testified intravenous methamphetamine users may experience psychosis and paranoia. They may smell or taste blood that is not there, hear voices or misinterpret the

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31. Earlier testimony by Fred Eckstein indicated that all kinds of people came to the trailer and that Fedor provided him with methamphetamine. (31 RT 2877.)

actions of others. (36 RT 3550-3555.) Methamphetamine could trigger a severe asthma attack in users who have asthma, resulting in death. (36 RT 3560.) The psychologist had no experience with asthmatic methamphetamine users who were injected with battery acid or exposed to electricity. (36 RT 3565-3566.) Some of his methamphetamine-using patients continued to work in any job you could think of, including as attorneys and insurance agents. (36 RT 3567-3568.)

PENALTY PHASE FACTS

In October or November 1994, Dawn Crawford, who was in the cell next door to appellant, heard appellant talking to Terry Carbeaugh. (43 RT 4084-4086.) While laughing, appellant said she was fighting the death penalty for the murder of "the bitch who owed her $80.00." Appellant also said she committed the murder with a woman named "John Boy." (43 RT 4089, 4086-4087.) Appellant added, although she did drugs herself, hearing the victim scream was the greatest high she has ever had. (43 RT 4087-4088.)

On September 13, 1993, Pamela Johnson was in a holding cell at Las Colinas talking with another inmate. Despite a "keep separate order," appellant told the other inmates to leave because she needed to speak with Johnson. (43 RT 4106-4108.) Appellant called Johnson "a snitch" and said if she snitched on appellant, Johnson would "pay for it" whether she was in jail or out. If Johnson "snitched" on appellant, she "would die." Appellant also asked Johnson how it felt to have a junkie son. Johnson pushed away from the table and stood up. Appellant also stood up, told Johnson that she could not get away from appellant and elbowed Johnson in the ribs leaving bruises. (43 RT 4108-4110.) Appellant said Johnson was going to die and asked if Johnson had heard from her husband or son. She had not heard from them for quite a while at that time. (43 RT 4110.) A deputy broke them apart. (43 RT 4109.)

Cynthia Johnson's mother was dying of cancer and had been on morphine for five years. (43 RT 4122-4125, 4127.) At about 11:30 a.m. on February 3, 1992, after being up all night with her mother, Johnson saw a guy wearing a goalie mask and appellant in a ski mask at her residence in Jamul, California. (43 RT 4124-4126, 4133.) The man called Johnson "Cindy," told her not to struggle because he did not want to hurt her, but repeatedly hit her on the head with a flashlight, causing a concussion. (43 RT 4126-4128.) She still got headaches in 1995, the time of trial. (43 RT 4136.) Johnson did not recognize the two people or their voices. (43 RT 4126.)

Appellant went through Johnson's purse. (43 RT 4128.) The two intruders took morphine, jewelry and $240 to $280 in cash. (43 RT 4135.) When the man tried to remove jewelry that Johnson was wearing, she bit him. (43 RT 4131.) Appellant ran out, the man followed and Johnson ran after them. (43 RT 4132-4133.) She saw appellant get in the driver seat of a car, wrote down the car license plate's number and called 911. (43 RT 4133.)

Penalty Defense

Teresa Carbeaugh denied ever having a conversation with appellant about tying someone up, killing and mutilating them and said that Crawford, in the cell next door, had a reputation as a liar. (43 RT 4172 (8); 44 RT 4176 (10).) Furthermore, the intercom box in the cells was used for police to contact the prisoners, not for conversations between prisoners. (44 RT 4176 (11-23).) Carbeaugh also testified appellant was very religiously dedicated, caring and sensitive. Appellant taught Carbeaugh not to judge people and was "very inspirational and . . . Crawford lies . . . ." (44 RT 4176 (11).) Appellant was not the type of person who would hit anyone in custody or threaten them. (44 RT 4180 (17).) Furthermore she was sensitive toward Crawford and "kept me [Carbeaugh] from whipping her [Crawford's] ass." (44 RT 4184 (19).)

Carbeaugh roomed with appellant only three or four weeks. (44 RT 4180 (14-15).)

Gwyndolyn Coleman, testified appellant never talked to her about her case. Appellant is a compassionate person who gave things to prisoners who did not have canteen money. (44 RT 4196 (32).) She is also in religious studies and very committed to those. (44 RT 4200 (34).) Coleman also testified Crawford had a reputation as "deceitful, evil and a liar." (44 RT 4196 (31).) She knew Crawford for 30 to 45 days. (44 RT 4196.)

An apartment manager and a woman who knew Crawford for three and a half months to 16 months, opined Crawford was a liar and manipulator. (44 RT 4228 (65), 4232 (66-67), 4236 (69-70).) A prisoner who used five different names and four separate birthdays to conceal her identity knew Crawford 60 days and thought she was a habitual liar. (44 RT 4224 (58-61), 4212 (46-47).)

In September 1992, Cameo Brooks was in a prison visiting room with appellant and Johnson. Johnson became hysterical and the deputies removed her. Appellant never threatened Johnson. (44 RT 4240 (70), 4243 (78-79), 4252 (86).) Based on what Brooks saw, Johnson would not have had a bruise similar to the one in the photograph Brooks was shown at trial. (44 RT 4256 (90-91).)

A volunteer chaplain and a volunteer Bible Studies teacher saw positive changes in appellant from 1992 until the time of trial and believed she should not be executed. The chaplain saw appellant grow "into a beautiful Christian woman." (44 RT 4260 (94-96), 4272 (108-110).)

A prisoner testified "you could hear voices in the cell next to you . . ." through the wall, but cannot hear what is said. The boxes on the wall were for emergencies. (44 RT 4284 (119-120).) Marion Pasas and Allan Cotton experimented while standing in adjoining cells. She could not hear when he spoke "in a conversational tone." (44 RT 4300; 45 RT 4375 (134, 137).)

When Pasas put her ear right next to the vent she heard muffled voices "except for one woman who was yelling, shouting." (44 RT 4300 (135).)

Appellant's sister, brother, father and mother asked the jury to spare appellant's life. The father admitted to being a drunk and not paying much attention to appellant. The sister, mother and brother were religious people. The mother and sister were raising some of appellant's five children. (44 RT 4320 (155-156), 4340 (176-177), 4348 (184-185); 45 RT 4385-4390.) The mother had not started visiting appellant until October or November of 1994 because appellant was a different person when she had been under the influence of drugs. (45 RT 4391.)

A Bible Studies teacher who had known appellant for 15 months felt that she would have a useful purpose as a prison minister if the jury spared her life. (45 RT 4366-4368.)

Rebuttal

In 1987, appellant's probation officer asked appellant for a written statement for sentencing. Appellant denied having a drug or alcohol problem and said on the day she was arrested she had decided not to attend Narcotics Anonymous meetings. (45 RT 4427-4420.) The probation officer arranged for appellant to enter a Christian drug program which appellant began on March 7, 1987. (45 RT 4429-4432.) It was stipulated that between December 1992 and January 14, 1995, appellant had 12 disciplinary actions in custody with no new criminal charges being filed against her. (45 RT 4434.)

A District Attorney's investigator and Officer Cooksey tested their ability to hear each other between the two cells previously occupied by appellant and Dawn Crawford. They removed speakers from the walls of Rooms 268 and 269 to see how they were mounted. They could hear each other with "no problem at all." (45 RT 4449, 4435-4436.) They repeated the tests with a tape recorder which they played for the jury. (45 RT 4450, 4456.)

Officer Cooksey testified "you can hear better with your ear than with this tape." (45 RT 4450.)

Dawn Crawford had not referred to speaker boxes when she told detective Cooksey about the conversation she had overheard. She said she had heard the conversation through the vent. (45 RT 4457.)

Attorney Athena Schudde was in a pre-trial hearing involving appellant on October 1, 1993. (45 RT 4465-4466.) Appellant spit at her client (TK), but the attorney could not recall at the time of trial, if TK was struck by the spittle. (45 RT 4466-4467.)

GUILT PHASE ARGUMENTS

I.

THE COURT DID NOT VIOLATE APPELLANT'S RIGHT OF CONFRONTATION BY ALLOWING THE PROSECUTION TO INTRODUCE MARK TOMPKINS' REDACTED STATEMENTS THROUGH HIS CELL-MATE

Appellant contends her conviction and death judgment must be reversed because the court allowed the hearsay statements of Mark Tompkins to be introduced through the testimony of "jailhouse informant, Donald McNeely," which denied her the right to confront the witnesses against her.[32/] (AOB 42-

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32. Donald McNeely, a cell-mate of Mark Tompkins, testified that Tompkins talked about the murder of Melanie May in a trailer (see statement of facts, above), and claimed "we [the jury heard "I"] tortured the hell out of that bitch." (32 RT 3074.)

Tompkins refused to testify and it was stipulated that if called he would take the Fifth Amendment. (32 RT 3070.) A criminal defendant cannot be called as a witness against himself or herself. (U.S. Const., Fifth Amendment.) California also provides a witness a constitutional and statutory right not be called as a witness against himself or herself in a criminal case. (Cal. Const., art. I, § 15; *In re Scott* (2003) 29 Cal.4th 783, 815.)

93; *Crawford v. Washington* (2004) 541 US 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].) The statements were properly admitted as statements against penal interest (Evid. Code, § 1230) and were redacted by substituting "I" for the word "we" to prevent prejudice. Further, McNeely was not an agent of law enforcement at the time of the conversation with TK, but initiated contact with police through his own attorney. The statements of one prisoner to another are not testimonial; thus they can be admitted under any hearsay exception without violating confrontation rights. Finally, McNeely obtained no benefit whatsoever for his report or his testimony.

A. The Trial Court Did Not Violate The Constitution Or Abuse Its Descretion By Allowing The Cellmate's Testimony About TK's Nontestimonial Statements Against Penal Interest

McNeely was not a government agent and his testimony was used by the prosecutor to establish Melanie's death by criminal means. *Crawford* does not apply for two reasons: there was no government action and the statements were not testimonial.

The confrontation clause of the Sixth Amendment guarantees the right of a criminal defendant to be confronted with the witnesses against him at trial. (*Pointer v. Texas* (1965) 380 U.S. 400, 406 [85 S.Ct. 1065, 13 L.Ed.2d 923]); *Ohio v. Roberts* (1980) 448 U.S. 56, 62-63 [100 S.Ct. 2531, 65 L.Ed.2d 597].) It is the function of cross-examination to test truth, place the witnesses' statements in context, and give the fact finder a chance to observe the demeanor of the witness. (*Pointer v. Texas, supra,* 380 U.S. at p. 404; *Douglas v. State of Ala.* (1965) 380 U.S. 415 [85 S.Ct. 1074, 13 L.Ed.2d 934].)

Under Evidence Code section 240, a witness is unavailable to testify if he or she is exempted or precluded on the ground of privilege. (Evid. Code, § 240, subd. (a)(1).) As such, when a witness invokes his or her Fifth Amendment right not to testify, the witness is unavailable under Evidence Code section 240, subdivision (a)(1). (*People v. Duarte* (2000) 24 Cal.4th 603, 609.)

At the same time, evidence admitted under hearsay exceptions generally does not deny confrontation. For example, Evidence Code section 1230 provides, in relevant part:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

Until recently, a trial court's decision as to whether a statement was against penal interest for purposes of Evidence Code section 1230 was reviewed for abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153.) To qualify for the Evidence Code section 1230 exception to the hearsay rule, the proponent of the evidence was required to show that the declarant was unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*Id.* at p. 153; citing *People v. Duarte, supra*, 24 Cal.4th at pp. 610-611; *People v. Lucas* (1995) 12 Cal.4th 415, 462.) A court could not find a declarant's statement sufficiently reliable solely because it incorporated an admission of criminal culpability. (*Lawley*, at p. 153; citing *Duarte,* at p. 611.)

On March 8, 2004, nearly nine years after appellant's trial, the United States Supreme Court decided *Crawford v. Washington, supra*, 124 S.Ct. 1354 at page 1357. In *Crawford*, the petitioner was charged with assault and attempted murder for stabbing a man who allegedly tried to rape his wife. (*Crawford v. Washington*, at p. 1357.) The petitioner and his wife were taken into custody, given Miranda warnings (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct 1602, 16 L.Ed.2d 694), and interrogated (*Ibid*). The wife's story, while generally corroborating the petitioner's, differed with respect to whether the victim had drawn a weapon before petitioner assaulted him. (*Ibid.*)

At trial, the petitioner claimed self-defense and his wife did not testify based on the State of Washington's marital privilege. (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1357.) To refute petitioner's self-defense claim, the prosecution sought to introduce the wife's tape-recorded statement to the police under the statement against penal interest exception to the hearsay rule. (*Id.* at p. 1358.) Over petitioner's Sixth Amendment Confrontation Clause objection, the trial court found, under *Ohio v. Roberts, supra,* 448 U.S. 56, that the statement bore "particularized guarantees of trustworthiness," and admitted the taped statement. (*Crawford v. Washington*, at p. 1358.)

The United States Supreme Court held that the admission of the wife's taped statement violated the Confrontation Clause. (*Crawford v. Washington, supra*, 124 S.Ct. at pp. 1359, 1374.) The Court overruled *Ohio v. Roberts, supra,* 448 U.S. 56, which held that an unavailable witness's hearsay statement may be admitted as long as it has adequate indicia of reliability, i.e., falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." (*Id.* at p. 66.) Crawford concluded that *Ohio v. Roberts* was inconsistent with the original, historical meaning of the Confrontation Clause, which was concerned primarily with testimonial hearsay statements. (*Crawford v. Washington,* at p. 1369.) Although the Court declined to formally define "testimonial," it stated that the Confrontation Clause applies to statements by "'witnesses' against the accused -- in other words, those who 'bear testimony.'" (*Id.* at p. 1364.) The Court cited prior testimony at a preliminary hearing, before a grand jury, or at a former trial, as well as statements made during police interrogations, as examples of testimonial statements. (*Ibid.*) The Court held that testimonial hearsay statements of unavailable-to-testify-witnesses are admissible only when the defendant had the opportunity to cross-examine. (*Id.* at pp. 1365, 1369, 1374.) If the declarant is available and testifies at trial, the statement is also admissible. (*Id.* at p. 1369, fn. 9.)

Here, appellant never had the opportunity to cross-examine her crime partner about his jailhouse statements, so, in view of *Crawford*, the issue becomes: Were the statements testimonial? Appellant correctly observes that her trial was severed from those of Baker and TK because incriminating statements made by them were not necessarily admissible against her. (AOB 44; 2 CT 285; 6 RT 694-695.) Nevertheless, TK's statements to his cell-mate were properly admitted at her trial because they were statements against penal interest and they were not testimonial.

TK talked about this crime to his jail cellmate and the statements were admitted in this trial as statements against penal interest, a longstanding exception to the hearsay rule whose trustworthiness was established by the fact that the witness got no benefit for his testimony. There is no allegation that McNeely was acting on behalf of the prosecution or police. He reported TK's statements to his attorney and then the prosecution.

Statements are testimonial when "the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) __ U.S. __ [126 S. Ct. 2266, 2273-2274, 165 L.Ed.2d 224].) In *Davis*, the high court determined that the inquires of a police operator in the course of a 911 call are an interrogation because the operators are at least agents of law enforcement. The speaker in *Davis* was relating events as they were actually happening to enable police assistance to meet an ongoing emergency. Thus, the statement was not testimonial. (*Id.* at pp. 2276-2277.) By contrast, interrogation by police officers resulting in testimonial hearsay is "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." (*Id.* at p. 2276.) Clearly, therefore, the statements TK made to a fellow prisoner are not testimonial within the meaning of *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856, 166 L.Ed.2d

856]. There was no police interrogation, and McNeely was not a police agent. In short, there was no state action.

Writing the opinion of the court, Justice Scalia pointed out that even under the earlier reasoning of *Ohio v. Roberts, supra*, 448 U.S. 56, confrontation was dispensed with only when "the statements at issue were clearly nontestimonial." In the examples that follow, the "clearly nontestimonial" list he cites *Dutton v. Evans* (1970) 400 U.S. 74, 87-89 [91 S.Ct. 210, 27 L.Ed.2d 213], a plurality opinion regarding statements from one prisoner to another. (*Davis v. Washington, supra*, 126 S. Ct. at p. 2275.) In other words, McNeely's testimony was properly admitted without affecting appellant's constitutional right of cross-examination.

Statements to third parties are not testimonial for purposes of the right of confrontation. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 169-217.) Like appellant, Cervantes contended that testimony about his codefendant's statements to a neighbor violated his right of confrontation and cross-examination, and was also inherently untrustworthy because the codefendant attempted to understate his own culpability and overstate that of Cervantes and the other defendant. All of the contentions were resolved against him. (*People v. Cervantes, supra,* at pp. 170-177; see also *Horton v. Allen* (1st Cir. 2004) 370 F.3d 75, 84, cert. den., (2005) 543 U.S. 1093 [125 S.Ct. 971, 160 L.Ed.2d 905]; (Private conversation with another person); *People v. Rincon* (2005) 129 Cal.App.4th 738.) Statements are not considered "testimonial" when made to a civilian unconnected to law enforcement, and under circumstances where the declarant could not reasonably anticipate they would be used in court.

The *Rincon* court held that spontaneous statements of a victim wounded in a gang-related gunfight, made to a former gang member and later related to a police officer, were not testimonial and thus their admission in the murder and attempted murder prosecution, did not violate the Confrontation Clause. The

Rincon victim made statements to a civilian in the immediate aftermath of the shooting, and could not reasonably have anticipated that his fellow gang member would relate the statements to law enforcement or that the statements would be used in court. Therefore, the statements were not testimonial under *Crawford* and the use of those statements against the defendant at trial did not violate the Sixth Amendment. (*People v. Rincon, supra*, 129 Cal.App.4th at p. 858; see also *People v. Corella* (2004) 122 Cal.App.4th 461, 468-469 [statements made to 911 operator and responding officer not "testimonial"].)

In *State v. Castilla* (Wash.App. Div. 1, 2004) 131 Wash.App. 7, 87 P.3d 1211, the court held that statements by the declarant to a nurse concerning a sexual assault were not testimonial as they were not elicited by a government official and were not given with an eye toward trial. In *Castilla*, the victim, who suffered from substantial mental impairments, was sexually assaulted while a patient in a rehabilitation center. The victim later told a nurse that she had been sexually assaulted and gave a description of the assailant. A sexual assault examination was performed. The victim did not testify at trial due to her deteriorating mental condition. But the statements made by the victim to the nurse concerning the sexual assault were admitted under a hearsay exception for statements made for purposes of obtaining medical treatment. The court rejected the defendant's argument that the victim's statements to the nurse violated his confrontation rights. Specifically, the court held that the statements were not testimonial: "They were not elicited by a government official and were not given with an eye toward trial." (*Id.* at p. 1214.)

As noted, *Crawford* does not formally define "testimonial." (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1374, fn. 10.) However, *Crawford* cites solemn declarations or affirmations made in response to structured questioning by a law enforcement officer for the purpose of establishing or proving some

fact in a criminal case or investigation as a concrete examples of testimonial evidence. (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1364.)

McNeely, TK's cell-mate, acted entirely on his own. While TK risked that McNeely might report the statements to the police, TK had no reason to lie to McNeely or any expectation that his statements would be used in court. Consequently, none of the statements TK made to his cell-mate were testimonial.

Further, two cases alleging Sixth Amendment violation under *Massiah* involve determining whether an informant was acting as a government agent. (*Massiah v. U.S.* (1964) 377 U.S. 201, 206 [84 S.Ct. 1199, 12 L.Ed.2d 246].) In *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, a jailhouse informant testified that she met the defendant when both were in custody at the San Bernardino County jail. The informant was in custody for a parole violation; defendant was in custody for several murders. The defendant discussed details about two of her crimes. The defendant also told the informant that killing one of the victims made her feel "really good." (*Id.* at p. 26.) The defendant moved to exclude the informant's testimony, claiming *Massiah* error. At a hearing on the defendant's motion, a deputy sheriff who worked at the jail testified she was aware that the informant pretended to be a "fortuneteller" in order to obtain information from fellow inmates which she would then pass on to law enforcement. The informant's parole officer testified that the informant had since been released from prison, did not ask for a deal in return for testimony against the defendant, and no deal was offered. The informant testified that she talked to defendant about her case because two of the informant's friends had been murdered and she wondered if the defendant was involved. She also testified that she had given information to law enforcement agencies in other cases in return for benefits, but was not promised, and did not receive, a benefit for information about the defendant's case. The trial court denied the motion

to exclude the informant's testimony. (*People v. Coffman & Marlow, supra*, 34 Cal.4th at pp. 67-68.)

On her automatic appeal from a judgment imposing the death penalty, the defendant contended that because the informant was a known informant, it could be inferred from the fact she was housed near the defendant that she was acting as an agent of the police. This Court rejected the contention. The Supreme Court stated that given the testimony before the trial court that the informant acted on her own initiative, that the authorities did not encourage her to supply information on the defendant's case or promise her a benefit, nor was she given a benefit, the trial court reasonably concluded that admission of her testimony did not violate the defendant's Sixth Amendment rights. (*People v. Coffman & Marlow, supra,* 1 Cal.4th at p. 68.)

Similarly, in *People v. Williams* (1997) 16 Cal.4th 153, this Court denied the defendant's *Massiah* claim when the informant initiated contact with law enforcement by telephoning a detective, was neither promised nor expected any benefit in return for the statements, and there was no evidence the informant was placed in a cell near defendant to obtain information. (*Id.* at pp. 204-205.) This Court found that the fact the informant spoke to prosecutors more than once about the defendant, and ultimately obtained a benefit, did not render him an "agent" of law enforcement. (*Ibid.*) Furthermore, the Supreme Court stated, the informant did not actively question the defendant about his case. Thus, even if the informant did have a pre-existing arrangement with law enforcement, "he acted as a mere governmental listening post, which, according to *Kuhlmann v. Wilson* (1986) 477 U.S. 436 [106 S.Ct. 2616, 91 L.Ed.2d 364] raises no Sixth Amendment concern [citation]." (*People v. Williams, supra,* 16 Cal.4th at p. 205.)

While McNeely was charged with 8 burglaries and TK was charged with this case, they shared a cell in the San Diego County jail for 3 months. (32 RT

3073-3074.) TK talked about Melanie's murder and McNeely reported the statements to his own attorney and then had a tape recorded interview with Detective Cooksey, the lead investigator on this case. (32 RT 3076-3077.) McNeely was merely TK's cellmate, not an agent of law enforcement; consequently, none of the statements TK made to him were testimonial. *Crawford*, does not apply.

Further, McNeely received nothing for his testimony so the circumstances indicate trustworthiness. As discussed below, the same deputy district attorney who was prosecuting appellant had prosecuted McNeely and filed a statement in aggravation. McNeely had a **maximum** exposure of 20 years for his burglary convictions and was in fact sentenced to 20 years. (32 RT 3077.) Admission of TK's statements against penal interest did not violate any of appellant's constitutional rights because McNeely received nothing for his testimony, the statements were not testimonial and he was not an agent of law enforcement.

B. Corpus Delecti Had Been Established, The Court Edited TK's Statement And Any Error In Admitting It Was Harmless

Because the body was never found, and the statements of an accomplice cannot be used to establish corpus delicti, appellant erroneously contends the prosecution relied on the testimony of appellant's cellmate to improperly establish that the crime occurred. (AOB 61-66.) Corpus delecti was established by Fedor's testimony before any accomplice testimony was admitted.

Before introducing a defendant's statement into evidence, the prosecutor must produce evidence that a crime occurred. (*People v. Jones* (1998) 17 Cal.4th 279, 319-320.) The purpose of the corpus delicti rule is to assure that the accused is not admitting to a crime that never occurred. It prevents the possibility that a false confession was secured by means of police coercion or abuse, and at the same time the possibility that a confession, though voluntarily

given, is false. (*People v. Jones, supra*, 17 Cal.4th at p. 320 (concurring opinion of J. Mosk).)

In the case at bench, the prosecution established that a crime had been committed through the testimony of Fedor and the disappearance of Melanie. TK's statement was not introduced until after the crime had been established. As the prosecutor pointed out at trial, neither the degree of the crime nor the identity of the perpetrator is part of the corpus delicti. (*People v. Cullen* (1951) 37 Cal.2d 614, 624; *People v. McDermond* (1984) 162 Cal.App.3d 770; 5 CT 875.)

Finally, once the corpus delecti is established, even the statement of the defendant herself could be considered for all purposes, including establishing the elements of the crime and the identity of the perpetrator.[33/] (*Matthews v. Superior Court* (1988) 201 Cal.App.3d 385, 397.) The rule simply governs the admissibility of evidence without reducing the prosecutor's burden of proof so the corpus delicti rule does not violate federal due process requirements. (*People v. Diaz* (1992) 3 Cal.4th 495, 528.)

The trial judge redacted TK's comments to eliminate references to another person, eliminating any direct or indirect reference to codefendants, as required by *People v. Aranda* (1965) 63 Cal.2d 518.[34/] (RT 1183.) Because the

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33. The corpus delicti rule does not apply to special circumstances. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1176; *Newberry v. Superior Court* (1985) 167 Cal.App.3d 238, 241.)

34. Appellant contents the testimony was inadmissible for all purposes, but if it were admissible to establish the crime, a limiting instruction should have been given to prevent its use to establish her guilt. (AOB 45.) However, the redaction made sure TK did not identify appellant–even indirectly. Thus, the evidence could only apply to establish the crime itself. As a result, appellant's argument that TK's statements virtually established appellant's guilt and the trial court and prosecutor intentionally misstated the evidence through redaction (AOB 57-60), is meritless.

corpus of the crime and appellant's identity had already been established by other evidence (Fedor and Melanie's disappearance), the trial judge allowed part of the redacted evidence to establish what happened in the trailer. (RT 1183-1185.) He expressly excluded TK's reference to what he was going to do (give Melanie a "hot shot," it being the perfect way to get rid of someone because it would look like an overdose) because it was not a statement against penal interest. Only what was done was allowed into evidence because that evidence was against TK's penal interest on the conspiracy and murder charges. (RT 1184-1185).

Appellant claims her due process rights were violated because the penal interest exception to the hearsay rule is not firmly established and the witness was a "sleazy, con-artist who nevertheless presented well." (AOB 45-55.) This contention is improperly based on evidence not before the jury. Specifically, the reference to McNeely's looks and brains was in the prosecutor's statement in aggravation filed in the burglary sentencing. (6 CT 1078, see AOB 82.) The judge excluded that evidence as hearsay.

The trial judge carefully reviewed the evidence in exercising his discretion. The statements of appellant's crime partner concerning what happened were made to a civilian–a fellow prisoner, not in response to any questions by law enforcement. TK was talking about his crime for his own purposes without anticipating their use in court. At the same time, he risked that his cellmate might report his incriminating statements to authorities.

Appellant also contends that TK's hearsay statements were not trustworthy because both the declarant and the testifying witness were highly suspect (AOB 51), McNeely was a "con artist" (AOB 53), and TK, a psychopathic "speed-freak" who would not have impressed the jurors with his trustworthiness or reporting skills, evaded their seeing his demeanor and assessing his credibility (AOB 55). But it was appellant who chose TK as her

boyfriend and as her crime partner, and the jury knew everyone involved with appellant frequently used methamphetamine and had problems meeting their obligations. The jury heard evidence of evictions, arrests, child protective services activity and drug use. The jury also knew that the conversation took place in prison where the absence of model citizens cannot be a surprise. In any event, the statements were edited to prevent prejudice.

Redaction is commonly used to protect one defendant from statements admissible against their codefendant at a joint trial. (*Bruton v. U.S.* (1968) 391 U.S. 123, 123-124 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *People v. Aranda, supra*, 63 Cal.2d at p. 547.)

Here, the prosecution admitted a non-testifying declarant's statements against appellant at her separate trial, but her rights of confrontation were protected by the fact that TK's statements were against penal interest combined with the fact that references to "we" in the statements were redacted, substituting "I" where appropriate. The redaction cured any constitutional error by limiting the statements to what TK, said he did.

The confrontation clause is **not** violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate "not only the defendant's name, but any reference to his or her existence." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211 [107 S.Ct. 1702, 95 L.Ed.2d 176].)

Even if the remarks were testimonial and it was error to admit TK's statements through his cellmate, the properly admitted evidence in this case was strong, rendering the error harmless. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1128-1129.) Finally, *Anderson* observes that error is harmless where (1) the properly admitted evidence was overwhelming, and (2) the evidence provided by the incriminating extrajudicial statement was cumulative of other direct evidence. (*Id.* at pp. 1128-1129.) Baker's testimony supplemented that

of Fedor and the statements appellant had made to other prisoners proved her guilt.

Crawford suggested confrontation errors are not structural, but instead are reviewed under the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1359, fn.1; see also *id.* at p. 1378 (conc. opn. of Rehnquist, J.) [stating that the majority implicitly recognized harmless error standard applies].)

Prior Supreme Court precedent supports the argument that Crawford errors are reviewed for harmless error. As the Supreme Court recognized in *Neder v. U.S.* (1999) 527 U.S. 1, 8-9 [119 S.Ct. 1827, 144 L.Ed.2d 35] "structural" error, requiring automatic reversal, is available only in a "very limited class of cases." These cases contained a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.* at p. 8, quotations omitted.)

Structural errors infect the entire trial process, and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair. (*Neder v. U.S., supra,* 527 U.S. at pp. 8-9, quotations and citations omitted.) Examples include the complete denial of counsel, *Johnson v. U.S.* (1997) 520 U.S. 461, 468 [117 S.Ct. 1544, 137 L.Ed.2d 718]; citing *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799]); a biased trial judge (*Tumey v. State of Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749]), racial discrimination in the selection of a grand jury (*Vasquez v. Hillery* (1986) 474 U.S. 254 [106 S.Ct. 617, 88 L.Ed.2d 598]); the denial of self-representation at trial (*McKaskle v. Wiggins* (1984) 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122]); the denial of

a public trial (*Waller v. Georgia* (1984) 467 U.S. 39 [104 S.Ct. 2210, 81 L.Ed.2d 31]); and a defective reasonable-doubt instruction (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]).

A Confrontation Clause violation does not infect the very framework within which the trial took place in a manner that calls into question the integrity of the entire process. Indeed, the Supreme Court in past decisions has applied harmless error analysis to Confrontation Clause violations that result in the improper admission or exclusion of evidence. (See, e.g., *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674] ["we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis."]; see also *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887, 144 L.Ed.2d 117] [remanding to state court for a harmless error determination after deciding that the admission of untested confession of non-testifying accomplice violated the state defendant's Confrontation Clause rights]; *Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022 [108 S.Ct. 2798, 101 L.Ed.2d 857] [remanding to state court for a harmless error determination after deciding that placement of screen between defendant and child sexual assault victims during testimony against defendant violated defendant's confrontation clause rights].)

In any event, appellant was not prejudiced. As the United States Supreme Court has previously held, violations of an accused's right to confront witnesses as guaranteed by the Sixth Amendment are subject to harmless-error analysis under the standard of *Chapman v. California*, *supra*, 386 U.S. at page 24. (*Neder v. United States*, *supra,* 527 U.S. at p. 18; *Delaware v. Van Arsdall, supra,* 475 U.S. at pp. 680-684.) Nothing in *Crawford* changed this analysis. Accordingly, the question presented, assuming error, is whether the admission of the testimony was harmless beyond a reasonable doubt.

Assuming, arguendo, that Tompkins' statements were testimonial, their admission was harmless beyond a reasonable doubt because Sheryl Baker testified as an eyewitness to the murder and the torture that took place and Fedor testified to what she heard that night and the blood she found throughout her trailer. The blood evidence and Melanie's disappearance further evidenced appellant's crime. The challenged testimony of the cellmate, even if erroneously admitted, was harmless beyond a reasonable doubt.

C. Impeachment Of McNeely Was Properly Limited To Exclude The Prosecutor's Hearsay Statements For McNeely's Sentencing And Time Consuming Trials-Within-The-Trial

Appellant also contends that she was prejudiced because the court did not allow impeachment of McNeely, with (1) the statements their mutual prosecutor had made about McNeely's character in a sentencing memo he had filed when he had prosecuted McNeely for residential burglary (AOB 74-82), or, (2) the details of the circumstances of McNeely's prior felonies (AOB 83-88), and (3) his misdemeanors (AOB 89-91). The trial court did not abuse its discretion in rejecting the evidence in question.

The defense wanted to use the prosecutor's comments about McNeely made in a document prepared for purposes of sentencing him in a series of robberies.[35/] The comments were based on the prosecutor's impressions and conclusions drawn from evidence produced at and during that robbery trial. They had no relevance to appellant's trial and were properly excluded. In any

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35. When he was in the Major Violator's Unit, the prosecutor in this case had prosecuted McNeely for robbery. That unit filed statements in aggravation on all cases. The defense wanted to evidence the prosecutor's characterizations of McNeely in that statement in aggravation. The prosecutor had called McNeely a liar and manipulator. The defense offered the characterization by stipulation, as "a way around having Mr. Dusek (the prosecutor) testify"in this trial. (29 RT 2475-2476.)

event, the defense cross-examined McNeely on some of those impressions, even though they had been excluded.

The trial court was asked to quash a subpoena for the prosecutor's testimony about comments he had made about McNeely when he asked for a 20 year sentence. Before hearing arguments, the court gave the following tentative ruling: It would quash the subpoena for the prosecutor (Mr. Dusek) because: (1) The attorney appearing in the case should not be called as a witness absent compelling need to prevent either attorney from arguing the credibility of the representative of one party, further, the witness had "multiple moral turpitude convictions" and that is the appropriate way to attack veracity. (2) It is highly unlikely that any Deputy District Attorney would speak favorably about a criminal defendant at a sentencing hearing, and there is nothing in the statement of aggravation ". . . where Mr. Dusek states an opinion with regards to the truthfulness and veracity of the potential witness." (29 RT 2472-2473.)

After argument, the court found that the quotes from the McNeely statement in aggravation were inadmissible hearsay and no exception applied to them. (29 RT 2477.) In the judge's experience, the Major Violators Unit routinely filed statements in aggravation and ". . . there are other ways to get the credibility of Mr. McNeely before the jury other than by calling the District Attorney who is prosecuting. . . (this current case)." (29 RT 2477-2478.) In any event, the defense used the prosecutor's sentencing comments, in its cross-examination of McNeely, without attributing them to the prosecutor.

The defense asked McNeely questions based on the prosecutor's remarks in a statement in aggravation. Specifically, McNeely was asked if he were a "confirmed thief and con-man" and manipulator. Appellant also contends the court erred prejudicially by refusing examination regarding the factual circumstances of McNeely's prior felony convictions. (AOB 83-89.) The

defense then attempted to get into the particulars of McNeely's burglaries by asking if he had posed as an exterminator to get into the homes.[36] (32 RT 3082-3083.) The court properly sustained an objection that the specific methods used to commit the felonies were irrelevant. (32 RT 3083.)

Evidence of prior felony convictions offered for impeachment purposes is restricted to the name or type of crime and the date and place of conviction. (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.) Inquiry into the circumstances and underlying facts of the felony is prohibited when the evidence is offered for impeachment purposes only. (*Ibid.; People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462; *People v. Santos* (1994) 30 Cal.App.4th 169, 175.)

Appellant makes the same argument regarding exclusion of the underlying circumstances of McNeely's misdemeanor misconduct. (AOB 89-91.) While this question is more open because such impeachment generally involves conduct rather than conviction, the judge properly averted a series of mini-trials concerning collateral issues with witnesses whose memories of events may have faded. (See *People v. Rivera* (2003) 107 Cal.App.4th 1374, fn. 3 at 1381.)

During discussion of impeachment, the court stated:

> As a general rule, I'll allow moral turpitude to be used as impeachment. As a general rule, I'm not going to allow misdemeanor priors to be used for impeachment, and the reason for that is the time consumption involved in proving up the misdemeanor. . . . Proving up the conduct is too time-consuming for the benefit of the misdemeanor conviction, especially when these witnesses, as I understand it, **will have felony convictions.**

(20 RT 2479-2480, emphasis added.)

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36. McNeely had gained entry into eight homes by claiming to be an exterminator, and the remaining four by posing as a drapery cleaner, and the defense wanted to evidence this to show manipulation. (32 RT 3084-3085.)

The defense itself observed that McNeely had been convicted of 12 felonies in California. (32 RT 3082.) Thus, the trial court decided that the felonies could be used for impeachment and the time-consuming misdemeanors would be cumulative and unnecessary.

The defense was not prejudiced by the limitations placed on impeachment of McNeely. It impeached him with his numerous felonies and implied that he had read TK's case file when they shared a cell.[37] (32 RT 3078-3081.) It's point was made and the jury was left to determine whether to believe him in view of all the other evidence. The court was within its discretion to control the trial and exclude marginally relevant and time consuming evidence that added nothing of consequence to the equation.

The prosecutor's hearsay statements in McNeely's sentencing memo were properly excluded and the impeachment was properly limited to felonies, without mini-trials about the specific methods used in those felonies or with time consuming trials-within-the-trial about misdemeanor conduct. Further, the defense was given a full opportunity to impeach McNeely with 12 felonies, and it did impeach him with those felony convictions. Additionally, McNeely was in custody and the jury was instructed to view the testimony of the in-custody-informants "with caution and close scrutiny." (CALJIC No. 3.20; 9 CT 1685.) Appellant was not denied any of her rights.

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37. At the bench after the objection, the defense stated it believed McNeely was manipulating the court because ". . . we believe that he read Tompkins' [TK's] documents and is basically just telling the jury what he read." McNeely had gained entry into eight homes by claiming to be an exterminator, and the remaining four by posing as a drapery cleaner, and the defense wanted to evidence this to show manipulation. (32 RT 3084-3085.)

TK's attorney had testified he had given TK reports and press coverage from which McNeely would have learned all the information he said TK told him. (See 35 RT 3461-3463.)

D. The Jury Was Correctly Instructed On Accomplices, Corraboration And Out-of-Court-Statements Of Accomplices And, Despite Claimed Exaggeration Or Misstatement, The Prosecutor's Arguments Were Fair Comment On The Evidence In The Case

Appellant erroneously claims an accomplice instruction was given as to Baker but not as to TK and his out-of-court statements. (AOB 67-70.) She also decries that the prosecutor used TK's statement as "direct evidence," and implied the jury should treat McNeely like any other witness, rather than use extra caution and care.[38] (AOB 83-88, 91-92.) Appellant also complaints that the prosecutor used TK's statement to corroborate Fedor (39 RT 3780), called TK an eyewitness (39 RT 3771-3772) and told the jury that TK enjoyed torture and violence (39 RT 3798). There is no issue of prosecutorial error and the jury was correctly instructed by the court.

Accomplice was defined and the jury was told the testimony of an accomplice required corroboration. (CALJIC No. 3.10 at 8 CT 1680; CALJIC Nos. 3.11, 3.12 at 8 CT 1681-1682.) The jury was instructed that Baker was an accomplice to these crimes as a matter of law and her testimony was to be viewed with distrust. (CALJIC Nos. 3.16, 3.18 at 8 CT 1683-1684.) The accomplice instruction and the fact that the testimony of an accomplice must be viewed with distrust, could be applied to any witness by the jury. Finally, the jury was expressly told that, "Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of

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38. In rebuttal argument, the prosecutor told the jurors to treat jailhouse informant testimony with caution, "but don't throw his (McNeely's) testimony out . . . look at it with caution and care "just like you look at everyone else." (39 RT 3860.) Appellant contends the underlined phrase, was not true because informants are cut from untrustworthy cloth. *United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 334. (AOB 91-92.) The jury was properly instructed and the phrase was not intended to mislead.

proving that what the accomplice stated was true." (CALJIC No. 3.11 at 8 CT 1681.) Further, the statements introduced into evidence through TK's cellmate, if inflammatory, were inflammatory as to TK, not appellant.

Fedor had already placed appellant in the trailer with Melanie, alone, when everyone else left. The jury heard that TK tortured Melanie, enjoyed it, and bragged about it. TK's extrajudicial statement in the form heard by the jury was not a material factor in linking appellant to the crime. There was no *Bruton* or *Aranda* error in the sense of incompetent evidence which incriminated or inculpated appellant.[39] (*People v. Epps* (1973) 34 Cal.App.3d 146, 156.)

Appellant attempts to manufacture an issue using the prosecutor's arguments to the jury. (See AOB 71.) She cannot (and does not) allege misconduct or prosecutorial error because wide latitude is given to attorneys when they comment on the evidence to the jury. Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempts to persuade either the court or the jury. Curable misconduct requires a defense objection. This is especially true when the alleged misconduct occurs during argument. (*People v. Wharton* (1991) 53 Cal.3d 552, 591, cert. denied (1992) 502 U.S. 1038 [112 S.Ct. 887, 116 L.Ed.2d 790]; *People v. Cruz* (1980) 26 Cal.3d 233, 254-255.) Appellant did not object at trial to the arguments she now claims were wrong.

The statements, questions and arguments of the attorneys are not evidence and appellant's jury was so instructed. (CALJIC No. 1.02 at 8 CT 1628.) Further, the court properly instructed the jury on how to evaluate each

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39. In the *Epps* case, the codefendant's statements ("what about the other guy?" and "Epps is the other guy. . . . I know him.") would not be admissible at all had the two men been tried separately. (*People v. Epps, supra*, 34 Cal.App.3d at pp. 156-157.) By contrast, TK's statements **were** admissible under a hearsay exception, because they were statements against penal interest–made under trustworthy circumstances.

witness, accomplice or in-custory-informant. (CALJIC Nos. 2.13, 2.20 at 8 CT 1636-1638; CALJIC No. 2.21.2 at 8 CT 1640; CALJIC Nos. 2.22, 2.23, 2.24 at 8 CT 1641-1643) and/or accomplice CALJIC Nos. 3.10, 3.11, 3.12, 3.16, 3.18) and in-custody-informant (CALJIC No. 3.20 at 8 CT 1685). Finally, the prosecutor's arguments were fair comment on the evidence.

In closing argument to the jury, "'[t]he right of counsel to discuss the merits of the case, both as to the law and the facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and deductions illogical, as such matters are ultimately for the consideration of the jury.'" (*People v. Bievelman* (1968) 70 Cal.2d 60, 76-77.)

TK was a participant in these crimes. Fedor testified appellant and her friends were in the living room and kitchen area all night, Melanie disappeared and there was blood in Fedor's trailer when she got home the next day. Baker testified about events after TK dropped off Fedor at the honor camp and about the murder itself. A reasonable juror could infer that TK was a witness to nearly everything that happened that Sunday. Thus, it was not error for the prosecutor to argue TK was an eyewitness who talked (to his cellmate) about use of a screwdriver, knife, skillet, electricity and hot shots or that Baker's testimony was corroborated by other eyewitnesses, including TK.

The prosecutor's arguments were proper and the jury was correctly instructed.

II.

BAKER'S GUILTY PLEA WAS PROPERLY RECEIVED INTO EVIDENCE WITHOUT OBJECTION AND NO LIMITING INSTRUCTION WAS REQUESTED OR REQUIRED SUA SPONTE

Appellant contends that because the court gave no limiting instruction to the jurors sua sponte regarding their use of Baker's plea, the prosecutor improperly relied on it to establish the victim's murder and appellant's guilt in violation of due process. (AOB 94-103.) There was no objection on the grounds urged on appeal, and he should be precluded from raising the issue on appeal. In any event, the prosecutor was obligated to reveal his plea bargain with the witness, and he properly did so. The prosecutor's use of Baker's plea in argument was fair comment on the evidence, and the court's failure to give a limiting instruction, sua sponte, even if error, was harmless.

Generally, the guilty plea and sentence of a codefendant are irrelevant and inadmissible. (*People v. Brown* (2003) 31 Cal.4th 518, 562-563; *People v. Young* (1978) 85 Cal.App.3d 594, 602.) Because there is a substantial risk that the jury, despite instructions to the contrary, will look to an incriminating extra-judicial confession of a non-testifying codefendant in determining the guilt of the defendant, admission of the confession in a *joint* trial violates the confrontation clause of the Sixth Amendment if the codefendant does not take the stand. (*Bruton v. U.S., supra,* 391 U.S. at p. 126.) The *Bruton* rule is implicated only by those statements that "expressly implicate" the defendant or are "powerfully incriminating." (*Richardson v. Marsh, supra,* 481 U.S. at p. 208.)

At the beginning of Sheryl Baker's testimony, the prosecutor established that she knew both appellant and TK, who were living together in 1988. (33 RT 3089-3093.) After establishing that Baker had been convicted of several felonies, the prosecutor asked if she had been charged with murder, in this case

and she responded, "Yes, I was." (33 RT 3093.) Without objection, he then inquired as follows:

Q. Have you pled guilty in this case?

A. Yes, I have.

Q. To what?

A. Second degree murder.

Q. What deals or promises were you made by our office in return for your plea?

A. That I would plead guilty to second degree murder.

Q. You would agree to do what?

A. Testify.

Q. Truthfully?

A. Yes.

(33 RT 3093-3094.)

At that point, the defense objected on grounds of relevance and was overruled. After establishing that the testimony was part of the deal and Baker had not yet been sentenced (33 RT 3094), the prosecutor began to question the witness about the events of June, 1988 and Melanie's murder (33 RT 3094).

Appellant now contends that the prosecutor used Baker's guilty plea itself, as evidence of appellant's guilt and to prove corpus delecti.[40/] (AOB 95-

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40. Telling the jury about the plea was not error. *Young* is readily distinguishable. That case found non-prejudicial error where three defendants were on trial for two robberies, and one defendant pled guilty during the trial and the trial judge informed the jury of the guilty plea. (*People v. Young, supra,* 85 Cal.App.3d 594, 601-603.) That was the context in which *Young* found the information given to the jury irrelevant. Young's counsel had correctly suggested the jury be informed that the codefendant's case had been

99.) The plea was admitted because the prosecution was required to reveal any benefits the witness received in exchange for her testimony. As appellant concedes, a plea agreement may sometimes be admissible to be considered by the jury in evaluating witness credibility. (See *United States v. King* (5th Cir. 1974) 505 F.2d 602; *Isaac v. United States* (9th Cir. 1970) 431 F.2d 11; AOB 96.) Here, the plea itself was admitted without objection. Nevertheless, appellant now contends that the prosecutor improperly used the existence of Baker's plea to prove appellant's substantive guilt. (AOB 97-99.) The argument was fair comment on the evidence and its implications.

Appellant finds fault with the prosecutor's argument that Baker was an eyewitness and participant in the murder. She contends the words that followed-- "not only that, she put her money where her mouth is. She pled guilty to the murder of Irene Melanie May. She knows what happened" (39 RT 3772), resulted in error. Appellant contends that argument improperly told the jury that the murder occurred and infringed on her presumption of innocence by pointing out that she, unlike Baker, did not plead guilty. (AOB 98.) The prosecutor also argued that Baker pled guilty to murder, not mutilating a corpse, as proof that the victim was alive when she was injected, hit and stabbed. (39 RT 3797, 3865; AOB 99.) The argument was fair comment on the evidence.

The prosecutor properly presented the fact that Baker had received a reduced charge as part of a plea bargain to testify in appellant's trial. This was evidence of interest or bias that could be used by the jury to assess her credibility. (*People v. Lawley, supra,* 27 Cal.4th 102, 162; *People v. Sully* (1991) 53 Cal.3d 1195, 1219.) There was no objection when Baker was asked if she pled guilty.

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disposed of and the jury should not concern itself with that defendant nor speculate upon the legal reasons for his removal from the case. (*Id.* at p. 602.)

Once the corpus delecti was proved through Fedor's testimony and evidence of Melanie's disappearance, Baker's testimony about all events could be used on all issues. (*Matthews v. Superior Court, supra*, 201 Cal.App.3d 385.) The prosecutor did not use the guilty plea itself, impermissibly. He presented Baker's testimony about the details of the murder and argued the facts and circumstances of the crime.

Appellant opines that even if the plea was admissible regarding Baker's credibility, the trial court's failure to give a cautionary limiting instruction constituted reversible error. (AOB 99.) No such instruction was requested, and appellant cannot cite to any authority requiring a limiting instruction sua sponte under these circumstances.

Appellant contends that the jury should have been instructed, sua sponte, that the guilty plea could only be used for the limited purpose of assessing Baker's credibility and possible bias. (AOB 99-102.) She relies on *United States v. Halbert* (9th Cir. 1981) 640 F.2d 1000, 1006, a direct appeal where the 9th circuit reversed a mail fraud conviction for want of a limiting instruction despite the fact that the prosecutor's references to the guilty pleas of crime partners were "permissible." Of course, that lower federal court opinion is not binding on this court. (*People v. Bradley* (1969) 1 Cal.3d 80, 86.) Further, *Halbert* held it was "clearly relevant" for the prosecutor to "elicit the fact that guilty pleas were entered" without "editorial comment or unnecessary elaboration . . . ." (*Halbert*, at p. 1005.) The reversal was granted purely on judicial error because the jury was not told "the limited purpose for which the pleas could be used." (*Id.* at p. 1006.) Here, the prosecutor's passing remark, and failure to give the limiting instruction, did not constitute reversible error.

A trial court generally is not obligated to provide a limiting instruction on its own motion. (*People v. Rogers* (2006) 39 Cal.4th 826, 863-864.) A limiting instruction in these circumstances is not fundamental or crucial to the

judicial process. While requested instructions should be given whenever there is evidence worthy of the jury's consideration, sua sponte instructions require more substantial evidence to put the court on notice. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716.) Even at the defendant's request, for example, a trial court has no duty to instruct a jury on a defense unless the defense is supported by substantial evidence. (*People v. Hill* (2006) 31 Cal.App.4th 1089, 1101.)

The trial court must instruct on the general principles of law relevant to the issues raised by the evidence of a particular case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*Ibid.*) The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

Assuming for the sake of argument that the trial court's failure to give a limiting instruction was error, it was harmless because no result more favorable was likely had the instruction been given.[41] (*People v Watson* (1956) 46 Cal.2d 818, 836.) Properly admitted evidence proved both the murder and appellant's primary role in the murder.

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41. The harmless beyond a reasonable doubt standard is inapplicable in that the failure to give a limiting instruction is not an error of constitutional proportion. Jury instructions rarely rise to constitutional error. (*United States v. Valle-Valdez* (9th Cir. 1977) 554 F.2d 911, 916.)

III.

THE BLOOD EVIDENCE WAS PROPERLY ADMITTED ALONG WITH THE EVIDENCE OF WHEN AND HOW THE TRAILER WAS INSPECTED WITHOUT FINDING BLOOD

Appellant contends because two prior searches found no blood in the trailer, the later found blood evidence was irrelevant and unreliable as the blood could have come from any mammal, at any time since the construction of the trailer. (AOB 104-118.) Blood evidence recovered in 1991 was properly admitted along with the fact that none was found on two prior occasions in 1988--all the circumstances and facts that the jury needed to evaluate it.

The admissibility of evidence is generally determined at the time it is offered, and the trial court is vested with wide discretion in admitting or rejecting preferred evidence. On appeal, reversal is only appropriate if there is a manifest abuse of discretion resulting in a miscarriage of justice. (*People v. Mattson* (1990) 50 Cal.3d 826, 850.) The ruling of the trial court regarding whether probative evidence is substantially outweighed by danger of prejudice, confusion and undue time consumption is reversed for abuse of discretion and will be disturbed only if it exceeds the bounds of reason. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Ordinarily, even erroneous admission of evidence does not offend due process unless it is so prejudicial as to render the proceedings fundamentally unfair. (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042.)

Melanie was killed on June 26, 1988. Four witnesses (Fedor, her daughter Alishia, Kathy Eckstein, and her son Fred), testified they saw blood in the trailer in June of 1988. Also, Fred replaced the trailer's living room carpet in June because it smelled like a dead animal. (31 RT 2875-2876.) The recliner he had re-upholstered had disappeared from the house, and he never saw it again. (31 RT 2875-2876.) From these facts alone, the jury could

reasonably conclude that the living room rug was so soaked with Melanie's blood, it stank as the blood spoiled, and the recliner was too blood soaked for appellant to clean so she threw it away, yet small blood stains remained in the trailer.

In September of 1988, Fedor let law enforcement come into the trailer and take samples and pieces of rugs and padding from throughout the trailer. They did the same in November of 1988. No blood was found.

On August 17, 1988, a fifth witness, Social Worker Darlene Burns, saw dark spots that looked like blood in Fedor's carpeting. (34 RT 3304-3305.) She called Deputy Wilson and asked him to check the trailer again. (34 RT 3306.)

On August 12, 1991, Luminol was used on the trailer for the first time, and the living room and master bedroom immediately reacted "very bright" to the spray. (32 RT 2933-2934.) Because it was getting dark, the lab technician returned on August 14, 1991, to cut stains out of the rug for analysis and found blood. (32 RT 2944-2945.) The trailer was occupied between June, 1988, and August, 1991. (32 RT 2955.)

Although Fedor got a dog for security after this murder, she testified no pets or other animals ever bled in the trailer while she lived there. (30 RT 2608.) No evidence was presented that any of the other occupants of the trailer bled in it or had injured animals in the trailer at any time. The jury was given all of the relevant evidence on this subject.

Appellant contends the blood evidence was irrelevant and should not have been allowed into evidence at all.[42/] Perhaps because it is inconceivable that blood evidence would be irrelevant in a murder trial, appellant contends the blood stains should have been excluded under Evidence Code section 352 as

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42. She also relies on the "irrelevance" of the blood evidence to argue its admission violated her right to due process. (AOB 109-113,115-116.)

unduly prejudicial because they were collected so long after the commission of the crime. (AOB 113-116.) However, the trial judge logically concluded that "the existence of these blood patterns or stains that are found a substantial period after the homicide, in my opinion, does not uniquely do anything to evoke an emotional bias against the defendant," and it was probative. (24 RT 1124-1155.) There is certainly nothing inflammatory about blood evidence in a murder trial.

Furthermore, the prejudice referred to by Evidence Code section 352 does not mean incriminating, but instead refers to prejudice from the introduction of irrelevant, or marginally relevant, evidence, or which evokes an emotional bias against a party while having only slight probative value with regard to the issues on trial. (*People v. Samuels* (2005) 36 Cal.4th 96, 124.)

Criminalists on two occasions in 1988 examined the trailer without finding blood evidence. This fact, along with the delay in actually collecting such evidence, after families had continued to live in the trailer, may go to the weight of the blood evidence, but does not render it inadmissable. The contrary holding urged by appellant, would lead to absurd results. While it is unusual that blood was collected about 3 years after the murder, the fact that the crime scene was "contaminated" because the trailer continued to be occupied, is very common. It does not cause exclusion of the evidence. Crime scenes are frequently disturbed through continued use because a crime is not quickly discovered or by efforts to help the victim. Such contamination cannot be and is not dispositive. The admission of the blood evidence was not an abuse of discretion or denial of appellant's due process rights.

Moreover, even assuming error, appellant was not prejudiced. Overwhelming evidence, separate and apart from the blood evidence, demonstrated appellant's guilt.

IV.

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT FOR CONSPIRACY AND FIRST-DEGREE MURDER

Appellant contends she was denied due process because there was insufficient evidence of murder or conspiracy to commit murder, essentially because accomplice testimony was insufficiently corroborated. (AOB 135-144.) Appellant's claim is based on the erroneous premise of a lack of corroboration.[43/] Her jury properly concluded the accomplices were corroborated and the evidence proved guilt beyond a reasonable doubt as to both charges.

When deciding appellant's claim of insufficient evidence, this court must examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence of reasonable, solid value that would support a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Nicolas* (2004) 34 Cal.4th 614, 658; *People v. Guiton* (1993) 4 Cal.4th 1116, 1126.)

A. The Conspiracy Conviction Is Supported By Substantial Evidence

A conspiracy is an agreement by two or more persons to commit any crime. (Pen. Code, § 182, subd. (a)(1); *People v. Morante* (1999) 20 Cal.4th 403, 416.) A conviction for conspiracy requires proof of four elements: (1) an agreement between two or more people; (2) who have the specific intent to agree or conspire to commit an offense; (3) the specific intent to commit that

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43. Corpus delecti of a felony-based special circumstance need not be proved independently of a defendant's extra-judicial statement. (Pen. Code, § 190.41, enacted by Proposition 115 took effect in 1994.) (*People v. Rogers* (2006) 39 Cal.4th 826, fn. 8 at p. 851.) This trial was in 1995.

offense; and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy. (Pen. Code, §§ 182, subd. (b)/184; *People v. Morante, supra,* 20 Cal.4th at p. 416.) The elements of conspiracy may be proven with circumstantial evidence, "particularly when these circumstances are the defendant's carrying out the agreed-upon crime." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464.) To prove agreement, it is not necessary to establish the parties met and expressly agreed; rather, "a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tactically came to a mutual understanding to accomplish the act and unlawful design." (*People v. Brown* (1969) 272 Cal.App.2d 623, 628; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1023.)

A conviction of a conspiracy to commit murder requires a finding of intent to kill. (*People v. Swain* (1996) 12 Cal.4th 593, 607.) Because there rarely is direct evidence of a defendant's intent, it must usually be derived from all of the circumstances of the attempt, including the defendant's actions. (*People v. Vu, supra*, 143 Cal.App.4th at p. 1023; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) There is sufficient evidence that appellant and her co-conspirators expressly or tacitly reached an agreement to murder Melanie.

Corroborative evidence may be entirely circumstantial. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) Corroborating evidence is sufficient if it relates to some act or fact that is an element of the crime and implicates the defendant. (Pen. Code, § 1111.) The determination by the trier of fact "on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. McDermott* (2002) 28 Cal.4th 949, 985.)

As the trial judge observed when denying the Penal Code section 1118 motion for conspiracy, there was evidence from which the jury could infer that there was a conspiracy in the testimony of Fedor that the victim was never left alone, that TK told the paramedic the call for breathing problems was for him and he was okay, the upset that 9-1-1 had been called, that the first time the responding paramedic saw the occupant of the trailer was when Fedor put her head out the window to ask about an inhaler and the fact that Fedor was taken to the honor camp, was supposed to be picked up at 3:30, but was not. (38 RT 3673-3674.)

Here, the evidence established that appellant was the leader of the trio that killed Melanie, and Bob helped dispose of the body. Conspiracy required an agreement with specific intent to commit the crime or murder plus at least one overt act towards that goal. (*People v. Morante, supra*, 20 Cal.4th at p. 416.) The agreement is generally proved by circumstantial evidence because direct evidence is rarely available. (*People v. Osslo* (1958) 50 Cal.2d 75, 94.)

Ten overt acts were alleged in appellant's case:

(1) After spending the night on June 25, the conspirators waited for Fedor to leave her trailer;

(2) On June 26, TK took Joanne Fedor to La Cima Honor Camp, to visit Robert Collier;

(3) Appellant restrained Melanie in a chair;

(4) Appellant and Baker injected Melanie with a hypodermic syringe containing battery acid;

(5) Appellant caused Baker to beat Melanie with a metal skillet;

(6) TK stabbed Melanie with a knife;

(7) Appellant took a shower and disposed of her bloody clothes;

(8) TK removed and disposed of Melanie's body so that it was never located;

(9) TK returned to Fedor's trailer to pick up appellant and Baker;

(10) Appellant and TK left the Fedor residence together.

(8 CT 1670-1671.)

These overt acts find substantial evidence in the record in the testimony of Fedor and Baker. Fedor testified TK and Baker did what appellant told them to do or refrained from what she said not to do.[44/] Baker invited Melanie to go with the group and TK told Fedor not to go back into the trailer to get something she forgot when they were leaving for the honor camp. From this evidence, a reasonable jury could conclude the trio was acting in conformity with a pre-conceived plan. TK's recommendation to Fedor indicates foul play was in progress per the conspiracy. The night before the murder, Fedor heard appellant wonder if Scott was a cop. (30 RT 2593.) This fear of being caught also indicated there was a plan to kill Melanie.

Appellant attacks the conspiracy conviction on two grounds, contending that Baker's testimony was insufficiently corroborated and there was no evidence of an agreement or that appellant sought out Melanie or went to the trailer with Baker and TK "intending to do harm." (AOB 127-140, 137.) In contending that Baker's testimony was insufficiently corroborated, appellant essentially makes an argument that is appropriate to make to a jury regarding inconsistencies in the evidence and how the prosecutor characterized certain events. (AOB 127-134.) Such an argument is not appropriate on appeal because the jury decided the facts, and already resolved inconsistencies in favor of the judgment.

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44. Although TK's stature TK is "big" (6', 200 lbs.), appellant told him what to do. (33 RT 3086, 3146.)

Baker's testimony established an agreement between appellant and TK when they returned to the trailer and found Melanie tied to a chair in the kitchen. Appellant told her something had happened while they were gone, and "they were going to kill her (Melanie)." (33 RT 3126.) Appellant was upset and TK was going along with her. Appellant and TK talked about 15 minutes. (33 RT 3127.) According to Baker, appellant told her that she was going to be part of the killing and gave her no choice. (33 RT 3126.) Nevertheless, appellant demanded and obtained Baker's express agreement to participate in the killing. This alone proved a conspiracy, especially when combined with the fact that TK was "going along" with appellant's plan.

Appellant also informed Baker that TK wanted to kill her so she had to help with the murder of Melanie in order not to be killed.[45/] They wanted her to also be "guilty" in connection with the murder so that she would not tell on them. (33 RT 3128.) Baker said she "agreed not to die." Appellant then took the sheet off Melanie's head and told her she was going to give her a sedative to calm her down. (33 RT 3128-3129.) Appellant had already taken Baker to the bathroom where there were four or five syringes that appellant said were filled with battery acid.[46/] (33 RT 3127-3128.) Baker never saw Melanie while she was under the sheet. (33 RT 3129, 3126.) Appellant told Baker to inject

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45. The prosecutor conceded that appellant ordering Baker to participate under threat of death did not prove conspiracy as to Baker. (38 RT 3667-3668.) The prosecution also conceded that although appellant instructed others to use some of the deadly weapons named in the charge, the evidence proved that she herself used the hypodermic syringe filled with battery acid. (38 RT 3669.) After observing that questions of fact and conflicts in the testimony had to be resolved by the jury, the trial court found there was no proof that appellant personally used the metal skillet or the electric cord. (38 RT 3672-3673.) The Court dismissed those allegations and the first overt act of the conspiracy. (38 RT 3673-3674.)

46. Baker never saw Melanie while she was under the sheet. (33 RT 3129, 3126.)

Melanie. Baker tried, but could not find a vein. She testified she was shaking and very upset, so Baker could not hit a vein in Melanie's arm or behind her knee. Appellant "was getting very mad and very angry." Appellant took the syringe and tried it herself. (33 RT 3129.)

When Melanie did not die after appellant injected the battery acid to the back of her leg, appellant gave Baker a black cast iron frying pan and told her to hit Melanie. (33 RT 3130.) Baker testified Melanie was suffering so she hit her head, hard with the frying pan, because she felt bad for her. (33 RT 3130-3131.) The pan broke, but there was no blood. (33 RT 3131.)

During the attack, Melanie said, 'please don't kill me. I am sorry that I had something to do with the jewelry." Melanie did not want to die and did not die quickly. (33 RT 3197.)

TK came into the trailer, called the two women "stupid bitches," and said they could not handle anything. (33 RT 3132.) A reasonable jury could also conclude there was a preconceived plan from that statement. The women not handling something implies they did not execute a planned action.

TK was loud and had a discussion with appellant wherein they decided to stab Melanie. TK prepared to stab her and appellant said, "no, I want Sheryl's hand on it too. . . ." (33 RT 3132.) Baker and TK then stabbed Melanie two times through the sheet, hitting her in the chest. Baker had removed her hand by the time TK stabbed Melanie in the throat. (33 RT 3133.) Baker remembered a screw driver being present, but did not remember at trial what they used it for. (33 RT 3134.) She testified she was scared to death she might be next and wanted to leave. (33 RT 3134.)

TK got Bob (George) from outside the trailer, and the two of them wrapped Melanie's body in a rug they got from the trailer, took it outside and put it in the back of Bob's truck. (33 RT 3134-3145.) While neither of the men said where they were going, appellant told Baker they were going to get

rid of the body and they would burn it. (33 RT 3136.) After the men left to get rid of the body, appellant told Baker to take a shower while she cleaned up the kitchen. (33 RT 3135.)

Baker testified that after the shower she collected some of the items that were used including a breaker bar, screw driver and pan. TK had the knife. (33 RT 3136-3137.) TK took a shower when he returned, and appellant was "freaking out at TK for putting on the same pants . . ." he was wearing before the shower. Appellant herself showered and did not put the same clothes on. (33 RT 3180.)

Appellant "started tweaking through . . . [Fedor's] stuff and she made a mess." After she got home, Fedor wondered why her things were thrown around. (33 RT 3137.)

When Baker, appellant, Bob (George) and TK left, they stopped at a gas station in Alpine and got rid of the "stuff" they had with them, then went to El Cajon where appellant sold a leather jacket. They stayed at a hotel on El Cajon Boulevard. (RT 3140.) Later, TK took Baker to her father's house, and when she was getting out of the truck, she saw the knife he had used to stab Melanie. It belonged to appellant. (33 RT 3134.)

Appellant told Baker they burned the body and it would never be found. (33 RT 3134.) Appellant also said, "there was no body, there was no case." (33 RT 3143.)

Even though she was involved in the murder, Baker told people, including Sherri Fisher and Fisher's mother, what happened, because if appellant and TK killed Baker, she wanted people to know why. (33 RT 3143-3144.) She also saw Bobby May and told him what happened to his wife. (33 RT 3144.) She did not give him any details, but when he asked if he should keep looking for Melanie, Baker told him no he should not; Melanie was not

around anymore. (33 RT 3145.) Scared for her life, Baker left town with Sherri Fisher's mother but returned the next day. (33 RT 3194-3195.)

Baker testified that it was important to her that Melanie's children know what happened to Melanie and how she died. The prosecutor's statement to the judge at her own sentencing was not important to Baker so long as she could be housed out-of-state for her sentence. (33 RT 3189.)

B. The Jury Properly Found First Degree Murder From The Evidence Presented At Trial (As Well As Felony Murder)

Despite appellant's contention that there was insufficient evidence of first degree murder (AOB 140-144), the evidence was more than adequate to establish first degree murder on a theory of premeditation and deliberation.

Murder was defined for the jury in this case as the unlawful killing of a human being with malice aforethought. (CALJIC No. 8.10 at 8 CT 1691). The jury was instructed on the meaning of malice aforethought (CALJIC No. 8.11 at 8 CT 1666), its duty to determine the degree of murder (CALJIC No. 8.70 at 8 CT 1693) and that it must return a verdict of second degree if it has a reasonable doubt that it was first degree (CALJIC Nos. 8.71, 8.30 at 8 CT 1667-1668). By returning a verdict for first degree murder, the jury found evidence of deliberation and premeditation beyond a reasonable doubt.

Three categories of evidence are helpful to sustain a finding of premeditation and deliberation in a murder case: (1) planning activities; (2) motive; and (3) manner of killing. (*People v. San Nicholas* (2004) 34 Cal.4th 614, 638; citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) Evidence of each of the factors enunciated in *Anderson* need not be present in order to support a finding of deliberation, but planning, or motive in conjunction either with planning or with manner of killing, must be present to support such a finding. (*Ibid.*, citing *People v. Hawkins* (1999) 10 Cal.4th 920, 956-957.) A judgment will not be reversed so long as there is substantial evidence to support

a rational trier of fact's conclusion that the murder committed was premeditated and deliberate. (*People v. San Nicholas, supra*, 34 Cal.4th at p. 638, citing *People v. Perez* (1992) 2 Cal.4th 1117, 1126-1127.)

The essence of appellant's argument that the evidence is insufficient is that Sheryl Baker was an accomplice whose testimony had insufficient corroboration. (AOB 120-135.) Baker's testimony was corroborated by Fedor, the blood in the trailer and by the disappearance of Melanie. Fedor testified that everyone left appellant and Melanie alone in the trailer on Sunday. Further, when she forgot something and tried to go back in, TK stopped her saying he would not recommend it. Baker was also corroborated by blood stains, the disappearance of Melanie, and Fedor's testimony that appellant was covered in blood late that afternoon, requested new clothes and the soap she used for her shower was bloody.

Under Penal Code section 1111, the jury had to conclude independent evidence linked appellant to the crime before relying on the testimony of Baker. (*People v. Davis* (2005) 36 Cal.4th 510, 543.) The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, so long as it tends to implicate the defendant by relating to an act that is an element of the crime. (*Ibid.*; *People v. McDermott, supra*, 28 Cal.4th at p. 986.) The independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies. (*Davis*, at p. 543.) It need not establish every element of the charged offense. (*McDermott*, at p. 986.) The corroborating evidence is sufficient if, without aid from accomplice testimony, it "tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth." (*Davis*, at p. 543; *People v. Williams* (1997) 16 Cal.4th 635, 680-681.) The corroborating evidence in this case clearly met that standard.

Murder which is perpetrated by any kind of willful, deliberate and premeditated killing with malice aforethought is murder of the first degree. (*People v. Perez, supra,* 2 Cal.4th at p. 1123.) Deliberate means formed or arrived at "as a result of careful thought and weighing considerations for and against the proposed course of conduct." (*Ibid.*) Premeditated means "considered beforehand." (*Ibid.*) "Premeditation can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." (*People v. Perez, supra*, 2 Cal.4th at p. 1127.) Three categories of evidence are pertinent to determining premeditation and deliberation: "(1) facts showing planning activity; (2) facts suggesting motive; and (3) facts about the manner of killing which suggest a preconceived design." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018.) This court has upheld verdicts of first degree murder "when there is evidence of all three types and otherwise . . . [an] extremely strong evidence of (1) or evidence of (2) in conjunction with (1) or (3)." (*People v. Perez, supra,* 2 Cal.4th at p. 1127.)

Here, the prosecution presented evidence in the three aforementioned categories.

Appellant kept tabs on Melanie the day she moved her things into storage, went to the convenience store where Melanie and her friends were waiting for drugs, spoke with TK privately at the trailer, had him lie to the paramedics who had been called when Melanie could not breathe, argued with Melanie about appellant's jewelry and possessions, called her a "rat" and used an unnecessarily intricate plan to kill. After the killing, appellant told people in Notolli's van that she "fucked that girl up," admitted in jail that she had killed Melanie "because she was a rat," and stated in a note (Exh. 28) that she had to

disappear. This evidence fully supported a first degree murder conviction based on a theory of premeditation and deliberation.

The prosecution presented compelling evidence establishing "facts showing planning activity" and "motive" based on the same facts discussed above. The jury's verdict is supported by substantial evidence.

V.

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT ON BOTH SPECIAL CIRCUMSTANCES

Appellant erroneously contends that neither the lying-in-wait nor torture-murder special circumstances is supported by the evidence. (AOB 145-188.) Substantial evidence supports each of the special circumstances.

Special circumstances must be found beyond a reasonable doubt. Consequently, when reviewing a contention of insufficient evidence, the reviewing court must determine, after viewing the evidence of the entire record in the light most favorable to the prosecution, any rational trier of fact could have found the special allegation true beyond a reasonable doubt. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414.)

Appellant's argument regarding the special circumstances essentially contends there was insufficient evidence of the means of Melanie's death (AOB 159-160), Fedor's testimony was not sufficient to uphold torture-murder because she was a "scum bag," and the prosecutor's argument and claiming he "assured the jurors" of facts beyond what had been established by the testimony as she summarizes it.[47/] (AOB 173-188.) However, credibility is to be

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47. The prosecutor was free to argue as he did that once the crime scene investigators had the time and "equipment," "they found evidence of this torture, of this blood-letting." (39 RT 3772-3773.) Despite appellant's argument to the contrary (AOB 164-165), a prosecutor may comment on the state of the evidence (*People v. Szeto* (1981) 29 Cal.3d 20, 34). The greatest latitude is given for argument to the jury. The adverse party cannot complain

determined by the jury, and it was instructed that the arguments and questions of counsel were not evidence. Viewed in its entirety, the record supports the jury's findings.

A. Substantial Evidence Of Torture And Intent To Kill Dictates That The Torture-Murder Special Circumstance Finding Be Upheld

Appellant's sub-claim on this point is that there was insufficient evidence introduced on the torture-murder special circumstance. (AOB 70.) Evidence of electric shock and "hot shots" with battery acid, support the jury's conclusion that the torture special circumstance was true.

Proposition 115 eliminated the necessity to show *extreme* physical pain on the victim so that the special circumstance is proved if the murder was intentional and involved the infliction of torture on a living victim. (*People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14; Pen. Code, § 190.2, subd. (a)(18).) Murder by torture does not require that the defendant acted with the intent to kill. (*People v. Cole* (2004) 33 Cal.4th 1158, 1226; *People v. Proctor* (1992) 4 Cal.4th 499, 535; *People v. Davenport* (1985) 41 Cal.3d 247, 271.) In other words, the intent to kill provides the distinction between the special circumstance and the murder-by-torture crime. (*People v. Bemore* (2000) 22 Cal.4th 809, 839.) This special circumstance sufficiently channels and limits the jury's sentencing discretion and meaningfully narrows the group of persons subject to the death penalty. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1162.) While the instruction required a jury to find that the murder was intentional and "involved the infliction of torture," the defendant must intend to inflict extreme

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if the prosecutor's reasoning is faulty and deductions illogical, as such matters are ultimately for the consideration of the jury. (*People v. Beivelman* (1968) 70 Cal.2d 60, 76-77.)

pain. (*People v. Elliott* (2005) 37 Cal.4th 453, 479; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Leach* (1985) 41 Cal.3d 92, 111.)

The intent to torture (AOB 169-173) is generally established by circumstantial evidence and may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the body. (*People v. Chatman* (2006) 38 Cal.4th 344, 389-390.) In this case, that evidence indicated electric shock (AOB 160-164), shots of battery acid (AOB 167), and teeth marks in a bloody soap (AOB 167). Taken together, all of these things imply torture and constitute substantial evidence to support the jury's finding.[48] Tying the victim up also speaks of torture. Appellant took her time killing Melanie. An intent to kill alone would not result in the acts involved in this case.

The special circumstance does not require proof that the act of torture caused the victim's death. (*People v. Bemore, supra*, 22 Cal.4th at p. 843.) It

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48. Appellant contends the detective's untrue statements during interrogation about the killing was an influential source of "disinformation." (AOB 163-164.) Again, the jury knew it was to decide the case on the evidence presented at trial and the admissions of appellant. The words of the officer, like the questions of an attorney, give context to the answers and statements made by the person being interrogated.

In any event, the detective's interrogation tactics were legitimate. An officer is permitted to lie about the evidence he or she has in a case so long as the fabrication is not the type that would cause an innocent person to confess. (*People v. Farnam* (2002) 28 Cal.4th 107,182; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280-1281.) Thus, for example, a police officer can cause a confession by falsely telling a suspect that his fingerprints were found on the victim's wallet (*Farnam, supra,* 28 Cal. 4th 107, 182), or that his accomplice has confessed (*People v. Felix* (1977) 72 Cal.App.3d 879, 885-886), or he was identified by an eyewitness (*Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 495), or his fingerprints were lifted from the body (*People v. Musselwhite* (1988) 17 Cal.4th 1216, 1241).

must merely have some connection to the murder in time or space. (*People v. Barnett, supra*, 17 Cal.4th at pp. 1161-1162.)

As the prosecutor argued, the evidence of murder was overwhelming, if Fedor was believed by the jury. The jury did not have to accept the defense urging that the victim was dead when Baker and TK returned to the trailer. (38 RT 3669-3670.) "With what was done to that woman, she was clearly tortured, and it was certainly an intentional act to cause cruel and prolonged pain, and she (appellant) certainly intended to kill that woman with what she did to her." (38 RT 3670.)

Both the evidence of intent to kill and the evidence of torture have substantial support in the evidence presented at trial. The jury could reasonably conclude Melanie was tortured with electricity, shots of battery acid, hits on the head with a pan, and being poked with a screwdriver, before she was stabbed to death. TK told McNeely that he tortured the victim with electric shock. Fedor and other witnesses saw a lamp cord that had been cut away from the lamp, remained plugged in, and had **burned** ends. The cord and burned ends corroborated TK's claim.

Baker told the jury appellant took her to Fedor's bathroom and showed her several hypodermic needles. Appellant said they were filled with battery acid. The "Hot Shots" of battery acid were intended to kill Melanie, and to cause extreme pain. There are more direct ways to kill someone than were used here. According to the expert, the acid did cause burning and pain and so did the electricity.

Fedor finding a screwdriver with skin, blood and hair on it implies torture too. Even though Baker could not recall how they used the screwdriver on Melanie, she testified it was TK's stabbing her in the neck and chest that killed her. Thus, the jury could reasonably conclude that the screwdriver was used to poke at Melanie's body and skull to cause pain.

The torture special circumstance was supported by substantial evidence both as to the intent to kill and the intent to cause pain.

B. Substantial Evidence Supports The Lying-In-Wait Special Circumstance

Appellant contends there is no evidence of concealment of purpose, watchful waiting or a surprise attack. (AOB 148-153.) There is substantial evidence of all three.

Physical concealment from, or an actual ambush of, the victim is not necessary for the lying-in-wait special circumstance. (*People v. Michaels* (2002) 28 Cal.4th 486, 517.) The concealment element is satisfied either by ambush or by the creation of a situation where the victim is taken unawares, even though he sees his murderer. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 500.) This special circumstance was proved where a defendant lured the victim to a motel room on the pretext of ordering a pizza, overpowered him on his arrival, bound him with a clothesline, gagged him, and left him either dead or to drown in a bathtub of water. (*People v. Sims* (1993) 5 Cal.4th 405, 433.) The evidence was also sufficient for this special circumstance where a defendant watchfully waited from a position of advantage in the back seat while the car was driven to a more isolated area and suddenly attacked from behind the victim without warning. (*People v. Morales* (1989) 48 Cal.3d 527, 555, 557.)

While it is true that Baker invited Melanie along, there is no requirement of "luring" the victim for lying-in-wait special circumstances. (*People v. Superior Court* (*Jurado*) (1992) 4 Cal.App.4th 1217, 1228-1229.)

Lying-in-wait requires an intentional murder under circumstances which include (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v.*

Morales, supra, 48 Cal.3d at pp. 557-558.) The special circumstance requires the killing be contemporaneous with, or following directly on the heels of, the watchful waiting. (*Id.* at p. 558.)

The prosecutor argued appellant and TK "laid in wait, waiting for the opportune time to strike the victim when she was unaware, unsuspecting, unprotected and defenseless and proceeded immediately into the long, slow, torturous death." (38 RT 3669.) Everyone drove off for the honor camp, leaving only appellant and the victim behind, and when the victim was seen again, she was bound, blindfolded and probably gagged, she was eventually killed. (38 RT 3669.) As the trial judge observed regard to the lying-in-wait special circumstances, in the Penal Code section 1118 motion made after all the evidence for both sides was in, once they were at the trailer, there is sufficient evidence, if believed, for the jury to find that the conspirators did intend to wait for an opportune time to take the victim by surprise when Fedor was not there, despite the fact that the victim knew that they were there and waiting for an opportune time to act.[49] (38 RT 3675.)

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49. Once all the evidence was in, the defense made an Penal Code section 1118.1 motion which included the lying-in-wait special circumstance. (38 RT 3667.) Appellant contended that no substantial evidence proved concealment, watching and waiting, and the killing during the same time period. (38 RT 3667.)

The prosecutor responded that there was a conspiracy between appellant and TK beginning perhaps from the time they went, uninvited, to the 7-11 store and then led the group out into the countryside. "From then on, it was their show. They were calling the shots as to where the people were going." (38 RT 3668.) The two of them were in a separate car, and they pulled over, invited the Fedor family with them, and were calling the shots from then on. The next morning TK was angry when he found out that police had been to his home, and there was no reason for his anger "if, in fact, they were not up to no good." TK knew they were up to murder when TK called appellant while Baker was getting her drugs after they had dropped off Fedor at the honor camp. He informed Baker "in so many words. From then on, we have active conspiracy

Specifically, Fedor testified she heard Dalton say Melanie was a snitch, was angry when she accused the victim of taking her property and selling it at a yard sale, and the victim sounded scared. (38 RT 3675-3676.) The next day, appellant treated the victim like a slave, the victim told Fedor she was afraid of appellant, and wanted to know how to get away. Fedor told her to go outside and scream or head for the freeway. The victim was never left alone. Finally, the paramedic was not allowed to go inside both times that she came, that TK was agitated and told Baker to get the paramedic out of there. (38 RT 3676.)

Although Baker asked Melanie to come along, the evidence indicated that appellant was angry at Melanie and following her activities the day before the murder and watching her at the trailer. Baker testified that while Robert May was in jail, she and others helped Melanie put her possessions into storage because she had been evicted on Saturday, June 25, 1988. Appellant came to the apartment complex where Melanie lived, was angry, and left only after Baker promised to call her if she found any of appellant's possessions. When Baker later telephoned to say she saw none of appellant's possessions, appellant and TK arrived at the convenience store where Baker, Melanie and the others were, within minutes of the phone call. (33 RT 3103.)

Once they arrived at the trailer, Melanie was never left there alone to prevent any opportunity she might escape. (30 RT 2586.) Appellant waited for Fedor to leave for the honor camp visit to attack Melanie. TK, who was driving Fedor, knew what was happening in the trailer because he advised Fedor not to go back in for the item she had forgotten. From this evidence, the jury could reasonably conclude that appellant concealed her purpose and waited for an opportunity to attack.

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full-fledged. Let's kill this lady, and it continues until she was killed, tortured and disposed of. . . ." (38 RT 3668.)

When Baker and TK returned to the trailer, they found Melanie tied to a chair in the kitchen with a sheet over her head and appellant sitting on a nearby sofa in the living room. There was no mention of any signs of struggle. From this evidence, the jury could reasonably conclude appellant used a surprise attack when the two women were alone.

Appellant waited until Fedor was gone to attack Melanie. When Baker and TK returned to the trailer, Melanie was tied up and hooded with a sheet. There was substantial evidence of lying in wait.

VI.

BAKER'S MARCH 4, 1992 INTERROGATION WAS PROPERLY ADMITTED INTO EVIDENCE AS A PRIOR CONSISTENT OR INCONSISTENT STATEMENT

Appellant contends Baker's motive to fabricate arose before her 1992 recorded interrogation, so it could not properly be admitted as a prior consistent or inconsistent statement. (AOB 189-215.) The trial judge's conclusion to the contrary was not an abuse of discretion. Further, the issue has been forfeited since it was not presented on these grounds at trial.

When an express or implied charge is made that the testimony of a witness is recently fabricated or influenced by bias or other improper motive, a prior consistent statement may be used to support the credibility of that witness, if it was made before the bias, motive for fabrication or other improper motive is alleged to have arisen. (Evid. Code, 791.) Prior statements inconsistent with testimony can be used to attack a witness' credibility. (*Ibid.*)

On November 9, 1995, after the jury had been selected, the prosecutor, in anticipation of cross-examination that would "expressly or impliedly" charge that their trial testimony was fabricated, asked to rehabilitate his witnesses with prior tape-recorded interviews. (6 CT 1235-1241.) Baker had been interviewed by police on March 4, 1992, after the detective had contacted her

at her home. (37 RT 3603-3604, transcript at 8 CT 1513-1591–Exh. 37.) Baker was interviewed again on July 5, 1994, with immunity in anticipation of her second degree murder plea that afternoon. (Exh. K-1, 20 CT 4115-4185, 4118.)

During the first interview, Detective Cooksey told Baker he would not take her into custody that day, but they were investigating the murder of Melanie and he wanted to know where the body was because her family wanted to put her to rest and her children would probably like to know where she was some day. (8 CT 1515-1516.) The officer told Baker,

"The fact that you participated is something else we think we can prove."

A. "Good luck."

Q. "Well, the reason we can prove it is, we have it on tape."

(8 CT 1516.)

The detective then played a recording of Baker discussing the murder with Pat Collins who had called her in cooperation with the police. (8 CT 1517-1518.) Baker said she did not care to listen to any of it. (8 CT 1518.) Baker refused to answer questions saying she was "an ex-convict, I ain't no snitch. . . ." (8 CT 1519.) The police assured her that "these people have already told on themselves," and what they wanted from Baker was "exactly, from your perspective, what was your part and what do you feel your part was?" (8 CT 1519-1520.) Baker said she was in the wrong place at the wrong time and "loaded" after using dope. (8 CT 1521.) She did not feel she could be charged with murder, but when she asked the police officer if she would be, he answered yes. (8 CT 1522.) Baker then started answering questions as to what happened when they got together with Melanie. (8 CT 1523, et seq.)

Appellant contends none of this interrogation should have been admitted because Baker already had a motive to lie from the fact that she would be arrested for murder. (AOB 194-196.) On that same basis, appellant claims her

right to due process was violated by its admission. (AOB 196-202.) However, Baker had no motive to fabricate when she was talking to Collins, and she knew that she would not be arrested when she made her March statement to the detective.[50/]

Evidence Code section 791, subdivision (b), requires the prior consistent statement to be made before the motive for fabrication is alleged to have arisen.

> (a) Evidence of a statement previously made by a witness that is consistent with his trial testimony is inadmissible to support his credibility unless it is offered after (1) evidence of a statement made by him that is inconsistent with any of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and (2) the statement was made before the alleged inconsistent statement; or

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50. Although appellant complains the police asked leading questions, interrogation is not governed by the rules of evidence. Further, she complains the officer said "inadmissible" things in his questions that may have misled the jury. (AOB 207-211.) Again, interrogation is not governed by rules of evidence.

Finally, appellant also complains that there were "numerous statements" that were neither consistent nor inconsistent in the interrogation played to the jury and the officer's statement that Melanie's children would want to know some day what happened to their mother was impermissible victim impact. (AOB 211-213.) However, as appellant admits, the tape was played after editing out irrelevant material such as references to the Dalton gang or a cult and an unrelated incident in an El Cajon hotel room. (35 RT 3415; AOB 189-190.)

The position of the defense was that if the March 4 tape was played, then the July 5 tape became relevant and should also be played. (35 RT 3414.) Exercising its discretion, the court found the March 4, 1992 tape more probative than prejudicial and allowed it to be played. (35 RT 3414-3415.) Consequently, it was played for the jury. (37 RT 3605-3606.) The mistrial motion that followed was denied. (37 RT 3607-3608.)

(b) an express or implied charge has been made that his testimony at the hearing is recently fabricated . . . and the statement was made before the . . . motive for fabrication . . . is alleged to have arisen.

(Evid. Code, § 791.)

At trial the District Attorney asked to play the videotapes "regarding what happened in this case" as both prior consistent and inconsistent statements regarding trial testimony. As to Baker, the prior inconsistent statements were that she had cleaned up blood and Melanie had made statements during her murder. (34 RT 3356; 35 RT 3410-3411.) The implied bias cited by the prosecution was that she was offered a "deal." (35 RT 3410.)

Prior consistent statements are admissible under Evidence Code section 1236 to rebut a charge of recent fabrication, as long as the statement is made before the existence of the motive that the opposing party expressly or impliedly suggested might have influenced the witness's testimony. (*People v. Noguera* (1992) 4 Cal.4th 599, 629.) The focus under Evidence Code section 791 is the suggestion proffered on cross-examination. (*People v. Jones* (2003) 30 Cal.4th 1084, 1107.) Arrest provides motive for fabrication. (*People v. Hitchings* (1997) 59 Cal.App.4th 915, 920-921.)

Here as in *DeSantis*, appellant claimed the motive to lie arose at the time of the murder.[51] (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1229.) The claim is that Baker had a motive to underplay her own culpability to get a plea bargain in the future so nothing she said before this trial could be used by the prosecution. But Baker did not think she could be arrested when she spoke with the detective and he assured her she would not be. Baker already had her plea bargain when she testified so, and had no motive to lie when the prior

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51. At trial, opposition was based on (1) the prosecutor had the testimony of the witness (35 RT 3412) and Evidence Code section 352 (35 RT 3413). As now presented, the issue should not be considered on appeal. (Evid. Code, § 353.)

statements were made because she did not expect to be arrested. (See *People v. DeSantis, supra*, 2 Cal.4th at p. 1229.)

Appellant relies chiefly on *Coleman* (AOB 191-192) which is distinguishable. Over two months after two men were seen running from the murder-robbery of a bar owner, one man(Stevenson) went to the police, confessed to being one of the participants, and named Coleman as the other. He pled guilty to first degree murder and was sent to prison for life. Testifying against Coleman, the witness said he was unarmed and did not know Coleman had a gun when he drove Coleman to the victim's home. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1161.) When the bar owner's car approached, Coleman ran up to him, knocked him down and fired three shots. The men split the money taken from the bar owner and went to a bar. Stevenson's wife confronted him at the bar, and Coleman told her not to get mad because her husband had been with him all night and did nothing wrong. Later, Stevenson drove appellant to the airport. Coleman flew to Virginia, and there was evidence he had several hundred dollars while he was there. (*People v. Coleman, supra,* 71 Cal.2d at p. 1162.)

Testifying in his own defense, Coleman denied planning or committing a robbery and murder and said he had sold his gun to the witness a week before the crime was committed. Further, the witness knew that Coleman was planning to leave town. (*People v. Coleman, supra*, 71 Cal.2d at pp. 1162-1163.) The California Supreme Court reversed Coleman's capital conviction on other grounds, and decided, for purposes of re-trial, that the witness's motive arose when he decided to protect himself at Coleman's expense–immediately after the murder. Consequently, the witness's statements to his wife and father should not have been admitted as prior consistent statements. (*People v. Coleman, supra*, 71 Cal.2d at pp. 1165-1166.) Coleman's testimony indicated Stevenson had committed the crime with someone else and confessed to a lesser

role in the crime, naming Coleman as the killer for the improper motive of falsely placing the major blame on defendant to escape the death penalty himself. (*People v. Coleman, supra*, 71 Cal.2d at pp. 1165-1166.)

In the case at bench, appellant contends Baker's motive to lie also arose after the murder. She contends that Baker's motive was to down play her role in the murder so that she might obtain a good plea bargain. This contention totally ignores that the implied bias arose only once the accomplice-witness made a "deal" with the prosecution, and that's when any motive to lie first emerged. (*People v. Coleman, supra,* 71 Cal.2d 1166, fn. 1; citing *People v. Duvall* (1968) 262 Cal.App.2d 417.) Indeed appellant never suggested otherwise below. (See 35 RT 3410.)

This Court's decision in *People v. Torres* (2003) 30 Cal.4th 1084 is the more apt legal precedent. In that case, a witness to murder implicated the defendant when interviewed by the police. Later, that witness was offered a plea bargain and testified against the defendant. The defendant argued it was error to admit a prior consistent statement before the plea bargain, because at the time the witness made the statement, he feared his own arrest for the murder. The court held the statement was properly admitted because it ws made before the plea bargain which was also a motive to fabricate testimony. (*People v. Jones, supra,* 30 Cal.4th 1084, 1106-1107.) Because the hearsay statement admitted fell within the scope of the prior consistent statement statute whose constitutionality is unchallenged, there is no federal due process violation. (*People v. DeSantis, supra*, 2 Cal.4th at pp. 1229-1230.)

Further, any error would be harmless because it is not of constitutional dimension. These are simply ordinary evidentiary rules that would be judged by the harmless error standard enunciated in *Watson.* (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

Appellant's

> "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. '"[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] Accordingly, the proper standard of review is that announced in *People* v. *Watson* [(1956)] 46 Cal.2d 818, 836 . . . , and not the stricter beyond-a-reasonable doubt standard reserved for errors of constitutional dimension (*Chapman* v. *California* (1967) 386 U.S. 18, 24.' [Citation.]"

(*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

Fedor testified that appellant was the leader of the pack at the trailer on the day of the murder. Consequently, the most that appellant can contend is that Baker had a motive to lie as a result of the plea bargain with the District Attorney, not the murder. Accordingly, the pre-plea bargain tapes were properly admitted, and even assuming error, there is no reasonable probability appellant would have enjoyed a more favorable outcome.

VII.

THE EFFECTS OF ELECTRIC SHOCK AND BATTERY ACID ON HUMANS WAS PROPER EXPERT TESTIMONY WITHIN THE MEDICAL EXPERTISE OF THE PATHOLOGIST

Appellant contends Dr. Blackbourne's testimony about the effects of injecting battery acid and using electricity on a person was speculative and prejudicial testimony. (AOB 216-232.) The effects of these actions were a proper subject for expert testimony and were within the expertise of the doctor.

California law is clear:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(Evid. Code, § 801, subds. (a) & (b).)

As the prosecutor argued at trial, the effects of battery (sulfuric) acid and electricity on the human body is sufficiently beyond the common experience of jurors and a proper subject for expert testimony. The 32-year medical education, training and experience of Dr. Blackbourne qualified him to answer hypothetical questions based on the information provided by Sheryl Baker. (5 CT 983-987; citing *People v. Hayes* (1985) 172 Cal.App.3d 517, 522; and CALJIC No. 2.82.)

There is no question that a doctor with 32 years experience could comment on the effect of electricity on a human body. He explained how and why an electrical shock would be painful. Here, there was circumstantial evidence that appellant used electricity on Melanie because several people saw the plugged-in lamp cord whose ends had been stripped. The ends were burned. Also, TK told his cell mate that he used "shock" therapy on Melanie. Observing that no electrical cords were ever recovered, and the fact that Baker did not mention use of electric shock (AOB 217-218), appellant makes a shotgun attack contending that the pain evidence was irrelevant, and common knowledge made it such that the trier of fact did not benefit from the expertise of a doctor who had autopsied 25 people who had died from electrocution (AOB 218-227).

The trial judge did not abuse his discretion or deny appellant due process by allowing the testimony of the pathologist. (AOB 227-230.)

VIII.

BRAKEWOOD'S TESTIMONY ABOUT HER CONVERSATION WITH APPELLANT AND NOTTOLI ABOUT BATTERY ACID WAS RELEVANT EVIDENCE OF AN ADOPTIVE ADMISSION

Appellant contends Brakewood's testimony about a conversation with appellant and Nottoli on the subject of battery acid was irrelevant and should have been excluded under Evidence Code section 352. (AOB 233-241.) The testimony was clearly relevant in view of Baker's testimony that appellant wanted her to shoot Melanie with battery acid. Further, it was an adoptive admission by appellant who apparently heard Nottoli's remarks, adopted them as her own and added that they really "fucked up that girl."

When a person is accused of having committed a crime under circumstances which fairly affords him an opportunity to hear, understand and reply and he fails to speak–or makes an evasive or equivocal reply–both the accusatory statement and the fact of the silence or equivocation may be offered in evidence as an implied or adoptive admission of guilt. (*People v. Pitts* (1990) 23 Cal.App.3d 606, 850.) Evidence Code section 1221 provides that a statement offered against a party is not made inadmissible by the hearsay rule if the party has by words or other conduct manifested his admission or belief of its truth. To warrant admissibility under this Evidence Code section,

> It is sufficient that the evidence support a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether the defendant's reaction actually constituted an adoptive admission becomes a question for the jury to decide. [Citation.]

(*People v. Pitts, supra,* 23 Cal.App.3d at p. 850 ; quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

Appellant contends that allowing Brakewood to testify was prejudicial error and inadmissable hearsay. After Nottoli said "they had shot up this girl

with battery acid. . . and burned her," appellant said, "Yeah, we really fucked that girl up." The judge overruled the hearsay objection made between the two quotes. (33 RT 3255.) Because appellant acknowledged Nottoli's comments, they became an adoptive admission which was admissible under California Evidence Code section 1221.

In this case, Nottoli made incriminating comments using the word "we," and appellant acknowledged and affirmed what he said by agreeing that "we really fucked that girl up." Appellant's word and conduct certainly adopted Nottoli's statements and indicated her belief in their truth. (See *People v. Silva* (1988) 45 Cal.3d 604, 623.) Further, in this case, Nottoli was called to the stand by the defense and he denied ever making such remarks. He testified that his van was white, not dark green, as Brakewood had testified. The issue then became credibility, which was for the jury to decide.

Appellant now claims that appellant did not even hear Nottoli's statement because she was outside the van making a telephone call during most of the conversation. Nevertheless, Brakewood testified that appellant came in at the tail end of the conversation and agreed with what Nottoli had been saying about shooting a girl up with battery acid and burning her. Appellant's current contention that her comment upon entering the van more likely referred to her telephone conversation rather than the words spoken in the van in her absence, was proper argument to make to the jury. It is not, however, a basis for finding error on appeal.

Brakewood's testimony about a conversation she had with appellant and Nottoli about battery acid was certainly relevant in view of Baker's testimony that appellant gave her hypodermic syringes filled with what she said was battery acid and told her to shoot it into Melanie. The admission of that evidence was a proper exercise of judicial discretion. Moreover, even assuming error, it is harmless. In light of the overwhelming evidence of appellant's guilt,

it is not reasonably probable that appellant would have enjoyed a more favorable outcome if only the evidence of the conversation about battery acid had been excluded as irrelevant.

IX.

THE "RESTRICTION" OF CROSS EXAMINATION OF PROSECUTION WITNESSES UNDER EVIDENCE CODE SECTION 352 ELIMINATED CUMULATIVE AND TIME CONSUMING IMPEACHMENT OF WITNESSES ALREADY IMPEACHABLE BY DRUG USE AND FELONY CONVICTIONS

Appellant contends that the trial court erroneously limited cross examination of Fedor and several other prosecution witnesses with pending criminal charges, details of their felony convictions and misdemeanor acts of moral turpitude. (AOB 242-257.) While appellant characterizes the issue as an unconstitutional limitation of the right of cross-examination, it must be remembered that the trial judge limited impeachment, not evidence that was relevant to guilt or innocence, by excluding presentation of cumulative and time-consuming evidence regarding witnesses who used drugs and had felony convictions. Nearly every single witness in this case was a drug addict with one or more felony convictions. The trial judge properly exercised discretion to eliminate remote and unduly time-consuming impeachment for drug and misdemeanor convictions and each witness was in fact impeached with his or her criminal record and/or drug use. Any error was harmless because the excluded evidence would not have resulted in a different impression of any of the witnesses in question. Appellant also contends that the court erroneously restricted cross-examination of a defense attorney regarding the methamphetamine use of his client and of Fred Eckstein regarding the drug use of his mother. (AOB 258-259.) This issue was forfeited below and is without merit.

Respondent agrees with appellant that cross-examination regarding pending charges, felony convictions and misdemeanor acts of moral turpitude is permissible to support an inference that the witness may be seeking leniency by testifying (*People v. Claxton* (1982) 129 Cal.App.3d 638, 662) and regarding felonies and misdemeanor acts of moral turpitude to attack the credibility of the witness (*People v. Castro* (1985) 38 Cal.3d 301, 306; *People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556).

The right of cross-examination generally includes exploration of bias, prejudice, credibility, veracity or motive. (*People v. Box* (2000) 23 Cal.4th 1153, 1203; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1054.) However, the determination to limit the evidence concerning proffered testimony, especially under Evidence Code section 352, is within the trial judge's discretion upon a balancing of factors. (*Semsch v. Memorial Hospital* (1985) 171 Cal.App.3d 162, 168; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588.) A trial court has discretion under Penal Code section 352 to limit cross-examination on matters which would be cumulative on the issue of credibility. (*People v. Burgener* (1986) 41 Cal.3d 505.)

The right of cross-examination is fundamental. Its function is to test truth, place the witness's statements in context, and give the fact finder a chance to observe the demeanor of the witness. (*Pointer v. Texas, supra*, 380 U.S. 400.) Both in the state and federal system, however, the trial court has discretion to determine the bounds of relevant cross-examination. (*United States v. Montgomery* (9th Cir. 1993) 998 F.2d 1468, 1478.)

Questions about violation of the Confrontation Clause arise where severe restrictions are imposed by the court, emasculating the right of cross-examination. (*Delaware v. Fensterer* (1985) 474 U.S. 15, 19 [106 S.Ct. 292, 88 L.Ed.2d 15]; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1139-1140.) In *People v. Belmontes* (1988) 45 Cal.3d 744, 778-780, the defendant

argued his cross-examination was restricted regarding motive for bias and fabrication. While wide latitude should be given to such cross-examination which tests credibility in a criminal case, the court concluded cross-examination was not "so unduly restrictive as to violate his Sixth Amendment right of confrontation." The court observed that while it violates the confrontation clause to prohibit otherwise appropriate cross-examination designated to show a prototypical form of bias on the part of the witness, and thereby to expose the jury to facts which it can use in evaluating reliability, a judge can certainly restrict repetitive or only marginally relevant questions. (*Delaware v. Van Arsdall, supra*, 475 U.S. at pp. 679-680.)

There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced a significantly different impression of the witness's credibility. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680.) Clearly, impeachment by both felonies and misdemeanors of moral turpitude is a matter subject to the trial court's discretion to exclude evidence under Evidence Code section 352. (*People v. Robinson* (2005) 37 Cal.4th 592, 626.) A court abuses its discretion only when its ruling falls outside the bounds of reason. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149.)

A. Fedor Was Adequately Impeached Despite Exclusion Of Cross About Her Pending Charges And Remote Misdemeanors

Appellant contends he was unduly restricted in his cross-examination of prosecution witnesses because he was not allowed to explore Fedor's pending criminal charges or her three misdemeanor convictions in 1982. (AOB 243-252.) During motions in limine, the defense raised impeachment issues with prior convictions. (30 RT 2506.) The prosecutor pointed out that mere possession of drugs is not a crime of moral turpitude and, at the time, the law did not allow impeachment with juvenile true findings. In this context, the trial court excluded three 1982 misdemeanor convictions as to Joanne Fedor because

they were too remote and involved undue consumption of time. (30 RT 2514.) Appellant noted that a pending case appeared to be a felony because of its case number and the court commented that was not a conviction. The pending case was ruled inadmissible. Fedor's 1983 misdemeanor conviction for battery was excluded because it was not a crime of moral turpitude. However, a case that ended in felony conviction for violation of Penal Code section 487 was allowed to be used to impeach Fedor. (30 RT 2519.)

Fedor was impeached by drug use, character witnesses and felonies. She used methamphetamine two or three times a day by nose, mouth or hypodermic needle. Some days she used the drug more than three times. (30 RT 2622-2623.) Several witnesses testified Fedor was a liar and Patrick Woods called her "a piece of shit." (32 RT 3041.) Had the trial judge admitted the pending grand theft-forgery charges and the remote or non-moral-turpitude misdemeanors, it would not reasonably have produced a significantly different impression of Fedor's credibility. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680.) The same is true of the remaining witnesses.

B. The Trial Court's Limitations On Impeachment Of Other Witnesses Did Not Violate The Confrontation Clause

"Not every restriction on a defendant's desired method of cross-examination is a constitutional violation." (*People v. Chatman, supra*, 38 Cal.4th at p. 372.) A trial court's limitation of cross-examination regarding the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been allowed. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

At the same in limine hearing, the court found as to Sheryl Baker that a misdemeanor true finding of violation of Penal Code section 470 in Juvenile Court was too remote and its probative value was outweighed by the

consumption of time, and a misdemeanor violation of Penal Code section 12020A (sic) (30 RT2507) in 1984 did not qualify under the exception the defense sought, was too remote and involved undue consumption of time compared to its probative value. The trial court found a 1986 misdemeanor theft conviction too remote and excluded a misdemeanor loitering conviction because it was not a crime of moral turpitude and would consume too much time compared to its probative value. Finally it found a conviction for violating Business and Professions Code section 4149 and a 1990 misdemeanor conviction for possession of a controlled substance, irrelevant, not involving moral turpitude and time-consuming. (30 RT 2507-2525.) Baker was impeached with drug use (crystal and marijuana). (33 RT 3095-3096.)

Regarding Judy Brakewood, the court found that her conviction for a wobbler (Pen. Code, § 12020) regarding weapons was not a crime of moral turpitude (30 RT 2510-2511). She was impeached with injecting 3/4 oz. of meth daily. (33 RT 3265.)

Regarding Lacy Grote, a 12-year old misdemeanor possession of marijuana conviction was too remote, involved no moral turpitude and would consume too much time and a violation of Vehicle Code section 23153, subdivision (a), a 1989 misdemeanor conviction for Penal Code section 243, subdivision (c), and a misdemeanor Health and Safety Code section 11550 violation as irrelevant and not involving moral turpitude. (30 RT 2515.)

Regarding Marcia Fisher, a misdemeanor Health and Safety Code section 4149 violation was excluded as irrelevant, less probative than it was time-consuming and not involving moral turpitude. (30 RT 2516.)

Regarding Laurie Carlisle, a conviction for possession of drugs was excluded because it was not a crime of moral turpitude or relevant to impeachment. Two misdemeanor convictions in 1985 and 1988 for theft, and a 1987 conviction for possession of drugs, were excluded on the same grounds.

Additionally, the court found the convictions remote and unduly consumptive of time when considering their probative value. (30 RT 2519.) Carlisle admitted three felony convictions in 3 states. (32 RT 3052).

Regarding Pamela Johnson a misdemeanor conviction for check forgery in 1982 was excluded as too remote and of limited probative value in view of the fact that there were three admissible felony convictions and too time consuming. (30 RT 2519-2520.)

Although the remaining four witnesses were not part of the motion in limine and there were no rulings restricting their impeachment, they were impeached as follows:

Jeannette Bench testified in jail clothes and admitted to 3 felony convictions for forgery, a burglary and a car theft. (32 RT 3017.)

Donald McNeely testified while in custody and was impeached with numerous felony convictions including 12 burglary convictions in San Diego. (32 RT 3071.)

Pat Collins was impeached with a 1986 felony conspiracy to manufacture methamphetamine. (33 RT 3205.)

Phyllis Cross was impeached with her use of methamphetamine. (31 RT 2849-4850). The only limitation on cross alleged was that Donald McNeely could not be questioned about the details of his felony convictions. The scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not extend to the facts of the underlying offense. (*People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1266, review denied Feb. 14, 1996.) Normally only the name or type of crime and the date and place of conviction is heard by the jury. (*People v. Allen* (1986) 42 Cal.3d 1222, 1270; *People v. Santos* (1994) 30 Cal.App.4th 169, 176.)

The restrictions upon impeachment were reasonable and did not abuse the judge's discretion or impinge on appellant's constitutional right to cross-examination. Impeachment with felonies is generally limited to the name of the felony and fact of conviction, and misdemeanors were properly excluded as remote and/or too time consuming.

C. Claims Regarding Impeachment Of Attorney Koliver And Fred Eckstein Were Not Preserved For Appeal And Have No Merit

Finally, appellant contends that limitations prevented her from questioning Attorney Kandy Koliver about Melanie's methamphetamine use and Fred Eckstein regarding his mother's use of methamphetamine. (AOB 258-259.) This contention was waived at trial for failure to raise an objection on the grounds now advanced. (*People v. Lewis* (2006) 39 Cal. 4th 970, 996; *People v. Rogers* (1978) 21 Cal.3d 542, 547.)

Appellant now contends that Attorney Koliver's knowledge or lack of knowledge regarding Melanie's drug use would relate to her credibility and reliability as a witness. The issue was not raised at trial. The defense merely asked attorney Koliver: "You were certainly aware that Irene May did have methamphetamine problem, weren't you?" The court sustained the following objection by the Prosecutor: "Objection. Irrelevant. Calls for speculation. No personal knowledge." Appellant responded she had no further question. (31 RT 2833.) Thus, the issue was waived for appeal. In any event, nothing in the record indicates that Koliver was ever in a position to witness Melanie's drug use or that she was trained to recognize symptoms of being under the influence. The jury heard direct testimony of Melanie's drug use from witnesses with personal knowledge.

Likewise, appellant now argues that she should have been allowed to question Fred Eckstein about his parent's methamphetamine use because drug use would bear on the mother's credibility and powers of observation. Again

this purpose was not presented to the trial court which merely sustained the prosecutor's objection of "Irrelevant. Calls for speculation" when Fred was asked, "Were your parents using methamphetamine?" (33 RT 3179.) Fred's father was never a witness in this case. Further, this testimony would have been cumulative as to the mother. Kathy Eckstein had already testified that she used methamphetamine during the time that she was making her observations at Fedor's trailer. (31 RT 2864.)

D. Any Improper Restriction Of Impeachement Was Harmless

If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution case. (*People v. Chatman, supra,* 38 Cal.4th at p. 371; *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684; *People v. Belmontes, supra*, 45 Cal.3d at p. 780; *People. v. Hillhouse, supra,* 27 Cal.4th at p. 494.)

Here, appellant cross-examined the witnesses about their drug use, and their felony convictions, extensively. It cannot be said that the court improperly restricted cross-examination by removing remote crimes, misdemeanors and unadjudicated charges. The jury got a complete picture of each witness. The trial judge's limitations on impeachment of witnesses was reasonable in view of the impeachment that took place. The time-consuming evidence of unadjudicated pending charges, remote felonies and misdemeanor convictions involving moral turpitude would have necessitated time consumption and trials within the trial that would have distracted and possibly misled the jury. The trial judge was within his discretion under Evidence Code 352 to place the limitations that he did upon further impeachment.

The additional impeachment appellant identifies as being improperly excluded would unduly consume time. Moreover, it would not change the jury's perception of any witness because the jury knew their felony convictions, drug use and demeanor under questioning by both sides. There was no error in limiting impeachment at trial. Further, any error was harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)[52] Assuming arguendo that the trial court over-limited impeachment, the error was harmless because the excluded impeachment would not have produced a significantly different impression of the credibility of any witness in question.

X.

MISTRIAL WAS PROPERLY DENIED AFTER FEDOR SPONTANEOUSLY STATED APPELLANT MOLESTED HER CHILDREN AND THE JURY WAS INSTRUCTED, IF IT HEARD THE COMMENT, NOT TO USE IT FOR ANY PURPOSE

Appellant contends her death judgment must be reversed because the court failed to grant her mistrial motion after Fedor's unsolicited statement that appellant had molested her children. (AOB 260-266.) The remark was stricken and the jury was instructed, if it heard the comment, not to consider it for any purpose.

The denial of a motion for mistrial is within the trial court's discretion and may be reversed only upon a showing of clear abuse of that discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1154-1155; *People v. Hines* (1997) 15 Cal.4th 997, 1038.) Mistrial is warranted only if the error that occurred is of an incurably prejudicial nature. (See *Id.* at p. 1154.) The assessment of potential prejudice is, by nature, speculative, so the trial court is vested with considerable discretion in ruling on mistrial motions and its

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52. The claimed error is not of constitutional dimension. (See *People v. Boyette, supra,* 29 Cal.4th at pp. 427-428.)

weighing and finding the balance in favor of no prejudice must be accorded great deference. (*People v. Price* (1991) 1 Cal.4th 324, 430-431; *People v. Wharton, supra*, 53 Cal.3d at p. 567.)

In the instant case, the trial court properly denied the motion for mistrial and cured any prejudice by instructing the jury to disregard the comment, if any of them heard it. A " jury is presumed to have followed an admonition to disregard improper evidence, particularly where there is an absence of bad faith. It is only in the exceptional case that the improper subject matter is of such a character that its effect cannot be removed by the court's admonition." (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) This case is not the exception.

Here, toward the end of her testimony, Fedor spontaneously asked the trial judge: "Does she [appellant] have to stare at me the whole time?" The court advised Fedor not to look at appellant, and Fedor replied, "Your Honor, she molested my kids." (30 RT 2615-2616.) The trial judge struck her comment and admonished the jury, ". . . if you heard her last comment, disregard it. It is stricken." (30 RT 2616.) The trial court properly denied the motion for mistrial and cured any prejudice. If the trial court, in its discretion, finds an error is curable and takes affirmative steps to cure it, an appellate court must uphold the trial court's decision unless it results in a miscarriage of justice. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708; *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Appellant apparently stared at Fedor during her entire testimony and made her uncomfortable. She asked the judge if appellant had to do that and then, added the molestation comment. During the next break in proceedings, the defense moved for a mistrial because "during a period of time where there was no question pending, Miss Fedor indicated with no question pending, 'she molested my kids,' about Miss Dalton [appellant], and I objected at that time."

(30 RT 2620.) Counsel added the witness had turned to the judge and made the comment loud enough that the judge heard it.

The judge struck the comment from the record and admonished the jury to disregard it, if they heard it. He did not repeat it during the admonishment. (30 RT 2620-2621.) He denied the mistrial motion and cautioned the witness not to volunteer information. Fedor indicated outside the presence of the jury that she was trying to get authorities to press charges but the Sheriff's Department had informed her they could not prove the molestation. The judge told her that is the very reason she could not mention it in front of the jury. (30 RT 2621.)

The judge immediately took corrective measures. The judge did not repeat it when admonishing the jury, but merely told jurors to disregard the comment if they heard it. Later, the court questioned jurors individually.

Eleven jurors heard the comment, knew they should not consider it and said they would follow the admonition and give appellant a fair trial. (31 RT 2683-2694, 2697.) One heard part of the comment and would not consider it. (31 RT 2685) Two jurors did not even hear the comment. (31 RT 2695-2696.) Consequently, all jurors who heard Fedor's volunteered comment said they would not consider it. Any potential prejudice was cured by striking the comment and admonishing the jury.

Even though most jurors heard the comment, prejudice was highly unlikely. The accusation involved conduct that paled in comparison to the vicious, torture murder. It is unlikely that even a statement that she had molested Fedor's children would have prejudiced the jury against appellant in view of the evidence presented at trial. Further, there is no basis for concluding that jurors ignored the trial court's admonition. The judge quickly admonished the jury after striking the volunteered comment. Without repeating it, he told the jury to disregard it, if they heard it. Questioned individually, jurors who had

heard the remark agreed to disregard it and stated they could still be fair to appellant. Any error was cured.

XI.

THE LYING IN WAIT SPECIAL CIRCUMSTANCE SUFFICIENTLY NARROWS THE CLASS OF MURDERERS TO WHICH IT APPLIES TO MEET CONSTITUTIONAL STANDARDS AND IT WAS PROPERLY APPLIED TO APPELLANT

Appellant contends that California's lying-in-wait special circumstance fails to provide a meaningful basis for distinguishing capital from noncapital murder cases in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. (AOB 267-273.) The special circumstance sufficiently narrows the class of murders considered more aggravated and meets federal constitutional standards.

The requirements of lying in wait for first degree murder under Penal Code section 189 are slightly different from the requirements of the lying in wait special circumstance under Penal Code section 190.2. The lying in wait special circumstance contains more stringent requirements. If "the evidence supports the special circumstance, it necessarily supports the theory of first degree murder." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 500.)

The lying in wait special circumstance requires a showing of an intentional murder committed under circumstances that include: "(1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . ." (*People v. Hillhouse, supra,* 27 Cal.4th at p. 500.)

The "concealment" element is satisfied by showing that "a defendant's true intent and purpose were concealed by his actions or conduct. It's not required that he be literally concealed from view before he attacks the victim."

(*People v. Hillhouse, supra,* 27 Cal.4th at p. 500.) The concealment element may be established by an ambush or by the creation of situation where the victim is taken unaware even though the victim knows of the murderer's presence. (*People v. Sims* (1993) 5 Cal.4th 405, 433.) The required concealment "puts the defendant in a position of advantage, from which the fact finder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise." (*Ibid.)*

As to the requirement of a "substantial period of watching and waiting," a "period of a matter of minutes" is sufficiently substantial. (*People v. Edwards* (1991) 54 Cal.3d 787, 826.) The period is sufficient if it "indicates a period of watching or waiting and concealment of purpose so as to put the defendant in a position to take the victim unawares and by surprise." (*Id.* at p. 826.)

With respect to the concealment, the evidence reflected appellant created the type of situation where Melanie was taken unaware even though she knew of appellant's presence in the trailer. The facts of the instant case closely resemble the facts of *People v. Morales, supra*, 48 Cal.3d 527, where this court found sufficient evidence of the lying in wait special circumstance. In *Morales*, the defendant Morales and a codefendant lured the victim in the car under the pretense that they would go to the mall to find a gift for a friend. They placed the victim in the front passenger seat while the defendant sat behind her armed with a belt, a knife, and a hammer. After the codefendant drove to a more isolated location in town, Morales reached over the seat and attempted to strangle the victim. When the belt broke, Morales beat her on the head repeatedly with the hammer. The court found sufficient evidence of "lying-in-wait" based on "defendant's watchful waiting, from a position of advantage in the backseat, while the car was driven to a more isolated area, and his sudden surprise from behind and without warning." (*People v. Morales, supra*, 48 Cal.3d at p. 555.)

Here, the evidence abundantly established appellant murdered Melanie while lying-in-wait. She watched Melanie's movements on Saturday, did not leave her in the trailer alone and waited until Fedor left with the others. Appellant must have taken Melanie by surprise because Baker mentioned no signs of struggle. Melanie was tied to a chair, hooded with a sheet when TK and Baker returned to the trailer. Appellant expressly and flat out said they were going to kill her. The required intent to kill was expressly stated. All the elements of the special circumstance are met.

The facts of the instant case, virtually identical to the facts presented in *Morales*, fully support the guilty verdict of first degree murder premised on a theory of lying in wait and the true finding returned on the lying in wait special circumstance. The lying-in-wait special circumstance requires intent to kill. Thus it is sufficiently more stringent that the lying-in-wait needed for first degree murder. That difference sufficiently narrows the class to the most serious crimes and the special circumstance was properly applied to appellant.

XII.

THE INSTRUCTIONS GIVEN TO APPELLANT'S JURY WERE BOTH ADEQUATE AND CORRECT STATEMENTS OF LAW

Appellant contends her jury was given erroneous, misleading and incomplete instructions mandating reversal of the convictions and special circumstance findings of the guilt phase. (AOB 274-320.) The instructions were both correct and adequate.

In a criminal case, the trial court decides what instructions should be given after conferring with the parties. (Pen. Code, § 1093.5.) Even absent a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles governing the case are those closely and openly connected with the facts and which are necessary for

the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Generally, if instructions given are legally sufficient, a defendant must ask that they be amplified or clarified in the trial court in order to complain on appeal that they should have been amplified or clarified. (See *People v. Medina* (1990) 51 Cal.3d 870, 902.) In determining whether there was error, the instructions must be considered as a whole. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

Jury instructions should be interpreted so as to support the judgment rather than defeat it, whenever the instructions are reasonably susceptible to such an interpretation. (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.) Even if error is present in the instructions to the jury, reversal is only required if it affirmatively appears that the error was likely to have misled the jury. (*People v. Mardian* (1975) 47 Cal.App.3d 16, 46.) The test for challenges being subject to misinterpretation by the jury is whether there is a "reasonable likelihood" that a reasonable jury as a whole, misinterpreted the instruction. (*Boyde v. California* (1994) 494 U.S. 370, 381-383 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *People v. Benson* (1990) 52 Cal.3d 754, 801-802.)

Unless the modification suggested on appeal delineates an element of the crime or form of criminal responsibility, or the instruction as given withdraws an element from the jury's consideration, the trial court has no sua sponte duty to modify or clarify an instruction. (See *People v. Cox* (1991) 53 Cal.3d 618, 668-669.)

Appellant's jury was instructed to consider the instructions as a whole (CALJIC No. 1.01 at 8 CT 1627), that the statements of counsel were not evidence unless they stipulated to a fact and not to consider for any purpose evidence that was rejected or stricken by the court; (CALJIC No. 1.02 at 8 CT 1628) sufficiency of circumstantial evidence to prove specific intent or other

mental state; (CALJIC No. 2.02 at 8 CT 1632) how to use prior consistent or inconsistent statements evidence; (CALJIC No. 2.13 at 8 CT 1636) credibility of witnesses' evaluation; (CALJIC No. 2.20 at 8 CT 1637-1638) felony conviction regarding credibility of a witness; (CALJIC No. 2.23 at 8 CT 1642) character for honesty regarding credibility; (CALJIC No. 2.24 at 8 CT 1643) motive; (CALJIC No. 2.51 at 8 CT 1645) admission and view oral admissions with caution; (CALJIC No. 2.71 at 8 CT 1648) malice aforethought and first degree murder were defined; (CALJIC Nos. 8.11, 8.71 at 8 CT 1666-1667) corpus delecti must be proved independent of admission or confession; (CALJIC No. 2.72 at 8 CT 1673) expert opinion is not conclusive; (CALJIC No. 2.80 at 8 CT 1674) an accomplice (CALJIC No. 3.10 at 8 CT 1680), and the corroboration requirement were defined,and the fact that any out-of-court statement purportedly made by an accomplice is included (CALJIC Nos. 3.11, 3.12 at 8 CT 1681-1682); that Sheryl Baker was an accomplice as a matter of law (CALJIC No. 3.16 at 8 CT 1683); and the testimony of an accomplice is to be viewed with distrust (CALJIC No. 3.18 at 8 CT 1684). A cautionary instruction regarding in-custody informant was given (CALJIC No. 3.20 at 8 CT 1685); and the jury was told that association alone does not prove membership in a conspiracy (CALJIC No. 6.13 at 8 CT 1690); and murder was defined (CALJIC No. 8.10 at 8 CT 1691).

A. The Accomplice Instruction Was Correct And The Jury Was Told Corroboration Is Required For Out-of-Court Statements As Well As Testimony

Appellant contends that TK was an accomplice as a matter of law; therefore, his out of court statements should be corroborated and viewed with caution. (AOB 275-278.) The jury was instructed regarding the definition of accomplice and the need for corroboration and caution for out-of-court statements as well as accomplice testimony.

As summarized above, the jury was instructed that corpus delecti must be proved independent of admission or confession (CALJIC No. 2.72 at 8 CT 1673), was told the accomplice definition (CALJIC No. 3.10 at 8 CT 1680), corroboration requirement and the fact that any out-of-court statement purportedly made by an accomplice was included (CALJIC Nos. 3.11, 3.12 at 8 CT 1681-1682), that Sheryl Baker was an accomplice as a matter of law (CALJIC No. 3.16 at 8 CT 1683), that the testimony of an accomplice was to be viewed with distrust (CALJIC No. 3.18 at 8 CT 1684) and in-custody informant's are viewed with caution and distrust (CALJIC No. 3.20 at 8 CT 1685).

The accomplice instruction could be applied to T.K. The corroboration and caution instructions were also given and the jury was told these principles also applied to out-of-court statements of accomplices. Consequently, the jury was properly instructed regarding TK and the statements he made to his cellmate, McNeeley. Finally, the jury was instructed to be wary of in-custody informants. There was no error.

B. The Jury Was Instructed To View Appellant's Out-Of-Court Statements With Caution

Appellant contends the court should have instructed the jury sua sponte to view her statements with caution. (AOB 278-282.) The jury was so instructed. (See definition of admission and view oral admissions with caution.) (CALJIC No. 2.71 at 8 CT 1648.)

C. The Consciousness Of Guilt Instructions Regarding Any Wilfully False Statements By Appellant Or Attempts To Suppress Evidence Against Herself Were Properly Given

Appellant contends that two instructions regarding consciousness of guilt (CALJIC No. 2.03 concerning false or misleading statements, and CALJIC No. 2.06 regarding efforts to suppress evidence) were "unnecessary

and argumentative and permitted the jury to draw irrational inferences against appellant." (AOB 282-296.) In this case, there was evidence that appellant told May and others that Melanie was still alive and told others she had killed Melanie. There was also testimony that she "cleaned up" the scene, showered and destroyed her clothing. Consequently, the instructions were properly given. Any duplication with the circumstantial evidence instructions (AOB 283-284) was irrelevant.

D. Baker's Credibility Was Not Bolstered By The Instruction Regarding Consistent Or Inconsistent Prior Statements

Appellant contends that CALJIC No. 2.13 violated due process because it was one-sided and bolstered the credibility of Sheryl Baker. (AOB 297-299.) This was a standard instruction applicable to all witnesses.

The instruction in question states:

> Evidence that on some former occasion, a witness made a statement or statements that were inconsistent [or consistent] with [his] or [her] testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion.
>
> [If you disbelieve a witness' testimony that [he] or [she] no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by [him] or [her] describing that event.]

(CALJIC No. 2.13 at 8 CT 1636; 39 RT 3872-3873.)

Citing *Wardius v. Oregon* (1973) 412 U.S. 470, 475 [93 S.Ct. 2208, 37 L.Ed.2d 82] regarding fairness in discovery, appellant objects to the fact that the instruction states that consistent or inconsistent statements may be considered for the truth of the facts as stated by the witness, on such former occasions, without expressly saying they could also consider those statements for their falsity. (AOB 299.) Of course, no case requires such language. Appellant was instructed that all evidence was to be considered and weighed by the jury under

the standard instructions and there could be no conviction if there is reasonable doubt.

The sandard instruction regarding consistent and inconsistent statements was a correct and impartial statement of law to be applied to all witnesses who had made such statements.

E. No Instruction Allowed The Jury To Find Guilt On Motive Alone

Appellant contends the motive instruction erroneously allowed the jury to find her guilty based on motive alone. (AOB 299-305.) This argument is nonsense.

The motive instruction states:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. The presence of the motive may tend to establish guilt. Absence of the motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CALJIC No. 2.51 at 8 CT 1645; 39 RT 3876.)

The instruction clearly states motive in not an element of murder and the jury was told in order to find appellant guilty of any of the charged crimes, each element of the offense must be proved beyond a reasonable doubt. The fact that motive did not expressly state that it alone was insufficient to establish guilt does not give credence to appellant's position. The presence or absence of motive "may tend" to establish guilt or innocence. The jury was expressly told to consider the instructions as a whole. It is not reasonable that the jury would ignore the substantive instructions on the elements of each crime and its duty to find guilt beyond a reasonable doubt, and decide the case purely on motive.

F. The Six Standard Instructions Given In This Case Do Not Vitiate Or Weaken The Reasonable Doubt Standard

Appellant contends the requirement to prove guilt beyond a reasonable doubt (CALJIC No. 2.90) was undermined by the following six standard instructions:

1. CALJIC 1.00, regarding the respective duties of the judge and jury. (8 CT 1625; 39 RT 3867-3868; *People v. Pensinger* (1991) 52 Cal.3d 1210.)

2. CALJIC 2.21.1, regarding discrepancies in testimony (8 CT 1639; 39 RT 3874);

3. CALJIC 2.21.2, regarding wilfully false testimony (8 CT 1640; 39 RT 3874-3875);

4. CALJIC 2.22, regarding weighing conflicting testimony (8 CT 1614; 39 RT 3875); *People v. Salas* (1975) 51 Cal.3d 151, 156);

5. CALJIC 2.27, regarding sufficiency of evidence of one witness (8 CT 1644; 39 RT 3875-3876); *People v. Gammage* (rev. gtd.);

6. CALJIC 2.51, regarding motive (8 CT 1645; 39 RT 3876).

(AOB 305-320.)

This Court has rejected identical challenges to these instructions. (*People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony in circumstantial evidence instructions, CALJIC No. 2.21.2]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Jennings* (1991) 53 Cal.3d 334, 386; and *People v. Cook* (2007) SO42659, filed May 17, 2007, ___ Cal.4th ____ [addressing circumstantial evidence instructions, CALJIC 2.01, 2.02, 8.83 and 8.83.1]; and *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27].) Appellant asks the court to reconsider its prior rulings upholding these instructions. However, Appellant provides no basis for this Court revisiting its prior rulings upholding these instructions.

There was no instructional error. The six standard instructions in question did not lower the burden of the prosecutor.

PENALTY PHASE ISSUES

XIII.

CRAWFORD'S TESTIMONY ABOUT WHAT APPELLANT SAID SHE FELT DURING THE MURDER OF MELANIE WAS PROPERLY ADMITTED IN THE PENALTY PHASE AS A CIRCUMSTANCE OF THE CRIME

Appellant contends the testimony of a female prisoner who overheard her talking about Melanie's murder and saying Melanie's screams were the greatest high she ever had, was inadmissible because it was evidence of lack of remorse, was unreliable and was more prejudicial than probative. (AOB 336-344.) The testimony was properly admitted as a circumstance of the crime.

At the penalty phase of a capital trial, the prosecutor may present evidence on any statutory factor of aggravation. Further, the trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed at the penalty phase than at the guilt phase. (*People v. Box* (2000) 23 Cal.4th 1153, 1201.) Evidence that bears directly on the defendant's state of mind at the time of the capital murder is relevant under factor (a) as a circumstance of the crime. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1154.) Aggravating circumstances are standards to guide the making of the choice between the verdicts of death and life imprisonment. (*Poland v. Arizona* (1986) 476 U.S. 147, 156 [106 S.Ct. 1749, 90 L.Ed.2d 123].)

While lack of remorse may not, in and of itself, be argued as aggravating, the prosecutor is entitled to point out the absence of evidence of remorse and argue therefore that the mitigating factor is not present. (*People*

v. Dyer (1988) 45 Cal.3d 26, 81-82.) Lack of remorse may also be introduced by the prosecution on cross-examination of defense witnesses and rebuttal of other testimony which suggests remorse. (*People v. Clark* (1993) 5 Cal.4th 950, 1016.)

In 1994, Dawn Crawford, who was in the cell next door to appellant, heard appellant talking to Terry Carbeaugh about killing Melanie. (43 RT 4084-4086.) While laughing, appellant said she was fighting the death penalty for a murder she and a woman named John Boy had committed. She said they killed "the bitch who owed her $80.00." (43 RT 4089, 4086-4087.) Appellant added, although she used drugs herself, hearing the victim scream was the greatest high she has ever had. (RT 4087-4088.)

According to the representations of counsel, the defense was given a tape of the prosecution's interview with Dawn Crawford on February 3, 1995. (42 RT 3973.) On March 1, 1995, the defense moved to exclude Crawford's testimony as evidence of lack of remorse, essentially because there was no notice of intent to use the statement in the prosecutor's notice of aggravation. (9 CT 1790-1793, 42 RT 3974.) The prosecutor observed that the notice of aggravation was limited to Penal Code section 190.3 factors while this testimony had to do with the underlying crime itself–for which he had given notice. (42 RT 3975.) In that context, the court observed that the defense had already gathered witnesses to rebut Crawford's testimony. (42 RT 3975.) The trial court addressed the defense motion to exclude portions of Crawford's testimony calling the victim a bitch and appellant's statement that the victim's screams were the greatest high she had ever experienced. (42 RT 3979, 4010.) The court tentatively indicated those two statements did not go to the circumstances of the offense, but to the lack of remorse and heard argument. (42 RT 3979.)

The prosecutor argued that the "greatest high" remark was an indication of how appellant felt at the time of the murder. (42 RT 3980.) The defense countered that (1) such statements must be made at the scene of the crime itself to be admissible (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232) and, (2) post-crime evidence of lack of remorse does not fit any of the statutory sentencing factors upon which the prosecution may present evidence at the penalty phase (*People v. Gonzalez, supra*, 51 Cal.3d at p. 32). The trial court initially agreed. (42 RT 3981.) However, the prosecutor pointed out that *Gonzales* introduced some behavior and statements made at the time of arrest when Gonzales was bragging about the crime. The judge agreed to read that case before ruling. (42 RT 3982.)

When the trial court returned to this matter, it had read all of the cases cited by the attorneys. It stated lack of remorse is not admissible, but "remorselessness at the scene of the crime is an aggravating factor that is part and parcel with the circumstances of the offense. The issue was whether ". . . the mere fact . . . [the comments were] made substantially . . . (later) disqualifies them." (42 RT 4011.) Because the statements expressed appellant's feelings or mental state at the time of the offense itself, if believed, the judge felt it was boastful conduct that shows contempt for human life by saying the screams of the victim were the greatest high appellant ever had. Thus, the statement did not fall within remorse. The statement was just a circumstance of the crime, so the testimony would be allowed. (42 RT 4012-4013.)

The appellant pointed out below that in this trial, Crawford was responding to a prosecutor's question about remorse, when she revealed appellant's statement and the conversation was six and one-half years after the offense. (42 RT 4014-4016.) In response, the court observed this evidence as "definitely [in] a gray area." However, evidence of the defendant's mental state is clearly relevant and would have been admissible during the case- in- chief

had it been offered. (42 RT 4016-4017.) The fact that appellant said she enjoyed the victim's screaming at the time of the offense renders it admissible, despite the fact that the information was gathered in response to the investigator's question about whether appellant ever expressed any remorse. (42 RT 4017.) Finding that the statement "just doesn't get into the remorse aspect . . . [and] there is no requirement that she (appellant) has to express . . . (her) mental state at the exact time of the crime" to be admissible (42 RT 4017-4018); the trial court properly allowed the testimony. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1232.)

Appellant's statement about how she felt at the time she committed the crime, was properly allowed into evidence as a circumstance of the murder, despite the fact that it was made in jail, years after Melanie was killed. The court was within its discretion in ruling the statement fell within the statutory aggravation factor of circumstances of the offense.

XIV.

THE PROSECUTOR'S "HAVE YOU HEARD" APPELLANT SPIT-AT-A-CO-DEFENDANT-IN-COURT QUESTION TO A CHARACTER WITNESS WAS PROPER, AND HIS PROOF OF THE SPITTING, IF ERROR, WAS HARMLESS ERROR

Appellant contends that unless it is harmless beyond a reasonable doubt, the Court permitting the prosecutor to prove the truth of his impeaching information was reversible error. The "have you heard" question was proper when asked of a character witness. Further, the Court had discretion to allow evidence of the event to prove the prosecutor's good faith in asking the question.

Once a defendant places her general character in issue, the prosecutor is entitled to rebut with evidence suggesting a more balanced picture of her personality. Such rebuttal evidence need not be a statutory aggravating factor

even if it is presented in the prosecutor's penalty case-in-chief. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) When impeaching the opinion testimony of a character witness, the prosecutor may explore the extent of the witness's knowledge of the character by asking whether that witness has heard of specific misconduct inconsistent with the trait of character testified to regarding the opinion. (*People v. Marsh* (1962) 58 Cal.2d 732, 745.)

Rumors or reports of wrongful acts by the defendant are relevant to the qualifications of the witness to speak on the defendant's reputation. The truth of the rumor is not as important as the community talk about the defendant. (*Michelson v. U.S.* (1948) 335 U.S. 469 [69 S.Ct. 213, 93 L.Ed. 168]; *People v. Caldaralla* (1958) 163 Cal.App.2d 32, 41; see also, *People v. Chatman, supra*, 38 Cal.4th at p. 404.)

Appellant also faults the trial court for not giving CALJIC No. 2.42 sua sponte.[53] (AOB 347-348.) As appellant admits, that instruction need not be given sua sponte. (*People v. White* (1958) 50 Cal.2d 428, 430-431.)

After a fellow prisoner testified that appellant was a compassionate person who reads her Bible, minds her own business, tries to help people and gives things to other prisoners from her canteen fund. (44 RT 4198.) The witness also stated appellant was "not vile . . . not vulgar." (44 RT 4198.) In response, the prosecutor asked the following questions:

Q. You said that she is not a vile person?

A. No. I did.

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53. CALJIC No. 2.42 states in pertinent part:

"These questions and answers [have you heard] are not evidence that the reports are true, and you must not assume from them that the defendant did in fact conduct himself inconsistently with those traits of character."

Q. OK, have you heard that she tried to spit on an inmate's window at Las Colinas?

A. No.

Q. Have you heard that she tried to spit on a co-defendant in this courtroom at an earlier hearing?

Mr. Landon: Objection, Your Honor. Assumes facts not in evidence.

The Court: That is proper with, "have you heard" impeachment of a character witness. Overruled.

Q. Have you heard that?

A. No.

(44 RT 4201.)

At the end of the defense, appellant informed the court that the prosecutor wanted to call the bailiff to testify about appellant spitting at TK "sometime ago." (45 RT 4422.) The Court informed the prosecutor that, while the bailiff was a percipient witness, the Court would prefer that the prosecutor use this defense attorney as a witness rather than court personnel.[54] (45 RT 4423.) While the defense objected to the entire testimony, it inquired about a stipulation. The prosecutor agreed provided the wording of the stipulation could be "worked out." (45 RT 4423-4424.) There was no objection based on Penal Code section 190.3 factors. (45 RT 4424-4425.)

The question was raised again when the prosecutor was ready to call his final witness or submit a stipulation. (45 RT 4460.) Appellant and the prosecutor were able to determine the date of the spitting incident after examining court records. However, the defense attorney saw appellant spit

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54. The trial judge avoided inflammatory, marginally relevant evidence at appellant's trial. For example, the judge excluded the sexual relationship between appellant and Baker. (33 RT 3090-3091.)

once, while the bailiff and the prosecutor saw her spit twice. (44 RT 4461.) If the defense was not willing to stipulate that appellant spat twice, the prosecutor said he would put on the bailiff and the defense could impeach what he saw with TK's defense attorney. (45 RT 4462-4463.) Because the Court wanted to keep its bailiff off the stand, the prosecutor decided to call the defense attorney. (45 RT 4463-4464.)

Athena Schudde testified she represented TK in the criminal case and for the murder of Melanie and was in court on October 1, 1993, for a pretrial hearing. (45 RT 4465-4466.) Appellant was seated in the chair of juror No. 10, and TK was seated in the seat of juror 12. (45 RT 4466.) Appellant and TK were in a whispered conversation that attorney Schudde could not hear. Appellant spit in her client's direction and she did not recall if the spittle actually struck TK.[55/] (45 RT 4467.) At the time of trial, attorney Schudde could not recall appellant spitting a second time. (45 RT 4468.)

This testimony was offered for the specific purpose of rebutting defense testimony "that the defendant is a reformed, nonfoul, noncussing, nonvile individual . . . ." (45 RT 4424-4425). While the prosecution is limited to aggravating factor evidence by statute, it can also rebut defense evidence. Consequently, the evidence that appellant spat at TK in court was properly received.

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55. Appellant states that the spitting evidence may "appear minor and of little consequence to the jurors' penalty determination" (AOB 348-349), and urges it be examined ". . . as part and parcel of the prosecutor's attempt to disparage and sully Ms. Dalton from every angle at every stage of the proceeding" (AOB 348-349). This statement is, of course, not true.

Before trial, the defense moved to prevent the prosecution from using evidence of gangs, Satanism, Human sacrifice and/ or Rainbow Cult. The prosecutor never intended to use such evidence. (5 CT 859-860.) In the trial itself, the prosecutor was professional and presented relevant evidence.

Even if we assume it was error for purposes of argument, the admission of the spitting incident was harmless error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Baker testified about the details of Melanie's murder. (AOB 349.) It is inconceivable that a jury would sentence someone to death because of a spitting incident. Further, this evidence was admissible to impeach the defense testimony that appellant was not vile, petty or vindictive. Thus, it cannot be said that the trial court abused its discretion by allowing the evidence.

XV.

THE CALIFORNIA DEATH PENALTY IS CONSTITUTIONAL BOTH AS INTERPRETED AND AS APPLIED TO APPELLANT

Appellant contends Penal Code section 190.2 and 190.3, subdivision (a) are too broad to be constitutional. Specifically, she states that the use of unadjudicated criminal activity as aggravation violates her rights to due process, equal protection and trial by jury. Further, she contends the death penalty and its jury instructions fail to set forth the appropriate burden of proof and written jury findings should be required. (AOB 350-364.) Finally, she contends the mitigating and aggravating factor instructions violated appellant's constitutional rights, prohibition against inter-case proportionality review results in an arbitrary imposition of the penalty, and the death statute violates both equal protection and international norms. (AOB 364-369.) These are "routine" attacks in capital cases, that have been rejected by this court. Appellant provides no basis for this court revisiting its prior holdings.

A.-B. Penal Code Sections 190.2 And 190.3(A) Are Not Overbroad

Appellant complaints Penal Code sections 190.2 and 190.3, subdivision (a) are over broad. (AOB 350-352.) The special circumstances set forth in the statute are not over-inclusive by their number or terms, nor have such categories been construed in an unduly expansive manner. (*People v. Ray* (1996) 13

Cal.4th 313, 356.) ~~The 1978 death~~ penalty law as set forth in 190.3 is proper and constitutional. (*California v. Ramos* (1983) 463 U.S. 992, 1004-1005 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Osband* (1996) 13 Cal.4th 622, 702.)

Further, there is no reason for circumstances of the crime to have spatial or temporal limitations. (*People v. Blair* (2005) 36 Cal.4th 686, 747.)

C. Unadjudicated Criminal Activity Is Admissible At The Penalty Phase

Appellant claims unadjudicated criminal activity is inadmissible. (AOB 353-354.) Neither the state nor federal constitution forbids admitting evidence of unadjudicated prior crimes to assist the jury in penalty determination. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 76-77.)

D. The Instructions Given At Appellant's Trial Set Forth The Proper Burden Of Proof

Appellant contends the instructions failed to convey the proper burden of proof. (AOB 354-364.) While appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed mitigating factors before determining whether or not to impose the death penalty, it was instructed that "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." (CALJIC No. 8.88 at 9 CT 1941-1942.) The jury had also been previously instructed that any circumstance which extenuated the gravity of the crime or any sympathetic or other aspect of the defendant's character or record could be used as a basis for a sentence less than death. (CALJIC No. 8.85 at 9 CT 1940.)

The jury instruction stating that whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" is sufficiently clear and narrow. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.)

No presumption that life without possibility of parole is the appropriate sentence is required by the constitution. This court has correctly held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) There is no presumption of life to correspond to the presumption of innocence. (*People v. Arias* (1996) 13 Cal.4th 92, 190.)

E. Appellant Is Not Denied Meaningful Appellate Review By The Absence Of Written Jury Findings

Appellant contends she is denied meaningful appellate review because the jury does not make written findings or require unanimity, on each aggravating factor. (AOB 364-365.) She receives meaningful appellate review because this court considers the entire record in determining whether substantial evidence supports the jury's verdict.

Unanimity with respect to aggravating factors is not required by statute or by constitutional procedural safeguards. (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) Each unadjudicated criminal activity need not be found by a unanimous jury. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) Nor does their use by individual jurors as an aggravating factor, render a death sentence unreliable. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.)

Written findings are not required for meaningful appellate review. (*People v. Moon* (2005) 37 Cal.4th 1, 43.) Because the Supreme Court reviews

by substantial evidence, there is no need for written jury findings. (*People v. Moon, supra*, 37 Cal.4th at p. 43.)

F. The Mitigating Instructions Were Adequate Despite Adjectives Such As "Extreme" And "Substantial," The Failure To Delete Inapplicable Sentencing Factors And Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigation

Appellant complains the jury instructions failed to adequately instruct the jury because of references to "extreme" and "substantial" and failure to delete inapplicable sentencing factors and to specify which factors were solely relevant as evidence in mitigation. (AOB 365-367.) As appellant concedes, these arguments have all been rejected by this Court. (*People v. Avila* (2006) 38 Cal.4th 491, 614; *People v. Cook* (2006) 39 Cal.4th 566, 618; and *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

G. Inter-Case Proportionality Review Is Not Constitutionally Required

Appellant complains her sentence is disproportionate. (AOB 367-368.) Neither the state nor federal constitution require a comparison between this and other similar cases regarding the relative proportionality of the death sentence. (*People v. Fierro* (1991) 1 Cal.4th 173, 253.)

H. Capital Punishment Does Not Violate Equal Protection Because Criminal Enhancements In Non-Capital Cases Require Written Jury Findings

Appellant contends she was denied equal protection because of the absence of written jury instructions. (AOB 368.) As appellant concedes, this issue has been decided against her. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

I. States Are Not Required To Abolish Capital Punishment By The Constitution Or By International "Evolving Standards Of Decency"

Appellant contends her sentence violates international law. (AOB 369.) While many other countries have no capital crimes, the states are free to punish the most serious forms of murder with death. (*People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Ghent* (1987) 43 Cal.3d 739, 779-781; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Cook, supra*, 39 Cal.4th at pp. 618-619.) California's death penalty law does not violate international law or any treaties. (*Perry*, at p. 322; *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)

XVI.

THE TRIAL COURT PROPERLY REJECTED FIVE DEFENSE INSTRUCTIONS

Appellant contends the penalty phase instructions were insufficient and asks this Court to reconsider its previous decisions holding that the requested instructions need not be given. (AOB 370-378.) To the contrary, her jury was adequately instructed under current law.

Appellant contends that pinpoint instructions and specially-tailored penalty instructions ought to be given to clarify the jury's task and how it should evaluate mitigation. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Davenport* (1985) 41 Cal.3d 247, 281-283; AOB 370-371.) She then argues that the trial court committed reversible error by refusing five requested instructions despite this Court's rulings that the requested instructions need not be given. (*People v. Andrews* (1989) 49 Cal.3d 200, 227-228; *People v. Nicolaus* (1991) 54 Cal.3d 551, 588.)

A. "Life Without Possibility Of Parole" Does Not Require Definition

Appellant requested a second paragraph added to CALJIC No. 8.84 to read as follows:

> Life without the possibility of parole and death mean just that. You must assume, for purposes of determining the penalty, that either sentence will be carried out. If you sentence Ms. Dalton [appellant] to life without the possibility of parole, she will spend the balance of her [natural] life in prison with no possibility of parole.

(9 CT 1731.)

The court refused the instruction as argumentative and duplicative of the fact that the jurors had already been informed to assume the penalty they decided upon would be carried out. (45 RT 4477-4478.) Such an instruction is not constitutionally required. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1277; *People v. Arias*, 13 Cal.4th at pp. 172-174.) The defense argued jurors confuse life with possibility of parole to life without possibility of parole. The judge responded that he had specifically addressed that issue with the jury previously, and if they asked any questions, he would respond in the manner the defense had suggested. (45 RT 4478.)

Appellant's argument that jurors distrust the life imprisonment choice ignores the fact that jurors are presumed to follow the instructions they are given.

B. Expansion Of The Factor (K) Instruction Is Unnecessary

Appellant asked the trial court to expand the CALJIC No. 8.85(k) instruction to state that the mitigating circumstances enumerated are merely examples of some of the factors the jury should take into account as reasons for deciding not to impose a death penalty upon appellant, and it should not limit its consideration of mitigating circumstances to specific factors but also consider any other circumstance presented as reasons for not imposing the death

sentence. (9 CT 1755.) She also submitted an instruction that repeated these principles and added that mitigating circumstances did not have to be proved beyond a reasonable doubt and could be found even if there is only weak evidence to support them. (9 CT 1755-1756.)

Even though this court has stated that "a substantially similar instruction" was consistent with the Eighth Amendment guarantees (*People v. Wharton, supra*, 53 Cal.3d at p. 600, fn. 23), the trial court did not abuse its discretion by refusing the instruction as cumulative and argumentative (45 RT 4492). The language of factor (k) satisfies the eighth amendment. (*Brown v. Payton* (2005) 544 U.S. 133 [125 S.Ct. 1432, 1438-1439, 161 L.Ed.2d 334].)

C. Refusing A Pinpoint Instruction That Appellant's Potential For Rehabilitation And Leading A Useful Life In Prison Was Not Constitutional Error

The trial Court instructed the jury in factor (k), that it could consider anything in mitigation whether it was listed in the factors mentioned by the statute or not (see CT 1940) and that factors were to be weighted qualitatively, not mechanically (9 CT 1941). It rejected a defense preferred "pinpoint" instruction that stated:

> In determining the appropriate penalty for Kerry Lyn Dalton, you may consider as a circumstance in mitigation her potential for rehabilitation and leading a useful and meaningful life while incarcerated.

(9 CT 1756-1757.)

The Court held that appellant could make that argument, but that the pinpoint instruction would in effect have the judge "arguing your case." It observed that the defense could certainly highlight the fact that several witnesses said appellant would be a help to other inmates in the area of religious education, but the court did not think it was appropriate for it to give a pinpoint instruction highlighting that particular fact anymore than it would be

appropriate to give such an instruction highlighting a piece of evidence the People would ask the court to highlight. (45 RT 4493.) There was no error.

D. The Judge Was Not Required To Instruct Appellant's Jury That It Could Return A Verdict Of Life Without Possibility Of Parole Even If It Concluded That The Circumstances In Aggravation Outweighed Those In Mitigation, Or Even If It Found No Mitigation Whatever

Appellant contends the trial court erred when it rejected appellant's proposed expansion of CALJIC No. 8.88 to say that

> You may recommend life sentence without finding the existence of an alleged statutory mitigating circumstance, and even should you find beyond a reasonable doubt the existence of an alleged statutory aggravating circumstances. In other words, you may, in your good judgment, recommend a life sentence for any reason at all that you see fit to consider.

(9 CT 1758-1759.)

She also offered an alternative instruction that said the jury could spare her life for any reason it deemed appropriate and satisfactory. (9 CT 1759.) The trial court did not err in denying the request because the proposed instructions because they were argumentative and were covered in the instructions given. (45 RT 4496.)

The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) California's death-penalty law expresses no preference as to the appropriate punishment, and the trial court could so instruct the jury without error. (*People v. Samayoa* (1997) 15 Cal.4th 795, 852.)

The instructions given, together with the arguments of counsel, made it clear that the facts were to be weighed qualitatively as well as quantitatively and one factor in mitigation could justify sparing appellant's life. The instructions given were sufficient.

E. No Additional Instruction Was Necessary That Sympathy Or Compassion Alone Was Sufficient To Reject Death And Return A Verdict Of Life Without Possibility Of Parole

Appellant contends the judge was required to give her requested instruction which stated:

> In determining whether to sentence Kerry Lyn Dalton to Life Imprisonment Without The Possibility of Parole or To Death, You May Decide To Exercise Mercy On Behalf Of Ms. Dalton.

(9 CT 1759.) She also requested an instruction that sympathy or compassion alone were sufficient to justify a verdict of life without possibility of parole. (9 CT 1761-1762.)

The judge concluded a mercy instruction was not appropriate, but the jury could consider sympathy. "They are specifically told that sympathy can be considered." The trial court then rejected the requested instruction because the U.S. Supreme Court had already ruled that it was not error to reject such an instruction. (46 RT 4496-4497.) The judge expressly stated that it was appropriate to argue that a sentence of life without possibility of parole was appropriate if the jury found no mitigation existed and sympathy and mercy could be discussed in argument. (46 RT 4496-4497.)

Appellant's claim that the instructions given did not expressly tell the jury "that any feeling of sympathy engendered by those aspects of appellant's character were, in and of themselves, a sufficient basis for rejecting a sentence of death" is not well taken. The fact that they were instructed to consider any sympathetic aspect of appellant's character or record certainly addressed the point satisfactorily. (See 46 RT 4591.)

The jury was instructed not to weigh aggravating and mitigating circumstances mechanically or by assigning arbitrary weights to any of them, and was expressly told: "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." (CALJIC No. 8.88 at 9 CT 1941.) Finally, the jury may be given 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. It is not necessary to instruct it how to weigh any particular fact in the capital sentencing decision. (*People v. Sanders* (1995) 11 Cal.4th 475, 564.)

It was not error for the trial court to refuse the five instructions requested by the defense. Further, the same concepts were all covered by the instructions given.

XVII.

APPELLANT RECEIVED A FAIR TRIAL, DESPITE ANY ERROR(S)

Appellant contends cumulative error requires reversal of her death judgment and convictions. (AOB 379-381.) The alleged errors are neither singularly nor cumulatively prejudicial.

While the prejudicial effect of cumulative errors may be considered in the aggregate, rather than individually (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 386-387; *People v. Rogers* (2006) 39 Cal.4th 826, 911), obviously, a finding of no error automatically rejects a claim of cumulative error resulting in prejudice under the federal constitution (*People v. Avila, supra*, 38 Cal.4th at p. 538) or a reversal on the basis of cumulative error (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79).

The "litmus" test for the cumulative errors doctrine "is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 340.) As demonstrated above, no single error was prejudicial and the cumulative effect is not prejudicial either, because the errors lack qualitative and quantitative strength.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the judgment be affirmed in its entirety.

Dated: May 25, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 38,681 words.

Dated: May 25, 2007

Respectfully submitted,

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Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Kerry Lyn Dalton** Case No.: **S046848**

I declare:

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

On **May 29, 2007**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 29, 2007**, at San Diego, California.

Connie Pasquali
Declarant

Connie Pasquali
Signature