

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK SOLIS,

Defendant and Appellant.

F062078

(Kings Super. Ct. No. 09CM7225)

**OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Donna Tarter, Judge.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans and Ivan P. Marrs, Deputy Attorneys General for Plaintiff and Respondent.

-ooOoo-

**INTRODUCTION**

Appellant/defendant Frank Solis, an inmate serving a life term at Corcoran State Prison, was charged with the fatal beating of his cellmate in the Security Housing Unit

(SHU), and convicted of count I, second degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)); and count II, assault with a deadly weapon or by means of force likely to produce great bodily injury while serving a life sentence (§ 4500), with two prior strike convictions and two prior serious felony enhancements (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)). Defendant was sentenced to life without the possibility of parole for count II, plus 10 years for the two prior serious felony enhancements, to be served consecutive to the life term which defendant was already serving. The court stayed the third strike term of 45 years to life imposed for count I pursuant to section 654.

On appeal, defendant contends the court improperly admitted statements he made to law enforcement officers on March 3, 2009, when he admitted that he fatally beat and kicked his cellmate, and asserts that the statements were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*). Defendant further contends the court should have granted his motion for mistrial based on jury misconduct, the jury failed to find true all the elements of count II, and the jury was not permitted to reach all the elements of the prior strike convictions. We will affirm.

## **FACTS**

### **PART I—THE HOMICIDE**

On January 26, 2009, defendant was an inmate serving a life term in Corcoran State Prison. Defendant shared a cell with fellow inmate, Paul Jensen. They were in cell No. 6 in the SHU, located in 4B yard building one, right side (4B1R). The inmates in this housing unit are not allowed to freely leave their cells or walk around, and they must be escorted everywhere by correctional officers. The individual cell doors can only be opened by correctional officers, and inmates cannot request the doors to be opened unless they are scheduled to be escorted to a specific location or appointment.

---

<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

Defendant and Jensen had been cellmates for about one week, and correctional officers were unaware of any problems between them. There were two concrete bunks in the cell attached to the right and left side walls, a concrete table attached to the back wall, and a sink/toilet attached to the right side of the door. The two bunks were separated by about two and a half feet in the middle of the cell.

### **Discovery of Jensen's body**

At 2:00 p.m., Correctional Officer Kelly Morrison made a regular check of the cells, including cell No. 6, and did not notice any problems.

Around 4:00 p.m., Officer Morrison headed to cell No. 6 to escort Jensen to medical personnel for his daily insulin injection.

As Morrison approached the cell door window, he noticed defendant was sitting on the left-side bunk. Defendant got up from the bunk, walked across the cell to the sink, and washed his hands. Defendant acted and moved in a calm and casual manner. Morrison saw a bunched-up blanket on the right-side bunk, and thought Jensen was underneath it. Morrison then noticed that Jensen was lying on the floor between the two bunks. Jensen was lying on his back, with his head toward the back part of the cell. He was not moving. There was blood behind his head. A sheet or towel neatly covered his face.<sup>2</sup>

Morrison immediately had the control booth officer trigger the alarm. Defendant was removed from the cell. Defendant was compliant and did not resist. He was escorted to a holding cell in the building's rotunda.

---

<sup>2</sup> There was conflicting evidence as to which inmate was assigned to which bunk. One correctional officer testified that defendant was assigned to the left bunk and Jensen was assigned to the right bunk. Two other officers testified that defendant was assigned to the right bunk and Jensen to the left bunk.

The prison medical staff responded to the cell to treat Jensen. He had bruises all over his face and a laceration on the top right side of his head. Attempts to resuscitate him were unsuccessful, and he died shortly after being removed from the cell.

### **The initial investigation**

Defendant was examined in the holding cell. There were small amounts of blood on defendant's T-shirt, boxer shorts, and soft knee brace. There was some redness on defendant's right forearm and hand.

A search of the cell revealed suspected blood stains on towels, three bed sheets, a blanket, and a T-shirt. There was an eight-inch circular blood stain on the T-shirt. One sheet was found on the table in the center of the cell, another sheet was wrapped around the mattress on the right bunk, and the third sheet was wadded up and on top of the right bunk. A string was found on the right bunk, under the blanket and a stack of linens; it appeared to be part of a sheet. There were blood spatters on paper bags which had been stored under the right bunk. There was blood on the floor and on the base of the built-in concrete table at the back of the cell, near the location of Jensen's head.

### **The pathologist's testimony**

The autopsy revealed that Jensen suffered numerous external injuries and bruises on his face and body. He had two deep lacerations to his right temple, two swollen eyes, and a very large abrasion on his left cheek. The lacerations were consistent with being inflicted by a blow from a blunt object. The swollen eyes were consistent with trauma to the head plus brain swelling.

There was a "noticeable" ligature imprint around the entirety of Jensen's neck, consistent with being strangled by some type of cord, rope, or sheet, which would have prevented the victim from breathing and/or compromised blood flow to the brain. There was soft tissue damage to the larynx, which would have been sufficient to close the airway. There were also contusions and abrasions around the neck. The ligature mark

was not consistent with the victim hanging himself, but instead consistent with strangulation being “done at the hands of another.”

Jensen suffered fractured ribs on his right side and hemorrhaging in the soft tissue between the ribs. He also had hemorrhaging on both sides of his head and jaw and mild swelling in his brain, also consistent with being inflicted by blunt force trauma, or the head being shoved into another blunt force object.

Jensen was not under the influence of drugs or alcohol, but blood tests showed Prozac in his system. Jensen was five feet eight inches tall and weighed 221 pounds.

The pathologist testified that Jensen’s cause of death was cardio-respiratory arrest “due to or as a consequence of cerebral phasing hypoxia, lack of oxygen due to blunt force tra[u]ma to the head in association with ligature strangulation.” The mild brain swelling could have resulted from external blunt force trauma, strangulation, or hypoxia. The victim stopped breathing from a combination of both the ligature strangulation and blunt force trauma, with the ligature strangulation the more likely cause.

The pathologist testified that Jensen would have died within a short period of time from either the ligature or blunt force trauma injuries to his head and body. Jensen might have survived if he had received immediate treatment for the head trauma.

In response to defense counsel’s cross-examination, the pathologist testified that Jensen’s head lacerations could have resulted from falling down and striking a concrete structure. The pathologist could not fully rule out the possibility that Jensen suffered the injuries by simply falling face-down on the floor, or if someone fell on top of Jensen. The pathologist further testified, however, the injuries to the right side of Jensen’s head were consistent with being inflicted as a direct external injury, rather than hitting his head after falling onto concrete.

On redirect examination, the pathologist clarified that, based on his experience, Jensen’s injuries were consistent with someone stomping on the victim’s chest and body,

while the victim was lying on his back. The rib fractures were also consistent with someone standing on top of the victim and dropping his weight on the victim's body.

### **Defendant's statements**<sup>3</sup>

On March 3, 2009, defendant met with four investigative officers in the prison, at his request and admitted that he killed Jensen. The meeting occurred in an interview room that contained a table and four chairs. Defendant sat down on one side of the table. The entire meeting was digitally recorded.

The prosecution introduced defendant's statements in its case-in-chief. During the March 3, 2009, meeting, defendant told the investigators that he killed Jensen because Jensen wouldn't tell him the truth about the nature of his prior sexual convictions, and whether the victims were children. Defendant said he repeatedly hit and punched Jensen, Jensen fell to the floor, and he kicked and stomped Jensen's head. Defendant denied trying to strangle Jensen, but said that he used a piece of glass and unsuccessfully tried to slit Jensen's throat shortly before Jensen died.

Defendant did not testify at trial or introduce any defense evidence.

## **PART II-DEFENDANT'S STATEMENTS**

We now turn to the facts and circumstances which led up to defendant's March 3, 2009, statements to law enforcement officers, when he admitted that he killed Jensen, and defendant's pretrial motion to exclude the entirety of his March 3, 2009, statements.

### **A. *Miranda*, *Edwards*, and custodial interrogation**

We begin with a brief review of the well-settled principles regarding *Miranda*, *Edwards*, and custodial interrogation. "As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial

---

<sup>3</sup> In part II of the facts, *post*, we will address the circumstances surrounding defendant's March 3, 2009, statements.

law enforcement questioning, that ‘he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.’ [Citations.] If the suspect knowingly and intelligently waives these rights, law enforcement may interrogate, but if at any point in the interview he invokes the right to remain silent or the right to counsel, ‘the interrogation must cease.’ [Citations.]” (*People v. Martinez* (2010) 47 Cal.4th 911, 947.)

In *Edwards*, the United States Supreme Court “superimposed a ‘second layer of prophylaxis’ ” to implement *Miranda* when a suspect invokes his right to counsel. (*Maryland v. Shatzer* (2010) \_\_ U.S. \_\_ [130 S.Ct. 1213, 1219] (*Shatzer*).

“[A]n accused ..., having expressed his desire to deal with the police only through counsel, *is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*” (*Edwards, supra*, 451 U.S. at pp. 484-485, italics added.)<sup>4</sup>

“An accused ‘initiates’ such dialogue when he speaks words or engages in conduct that can be ‘fairly said to represent a desire’ on his part ‘to open up a more generalized discussion relating directly or indirectly to the investigation.’ [Citation.] In the event he does in fact ‘initiate’ dialogue, *the police may commence interrogation if he validly waives his rights.* [Citations.]” (*People v. Mickey* (1991) 54 Cal.3d 612, 648-649 (*Mickey*), italics added; *People v. Waidla* (2000) 22 Cal.4th 690, 727.)<sup>5</sup>

However, the advisement of *Miranda* rights is only required when a person is subject to custodial interrogation. Custodial interrogation has two components. First, the

---

<sup>4</sup> “The right to counsel for purposes of custodial interrogation implicates the Fifth Amendment privilege against self-incrimination, and must be distinguished from the Sixth Amendment right to counsel, which attaches upon the initiation of formal criminal proceedings. [Citations.]” (*People v. Nelson* (2012) 53 Cal.4th 367, 371, fn. 1.)

<sup>5</sup> In issue I, *post*, we will address the impact of *Edwards* on defendant’s March 3, 2009, statements.

person being questioned must be in custody. (*Mickey, supra*, 54 Cal.3d at p. 648; *People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088 (*Mosley*)). “Custody, for these purposes, means that the person has been taken into custody or otherwise deprived of his freedom in any significant way. [Citation.]” (*Mosley, supra*, 73 Cal.App.4th at p. 1088.)

A prison inmate may be “in custody” for purposes of *Miranda*. (*Mathis v. United States* (1968) 391 U.S. 1, 4-5; *People v. Fradiue* (2000) 80 Cal.App.4th 15, 19 (*Fradiue*)). As we will explain, *post*, however, *Miranda* warnings are not required for all investigatory questioning of a prison inmate. (*Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427 (*Cervantes*); *Howes v. Fields* (2012) \_\_ U.S. \_\_ [132 S.Ct. 1181, 1191-1193] (*Howes*)).<sup>6</sup>

The second *Miranda* component is obviously interrogation. (*Mickey, supra*, 54 Cal.3d at p. 648; *Mosley, supra*, 73 Cal.App.4th at p. 1088.) “For *Miranda* purposes, interrogation is defined as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response. [Citation.]” (*Mosley, supra*, 73 Cal.App.4th at p. 1089.)

“Absent ‘custodial interrogation,’ *Miranda* simply does not come into play. [Citations.]” (*Mickey, supra*, 54 Cal.3d at p. 648.) “[V]olunteered statements not the product of interrogation are admissible.” (*People v. Edwards* (1991) 54 Cal.3d 787, 815.) A police officer is not obligated to prevent a suspect from volunteering incriminating statements. (*Id.* at p. 816.) Neither spontaneous nor volunteered statements are the products of interrogation and are not barred by the Fifth Amendment or subject to the requirements of *Miranda*. (*Miranda, supra*, 384 U.S. at p. 478; *Rhode Island v. Innis* (1980) 446 U.S. 291, 299-300 (*Innis*); *People v. Ray* (1996) 13 Cal.4th 313, 337 (*Ray*); *Mickey, supra*, 54 Cal.3d at p. 648.) “Just as custodial interrogation can occur in the

---

<sup>6</sup> In issue III, *post*, we will address whether defendant was “in custody” for purposes of *Miranda* and custodial interrogation.

absence of express questioning [citation], *not all questioning of a person in custody constitutes interrogation under Miranda*. [Citations.]” (*Ray, supra*, 13 Cal.4th at p. 338, italics added.)

“In reviewing *Miranda* issues on appeal, we accept the trial court’s resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained. [Citations.]” (*People v. Smith* (2007) 40 Cal.4th 483, 502.) We apply federal standards in reviewing a defendant’s claim that a challenged statement was obtained in violation of *Miranda*. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1043.)

“Statements obtained in violation of *Miranda* are not admissible to establish [the defendant’s] guilt.” (*People v. Boyer* (1989) 48 Cal.3d 247, 271, overruled on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)<sup>7</sup> The erroneous admission of a statement obtained in violation of *Miranda* is reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Arizona v. Fulminate* (1991) 499 U.S. 279, 309-310; *People v. Cunningham* (2001) 25 Cal.4th 926, 994.)

With this legal framework in mind, we turn to the facts and circumstances surrounding defendant’s pretrial statements.

---

<sup>7</sup> A statement obtained in violation of *Miranda* is inadmissible in the prosecution’s case-in-chief, but admissible to impeach the defendant’s credibility as a witness, if the statement is otherwise voluntary. (*Harris v. New York* (1971) 401 U.S. 222, 224, 226; *People v. Peevy* (1998) 17 Cal.4th 1184, 1188.) In this case, the prosecution introduced defendant’s March 3, 2009, statements in the case-in-chief; defendant did not testify in this case. Thus, if defendant’s statements were obtained in violation of *Miranda*, then the statements were not admissible for any purpose in this case.

**B. The January 26, 2009, interview**

On January 26, 2009, Jensen's body was discovered in the SHU cell around 4:00 p.m. Defendant was removed from the cell and transferred to a holding cell in the same building. At 11:07 p.m., Investigators Robinson and Avila from the prison's Investigative Services Unit (ISU) interviewed defendant. Robinson advised defendant of the *Miranda* warnings. Defendant said he understood the warnings and waived his rights. Defendant did not make any incriminating statements. Defendant invoked his right to counsel and asked for an attorney, and the interview ended. Thereafter, defendant was removed from the SHU where he had been housed with Jensen, and he was placed in administrative segregation.<sup>8</sup>

The prosecution did not seek to introduce at trial any statements which defendant made during the January 26, 2009, interview.

**C. Defendant's note**

On March 3, 2009, 36 days after he invoked his right to counsel, defendant wrote a note on a preprinted prison form entitled "Inmate Request For Interview." Defendant addressed the note to Investigator Avila, who had participated in the January 26, 2009, interview. Defendant identified himself as the sender; there is no dispute that defendant wrote this note.

The preprinted form advises the inmate: "Clearly state your reason for requesting this interview. [¶] You will be called in for interview in the near future if the matter

---

<sup>8</sup> Administrative segregation of inmates occurs when the inmates "are determined to be prone to: escape; assault staff or other inmates; disrupt the operations of the jail, or likely to need protection from other inmates, if such administrative segregation is determined to be necessary in order to obtain the objective of protecting the welfare of inmates and staff. Administrative segregation shall consist of separate and secure housing but shall not involve any other deprivation of privileges than is necessary to obtain the objective of protecting the inmates and staff." (Cal. Admin. Code, tit. 15, § 1053.)

cannot be handled by correspondence.” Defendant wrote the following note below the preprinted advisement:

“Requesting to talk with Avila T Squad Officer #7 (ASAP Thank you) [¶]  
Regarding Homicide \_\_ an [sic] return of property.”

Defendant was still being housed in administrative segregation when he sent the note to Investigator Avila.<sup>9</sup>

**D. The March 3, 2009, meeting**<sup>10</sup>

Later on March 3, 2009, in response to defendant’s note, defendant met with Corcoran ISU Investigators Avila, Torres, and Castro. Investigator Hershberger of the Kings County District Attorney’s Office was also present. The entire meeting was digitally recorded.<sup>11</sup> The meeting began at 2:30 p.m. and ended at 4:05 p.m.

**1. Defendant’s initial questions about the case**

The meeting began with the following exchange between Investigator Avila and defendant about the January 26, 2009, interview.

“Avila: Oh now is so to put on record that you have previously requested a uh

---

<sup>9</sup> At the hearing on defendant’s motion to exclude his statement, the parties stipulated that defendant was housed in administrative segregation from January 26 to March 3, 2009, between the two interviews. However, the record is silent as to the reason that defendant was in administrative segregation. As we will explain, defendant acknowledged during the March 3, 2009, interview, that at the time of the homicide, he was already serving a life term, he had previously been housed in administrative segregation, he was not housed in general population, and he was housed in the “sensitive needs yard” of Corcoran’s SHU when Jensen was his cellmate.

<sup>10</sup> The parties stipulated that the court could consider the entirety of defendant’s March 3, 2009, statement in ruling on defendant’s motion to exclude the statements he made on that day.

<sup>11</sup> The suppression hearing evidence was silent as to the location of this meeting. According to the trial evidence, however, this meeting occurred in an interview room that contained a table and four chairs. Defendant sat down on one side of the table.

“[Defendant]: Interview[.]

“Avila: *No you previously requested to get a lawyer and we stopped questioning[.]*

“[Defendant]: *Ok last time yeah[.]*

“Avila: *Right but today we are here because you requested to speak to us correct[?]*

“[Defendant]: *Yes[.]*

“Avila: *So we haven’t come to you you actually shot us an inmate request to interview to speak to me correct[?]*

“[Defendant]: *Yes[.]*” (Italics added.)

Avila asked defendant, “[W]hat is it actually ... you would like to talk about?”

“[Defendant]: [W]ell I ... been going through my mind as far as I know things *I’ve heard from different CO’s about being a death penalty case* and all that kind of shit right[?]

“Avila: [B]eing what? Excuse me.

“[Defendant]: [I]f it was a death penalty case[?]

“Avila: Ok[.]

“[Defendant]: [A]nd uh it just kind of agitated me and *I wanted to know where you know where I was at with it and if I were to revoke my 115 while I was looking at it two ways if I wait on the DA to take me to court and they decide to hold out would the 115 be finished with or would I still be pending or what[?]*” (Italics added.)<sup>12</sup>

Defendant asked Avila and Torres about the status of his prison infraction, compared to being charged by the district attorney. Avila said the CDC 115 was pending. Defendant asked if he had to wait a year for the district attorney to file charges.

---

<sup>12</sup> Defendant’s references to a “115” were to California Department of Corrections Form 115, a rules violation report that documents misconduct that is believed to be a violation of law or is not minor in nature. (*In re Roderick* (2007) 154 Cal.App.4th 242, 249, fn. 3; *In re Reed* (2009) 171 Cal.App.4th 1071, 1077.)

Torres replied it depended on how long the district attorney needed to put the case together. Castro asked defendant if he understood that it was a murder case, and defendant said yes.

**2. Defendant says that he wants to explain why he killed Jensen**

Investigator Hershberger asked defendant if the only reason he contacted the officers was “because you had some questions about what we were going to do with your case?”

“[Defendant]: Some what yeah part of it was yeah but *I just wanted kind of like you know let you know why I did it* you know what I mean[?]”

“Hershberger: Ok[.]”

“[Defendant]: *Cause it was like its [sic] been bothering me a lot[.]*”

“Hershberger: Ok and you want to do this because it’s bothering you[?]”

“[Defendant]: Right[.]”

“Hershberger: *And you choose to contact us and talk to us about that[?]*”

“[Defendant]: *Right right[.]*”

“Hershberger: *Ok so you want to just start from the beginning of the night and just tell us the story easiest way to do it[?]*”

“[Defendant]: I guess I can do it that way sounds great[.]”  
(Italics added.)

**3. Defendant explains why he became upset with Jensen**

Defendant launched into a lengthy narrative and explained that Jensen asked a correctional officer if he could share a cell with defendant, a correctional officer asked defendant, and defendant said that was not a problem.

Defendant said that he knew that Jensen had a rape conviction, but he did not know the details about it. Defendant said he asked Jensen why he had an “R” on his CDC jacket and “whether there were any kids involved,” and Jensen said no.<sup>13</sup> Jensen showed defendant some of his paperwork. Defendant realized Jensen had a prior conviction in the 1980s “for the same kind of shit,” and that Jensen lied about whether he had previously been to prison.

Defendant said that he kept asking Jensen whether there were any kids involved in his prior sex case, and why he had an “R” on his jacket. Jensen again said there were no kids involved. Defendant told Jensen to prove it to him. Jensen kept “dishing out different papers about the second conviction.”

Defendant said he had a prior sex conviction in the 1980s for sodomy and oral copulation on a “German kid.” Defendant said he finished serving the prison term in 1991, he “wasn’t hiding nothing,” and “everybody knew.”

Defendant said Jensen pulled out various documents and said his rape case involved older women. Defendant asked Jensen why he lied when he first claimed this was his first prison term, since some of Jensen’s paperwork said he had a previous conviction. Defendant said he was upset that Jensen lied to him. Defendant told Jensen he was going to look through the papers himself to find out.

#### **4. Defendant says that Jensen tried to grab him**

Defendant told the investigators that “we were both going through all of his paperwork,” and defendant turned away from Jensen. Defendant said Jensen grabbed his arm and may have tried to bite or scratch him with his nails. Defendant said he had a mark on his arm from that. Defendant said he was tired of looking through Jensen’s papers and tired of Jensen trying to justify the nature of the prior sex case: “I couldn’t

---

<sup>13</sup> “The California Department of Corrections ... identifies sex offenders in the prison population by affixing an ‘R’ suffix to the inmate’s custody designation.” (*In re Farley* (2003) 109 Cal.App.4th 1356, 1358.)

stand that fool[.]...” Defendant stated that he did not like the way Jensen conducted himself because “he was smelly he wouldn’t rinse off he was just a really nasty person,” and Jensen never cleaned the cell.

**5. Defendant says he repeatedly hit Jensen**

Defendant then explained how he killed Jensen:

“[Defendant]: *[W]e wasn’t even mad at each other when it happened he was kind of like you know I had put up with him enough in the cell the days I was in with him as far as trying to keep him clean cause every now and then his underarms would just smell real bad and I told him you know man get some water running you know but he wouldn’t listen to me he didn’t care I mean he didn’t hear he didn’t want to hear nothing I had to say I just put up with it and then after all this came about sex crime I don’t know if he was going to I don’t think he was going to attack me but I thought he just grabbed my arm but anyways I don’t know if it was with his nails or not but he scratched my arm pretty bad so I just started hitting him and he went on the floor and I just started hitting him and beating him. I hit him like 8 times in the face[.]*

“Castro: *What did you hit him with?*

“[Defendant]: *With my fist and then a couple of time with my foot[.]*

“Castro: *With both fists or with one fist?*

“[Defendant]: *Yeah with both of them and um you know he was on this side and when I seen his arm go up I went to block it but I didn’t really block it but and he really didn’t grab a hold of me either he scratched me you know it looked like he scratched me[.]” (Italics added.)*

Defendant said that before he talked to Jensen about his paperwork, defendant had been lying on his bunk with the sheet over his eyes, and then he realized that Jensen was “standing over me” and “looking at me in my head.” Jensen was “just sitting there looking at my face,” and defendant thought “the dude was up to something ....” Defendant said that was when he started to ask Jensen why he had an “R” on his jacket.

Defendant said he thought Jensen was going to grab him. Defendant said he “started beating the shit out of [Jensen] I hit him about 7 times 5 time[s] in the face.”

Defendant said Jensen fell about 35 seconds later, and defendant kept “swinging in his face.” Defendant said after Jensen went down, he hit and kicked him a couple of times.

Defendant said he stomped Jensen while wearing shower shoes. Defendant realized Jensen wasn’t breathing, and he left him there for about 45 minutes. Defendant said he started to wash and clean up. He knew the correctional officers would be around within 30 minutes, and he was going to wait for them to find out for themselves.

Defendant denied strangling Jensen. Defendant said that after he stomped Jensen, however, he realized Jensen was still alive, and he tried to slit Jensen’s throat with a piece of glass. Defendant said he wanted to kill Jensen because he knew Jensen was a sex offender, and Jensen never proved that he had not molested children.

In the course of the meeting with the investigators, defendant said he and Jensen were both “SNY” inmates. Defendant explained he was “SNY” because he wanted to get away from prison politics since he used to be involved with the “South Siders.”<sup>14</sup> Defendant also said he had seen Jensen before they became cellmates, when defendant and Jensen were both housed in administrative segregation, and he heard others describe Jensen as a child molester.

Toward the end of the meeting, defendant asked the investigators if the court would throw out his case since he admitted that he killed Jensen, he was already serving a life term, and Jensen was a “piece of shit.” The investigators explained that the district attorney’s office would decide whether to file murder charges against him.

At the conclusion of the meeting, defendant asked to speak to Investigator Robinson because “I have this 115 pending” and “I’m tired of being in Ad Seg and I

---

<sup>14</sup> “SNY” stands for Corcoran’s “sensitive needs yard,” a form of protective custody where inmates are housed away from the general inmate population either because of former gang membership, the nature of their convictions, or when they are vulnerable to attack from inmates in the general population. (See, e.g. § 2063, subd. (c)(1).)

know I'm going to get a SHU out of it wither [*sic*] I'm convicted or not." He wanted Robinson to get him out of "Ad Seg" so he could start his SHU term because he did not want to wait to find out whether the district attorney was going to charge him with murder. Hershberger explained that it could take months for the district attorney to move forward on the case.

**E. Defendant's motion to exclude**

Prior to trial, defense counsel moved to exclude the entirety of the statements which defendant made on March 3, 2009. In lieu of an evidentiary hearing on the motion, the parties stipulated to certain facts, and that the court could review the entirety of the March 3, 2009, transcript (Exhibit 20A), and portions of the preliminary hearing transcript (discussed *post*).

Based on the stipulated facts, defense counsel argued defendant was subject to custodial interrogation and was never advised of the *Miranda* warnings. Defense counsel argued that it was irrelevant that he was advised of and waived the *Miranda* warnings during the January 26, 2009, interview, given the passage of time between the two interviews.

The prosecutor argued that the entirety of defendant's March 3, 2009, statements were admissible under *Edwards* even though defendant requested an attorney on January 26, 2009, since defendant initiated the second meeting by asking the investigators to contact him. The prosecutor conceded that the officers did not read the *Miranda* warnings to defendant during the second meeting. However, the prosecutor argued defendant's March 3, 2009, statements were voluntary, and he was not in custody for purposes of *Miranda*, based on the standards set forth in *Edwards, supra*, 451 U.S. 477, and *Shatzer, supra*, 130 S.Ct. 1213.<sup>15</sup>

---

<sup>15</sup> In issue I, *post*, we will address *Shatzer's* holding that an inmate may have been subject to a break in custody for purposes of *Edwards*, even if still incarcerated.

Defense counsel replied that defendant's note simply indicated he wanted to know about the status of his case, but the investigators went further and elicited incriminating statements from him about the homicide. Defense counsel argued there was no break in custody as required in *Shatzer*, since defendant had been held in administrative segregation since the first interview, and there was no evidence that defendant was in administrative segregation for a reason other than the homicide.

The prosecutor pointed out that during the March 3, 2009, interview, defendant was expressly asked if he just wanted to ask the investigators questions about his case. Defendant replied that he wanted to let the officer " 'know why I did it' " because " 'it has been bothering me a lot.' " Defense counsel replied that at that moment, the officers were required to advise defendant of the *Miranda* warnings. The prosecutor reasserted that the entire issue was voluntariness, and that defendant asked to meet with the investigators and gave "an absolutely voluntary statement."

**F. Hershberger's testimony about the March 3, 2009, meeting**

As part of defendant's motion to exclude, the parties stipulated that the court could consider portions of Investigator Hershberger's preliminary hearing testimony about the March 3, 2009, meeting. At the preliminary hearing, Hershberger testified that she was at the March 3, 2009, meeting between defendant and the prison investigators, because Corcoran ISU Investigator Robinson contacted her and asked her to respond to the prison and assist in the interview. Hershberger did not know whether defendant had talked to an attorney after his initial invocation of the right to counsel on January 26, 2009.

Hershberger further testified that Jensen's death was an ongoing investigation. She contacted defendant because he requested to see the officers. Hershberger knew that Investigator Robinson had advised defendant of the *Miranda* warnings during the January 26, 2009, interview. She did not advise defendant of the *Miranda* warnings on March 3, 2009, because "[*h*]e wasn't in custody, he wasn't under arrest for that crime, and he had asked to speak to us." (Italics added.) Hershberger testified that as the interview

continued, the officers asked defendant what happened and about his involvement in Jensen's death.

**G. The court's ruling**

The court denied defendant's motion to exclude his March 3, 2009, statements, and made the following findings:

“On January 26th, 2009 [Officer] David Robinson read the defendant *Miranda* rights. Initially the defendant waived his rights and requested to talk to an attorney. At that time all questions [ceased], and the defendant was placed in Ad. Seg. 36 [*sic*] days later on March 3rd, 2009 the defendant initiated contact with Officer Avila by sending a note specifically requesting to talk to someone about the homicide. He was then brought before Officer Avila, and other members of the investigative team. At that time the defendant acknowledged that the March 3rd interview request was his request and not at the initiation of the investigators. He goes on to state that the reason he wants to talk to them was to let them know why he did it. *Clearly the defendant understood his right to remain silent. He clearly understood his right to talk to an attorney. When he invoked originally all questioning [ceased], and he was returned to custody. It was only at the defendant's invitation that the questions resumed, and it was made clear that the reason for the interview was to talk to the investigator and to give his side of the stor[y]. I stated [sic] in Edwards ..., an accused having expressed his desire to deal with police only through counsel and not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication. In this case [defendant] did initiate the further communication.*” (Italics added)

**DISCUSSION**

**I. DEFENDANT'S STATEMENTS WERE ADMISSIBLE UNDER EDWARDS**

It is undisputed that on January 26, 2009, defendant was advised of the *Miranda* warnings. He initially waived his rights but then invoked his right to counsel, and the interrogation ended. On March 3, 2009, 36 days later, defendant was not readvised of the *Miranda* warnings or his right to counsel, he had not met with an attorney after the invocation of his right to counsel, and an attorney was not present during the meeting between defendant and the four investigators. Thus, we must first determine the

application of *Edwards* to this case, based on defendant's invocation of his right to counsel during the first interview on January 26, 2009, and the fact that an attorney was not present during the meeting on March 3, 2009.

**A. *Edwards and Shatzer***

As explained *ante*, *Edwards* held that when an accused is advised of the *Miranda* warnings and invokes his right to counsel, “a valid waiver of that right [to counsel] cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [He] is not subject to further interrogation *by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*” (*Edwards, supra*, 451 U.S. at pp. 484-485, fn. omitted, italics added.)

“The rationale of *Edwards* is that once a suspect indicates that ‘he is not capable of undergoing [custodial] questioning without advice of counsel,’ ‘any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the “inherently compelling pressures” and not the purely voluntary choice of the suspect.’ [Citation.]” (*Shatzer, supra*, 130 S.Ct. at p. 1219.)

However, if the defendant, after invoking his right to counsel, initiates a statement to police, “nothing in the Fifth and Fourteenth Amendments ... prohibit[s] the police from merely listening to his voluntary, volunteered statements and using them against him at the trial.” (*Edwards, supra*, 451 U.S. at p. 485; *People v. Dement* (2011) 53 Cal.4th 1, 26; *People v. Thomas* (2012) 54 Cal.4th 908, 927-928.) “An accused ‘initiates’ such dialogue when he speaks words or engages in conduct that can be ‘fairly said to represent a desire’ on his part ‘to open up a more generalized discussion relating directly or indirectly to the investigation.’ ” (*Mickey, supra*, 54 Cal.3d 612, 648.)

As a separate matter from a suspect initiating voluntary contact, the United States Supreme Court recently held in *Shatzer* that a 14-day break in custody ends the presumption of involuntariness established in *Edwards*, so that law enforcement officers

may recontact a suspect who has previously invoked his right to counsel. (*Shatzer, supra*, 130 S.Ct. at p. 1217.)

*Shatzer* involved law enforcement questioning of a suspect who was already serving time for a different offense. In 2003, a police detective contacted the defendant in prison and advised him of the *Miranda* warnings. The defendant initially waived his rights, but then learned the detective wanted to question him about whether he had molested his son. The defendant invoked his right to counsel and the interview ended. In 2006, the defendant was still serving the same prison term, and he was contacted by another detective, who again advised him of the *Miranda* warnings. The detective told the defendant that he wanted to talk to him about the alleged molestation of his son. The defendant waived his rights, answered questions, and made incriminating statements. The defendant never requested to speak to an attorney or referred to his prior invocation of his right to counsel. Thereafter, the defendant was charged with multiple sexual offenses and moved to suppress his incriminating statements. He argued the second interview violated *Edwards* since he had previously invoked his right to counsel. The lower court denied the motion and found that *Edwards* did not apply since there was a break in custody between the two interviews, even though the defendant was still in prison. (*Shatzer, supra*, 130 S.Ct. at pp. 1217-1218.)

*Shatzer* held that under *Edwards*, “a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect’s right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel.” (*Shatzer, supra*, 130 S.Ct. at pp. 1219-1220.)

*Shatzer* observed that the *Edwards* rule “is not a constitutional mandate, but judicially prescribed prophylaxis. [Citations.]” (*Shatzer, supra*, 130 S.Ct. at p. 1220.) *Shatzer* noted that an extension of the *Edwards* rule would lead to increased costs based on “the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain. Voluntary confessions are

not merely ‘a proper element in law enforcement,’ [citation], they are an ‘unmitigated good,’ [citation], ‘ “essential to society’s compelling interest in finding, convicting, and punishing those who violate the law,” ’ [citations].” (*Shatzer, supra*, 130 S.Ct. at pp. 1221-1222.)

*Shatzer* further observed that “[l]ower courts have uniformly held that a break in custody ends the *Edwards* presumption. [Citations.]” (*Shatzer, supra*, 130 S.Ct. at p. 1220.)<sup>16</sup> *Shatzer* endorsed this uniform holding:

“The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects. Without that limitation--and barring some purely arbitrary time-limit--every *Edwards* prohibition of custodial interrogation of a particular suspect would be eternal. The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, [citation], when it is conducted by a different law enforcement authority, [citation], and even when the suspect has met with an attorney after the first interrogation, [citation]. And it not only prevents questioning *ex ante*; it would render invalid *ex post*, confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any jurisdiction. In a country that harbors a large number of repeat offenders, this consequence is disastrous.

“We conclude that such an extension of *Edwards* is not justified; we have opened its ‘protective umbrella,’ [citation], far enough. The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect’s desire to have an attorney present the first time police interrogate him, adequately ensure that result *when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.*” (*Shatzer, supra*, 130 S.Ct. at p. 1222, , fns. omitted, italics added.)

---

<sup>16</sup> Prior to *Shatzer*, California courts “uniformly ... held or assumed that the rule barring police recontact after a *Miranda* request for counsel applies only during continuous custody,” and that the police could recontact the suspect “on their own initiative” if there had been “ ‘a break in custody of a sufficient length such that the suspect has time to consult with counsel or other advisors....’ ” (*People v. Storm* (2002) 28 Cal.4th 1007, 1023, 1024; *Shatzer, supra*, 130 S.Ct. at p. 1220.)

*Shatzer* set forth a specific time period which constitutes the appropriate break in custody for purposes of *Edwards*:

“We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption ‘will not reach the correct result most of the time.’ [Citation.] It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacquainted to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.” (*Shatzer, supra*, 130 S.Ct. at p. 1223.)

*Shatzer* turned to the question of whether a prison inmate who had invoked his right to counsel during an interrogation could be considered to have had such a break in custody, even though the inmate remained imprisoned for the 14-day period. *Shatzer* concluded that a suspect’s continued imprisonment on unrelated charges did not constitute “custody” for purposes of either *Miranda* or *Edwards*:

“Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to *a baseline set of restraints imposed pursuant to a prior conviction*. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.

“Interrogated suspects who have previously been convicted of crime live in prison. *When they are released back into the general prison population, they return to their accustomed surroundings and daily routine* --they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

“*Their detention, moreover, is relatively disconnected from their prior unwillingness to cooperate in an investigation*. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing. And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time served. This is in stark contrast to the circumstances faced by the defendants in *Edwards* [and other cases], whose continued detention as suspects rested with those controlling their interrogation, and who

confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.” (*Shatzer, supra*, 130 S.Ct. at pp. 1224-1225, fn. omitted, italics added.)

*Shatzer* held the custodial situation of the defendant in that case was vastly different from “*Miranda* custody.” The defendant in *Shatzer* invoked his right to counsel during the 2003 interview, which triggered the protection of *Edwards*. Afterwards, however, the defendant was returned to the “general prison population where he was serving an unrelated sentence,” then transferred to another prison “for unrelated reasons,” but he was incarcerated in medium security prisons for the entire period. (*Shatzer, supra*, 130 S.Ct. at pp.1224, 1225.)

“[Defendant’s] continued detention after the 2003 interrogation did not depend on what he said (or did not say) to [the detective], and he has not alleged that he was placed in a higher level of security or faced any continuing restraints as a result of the 2003 interrogation. *The ‘inherently compelling pressures’ of custodial interrogation ended when he returned to his normal life.*” (*Shatzer, supra*, 130 S.Ct. at p. 1225, italics added.)

*Shatzer* concluded that the defendant’s return to the general prison population, between the 2003 interview when he invoked his right to counsel and the 2006 interview when he gave the incriminating statements, qualified as a break in custody under *Edwards* because it was two and a half years long—“long enough ... to meet that duration requirement.” (*Shatzer, supra*, 130 S.Ct. at p. 1222.)

**B. Defendant initiated the March 3, 2009, meeting**

The investigators’ meeting with defendant on March 3, 2009, did not violate *Edwards*. Prior to the holding in *Shatzer*, it was settled that a suspect who had invoked his right to counsel was not subject to further interrogation “*unless the accused himself initiates further communication, exchanges, or conversations with the police.*” (*Edwards, supra*, 451 U.S. at pp. 484-485, italics added.) On January 26, 2009, defendant invoked his right to counsel. On March 3, 2009, defendant sent a handwritten note to one of the

investigators who was present during the January 26, 2009, interview, and asked to speak to him about the homicide and the return of his property.

There is no question that based on *Edwards*, defendant initiated the March 3, 2009, meeting, because he sent a note to Investigator Avila and asked to speak to him about the “[h]omicide.” Defendant sent the note using a standard preprinted prison interview request form, which admonished the prisoner that he would be contacted by an officer as a result of sending the form. Even though defendant had not spoken to an attorney, and an attorney was not present when he met with the investigators on March 3, 2009, defendant voluntarily initiated contact with Investigator Avila and particularly specified that he wanted to talk about the homicide.

At the beginning of the meeting, Investigator Avila reminded defendant that he previously asked for an attorney, but that he had requested to meet with the officers that day. Defendant acknowledged that he had previously asked for an attorney, but he repeatedly stated that he wanted to talk to the investigators about the pending charges and tell them about the homicide. “... I just wanted kin[d] of like you know let you know why I did it” because it was like its been bothering me a lot ....” Defendant’s meeting with the investigators on March 3, 2009, did not violate *Edwards* because his note and initial statements constituted words or conduct representing his desire to “to open up a more generalized discussion relating directly or indirectly to the investigation.’ ” (*Mickey, supra*, 54 Cal.3d 612, 648.)

### **C. *Shatzer* and the 36-day “break-in-custody”**

As a separate matter, even if the investigators had initiated the March 3, 2009, meeting, *Shatzer*’s “break-in-custody” standard is certainly applicable to this case. The facts fit within *Shatzer*’s 14-day minimum period, given the passage of 36 days between defendant’s initial invocation of the right to counsel, and his second contact with the investigating officers. The additional question is whether the circumstances of

defendant's incarceration constituted a "break-in-custody" during that 36-day period, within the meaning of *Edwards* and *Shatzer*.

The entirety of the record suggests that defendant's continued detention after January 26, 2009, constituted the type of break-in-custody contemplated by *Shatzer*. In contrast to the defendant in *Shatzer*, defendant was not in the general prison population either before or after the homicide. The important point in *Shatzer*, however, was that the defendant in that case was subject to the same level of confinement both before and after he invoked his right to counsel. It could similarly be argued that the defendant in this case remained subject to the same level of confinement both before and after his invocation of his right to counsel on January 26, 2009. Based on defendant's statements during the March 3, 2009, meeting, he was already serving a life term, and he had previously been housed in administrative segregation. At the time of the homicide, he was housed in the sensitive needs yard (SNY) of Corcoran's SHU. Defendant explained he was in the SHU's SNY because he was trying to stay away from "prison politics," given his prior involvement with the Southern gangs. Defendant also admitted he had been convicted of committing sexual offenses on a "German kid."

As explained *ante*, an inmate in the SHU cannot freely leave his cell or walk around, he must be escorted everywhere by correctional officers, the cell doors can only be opened by correctional officers, and inmates cannot request the doors to be opened unless they are scheduled to be escorted to a specific location or appointment. Moreover, a SHU's special needs yard constitutes a form of protective custody based on an inmate's particular status. Defendant was never in the general prison population during any period relevant to this case.

After the January 26, 2009, interview, defendant was moved from the SHU's SNY to administrative segregation. During the March 3, 2009, meeting, defendant admitted he had already been in administrative segregation at some point prior to the homicide, and that he first noticed Jensen during that period in administrative segregation.

After defendant invoked his right to counsel, he was not returned to the “general prison population where he was serving an unrelated sentence” in a medium security prison, since he had never been in the general prison population and he was already in a heightened level of confinement. (*Shatzer, supra*, 130 S.Ct. at pp. 1224-1225.) However, it could still be argued that a break in custody occurred, as defined by *Shatzer*, because defendant had already experienced a more restrictive custodial environment before both the homicide and after he invoked his right to counsel. Given defendant’s life term, prior record, and prior gang affiliations, he could have been placed in administrative segregation for a variety of reasons.

It is reasonable to assume that defendant was placed in administrative segregation on January 26, 2009, because he was suspected of fatally beating his cellmate in the SHU. However, there is no evidence in the record that he was moved to that level of custody because he invoked his right to counsel during the January 26, 2009, interview. More importantly, there is no evidence that he was returned to a less restrictive custodial level because he asked for the March 3, 2009, meeting or gave a detailed statement that day.

It could be argued that defendant believed he would receive some type of benefit by contacting the officers and giving a statement on March 3, 2009, such as being transferred from administrative segregation to a less restrictive level of custody. At the conclusion of the March 3, 2009, meeting, defendant asked to meet with Investigator Robinson to find out how long he had to stay in administrative segregation. However, it is important to note that defendant’s March 3, 2009, note, which triggered the meeting, was addressed to Investigator Avila, not Investigator Robinson. Defendant specifically wrote that he wanted to talk about the “[h]omicide,” not that he wanted to find out how he could be transferred from administrative segregation. Moreover, given the entirety of the record, defendant would not have been returned to the general population, but would

have likely been placed in the more restrictive level of the SHU's sensitive needs yard, given his status prior to the homicide.

Thus, even if the investigators had initiated the March 3, 2009, meeting, defendant's rights under *Edwards* were not violated since he had been subject to a 36-day "break-in-custody" after his initial invocation of his right to counsel.

## **II. Readvisement of the *Miranda* warnings**

We now turn to a preliminary question as to the possible impact of defendant having been advised of the *Miranda* warnings on January 26, 2009. He was not readvised of those warnings during the March 3, 2009, meeting with the investigators. Defendant argues he should have been readvised of the *Miranda* warnings on March 3, 2009, because too much time had passed between the two interviews.<sup>17</sup>

"After a valid *Miranda* waiver, readvisement prior to continued custodial interrogation is unnecessary 'so long as a proper warning has been given, and 'the subsequent interrogation is '*reasonably contemporaneous*' with the prior knowing and intelligent waiver.'" [Citations.]' [Citation.] The necessity for readvisement depends upon various circumstances, including *the amount of time that has elapsed since the first waiver*, changes in the identity of the interrogating officer and the location of the interrogation, any reminder of the prior advisement, the defendant's experience with the criminal justice system, and '[other] indicia that the defendant subjectively underst[ood] and waive[d] his rights.' [Citations.]" (*People v. Williams* (2010) 49 Cal.4th 405, 434-435 [readvisement was not required where the second interrogation occurred "approximately 40 hours later in the same location as the first, and was conducted by one of the previous interrogators"], italics added; see also *People v. Mickle* (1991) 54 Cal.3d

---

<sup>17</sup> When the superior court denied defendant's motion to suppress, it never addressed whether defendant should have been readvised of the *Miranda* warnings. Instead, the court found defendant initiated the March 3, 2009, meeting, he understood his rights, and his statements were voluntary.

140, 170-171 [readvisement not necessary where defendant twice received and twice waived his *Miranda* rights 36 hours before interrogation resumed]; *People v. Lewis* (2001) 26 Cal.4th 334, 386-387 [five-hour lapse of time since prior advisement]; *People v. Smith, supra*, 40 Cal.4th at pp. 504-506 [less than 12 hours since prior advisement]; *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1089 [16 hours].)

As applied to the instant case, the first factor would seem to categorically refute any possibility that the January 26, 2009, *Miranda* advisements were sufficient to address any custodial interrogation which might have occurred on March 3, 2009. While the passage of 36 days was sufficient to remove the *Edwards* presumption of involuntariness, that same time period is excessive in light of the cases which have addressed when *Miranda* readvisements were not necessary. Defendant's meeting with the investigators on March 3, 2009, was not "reasonably contemporaneous" with the *Miranda* advisements which defendant received on January 26, 2009.

### **III. Defendant was not "in custody" pursuant to *Miranda***

Defendant next contends that he should have been advised of the *Miranda* warnings on March 3, 2009. As explained *ante*, however, the advisement of *Miranda* rights is only required when a person is subject to custodial interrogation. (*Mickey, supra*, 54 Cal.3d at p. 648; *Mosley, supra*, 73 Cal.App.4th at p. 1088.) "Absent 'custodial interrogation,' *Miranda* simply does not come into play. [Citations.]" (*Mickey, supra*, 54 Cal.3d at p. 648.) As we will explain, defendant was not "in custody" within the meaning of *Miranda*.

**A. *Miranda* “custody” and prison inmates**

If defendant, an inmate incarcerated in state prison, was not subjected to “custodial” interrogation during the March 3, 2009, meeting, then the *Miranda* warnings were not required, and the entirety of his statements were properly admitted.<sup>18</sup>

Custody, for purposes of *Miranda*, means that “the person has been taken into custody or otherwise deprived of his freedom in any significant way. [Citation.]” (*Mosley, supra*, 73 Cal.App.4th at p. 1088.) “ ‘[C]ustody’ is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion.” (*Howes, supra*, 132 S.Ct. 1181, 1189.) “In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but ‘the ultimate inquiry is simply whether there [was] a “formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.’ [Citations.]” (*Stansbury v. California* (1994) 511 U.S. 318, 322.)

A prison inmate may be “in custody” for purposes of *Miranda*. (*Mathis v. United States, supra*, 391 U.S. 1, 4-5; *Fradiue, supra*, 80 Cal.App.4th 15, 19.) However, “[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*.” (*Howes, supra*, 132 S.Ct. at p. 1189.) “Nothing in *Miranda* suggests that an inmate is automatically ‘in custody’ and therefore entitled to *Miranda* warnings merely by virtue of his prisoner status. [Citations.]” (*People v. Anthony* (1986) 185 Cal.App.3d 1114, 1120 (*Anthony*).)

**B. *Cervantes* and California cases**

For many years, the United States Supreme Court repeatedly declined to address the issue of whether a prison inmate was “in custody” for purposes of *Miranda*. (*Shatzer*,

---

<sup>18</sup> During defendant’s pretrial motion to suppress, the prosecutor repeatedly argued that defendant was not “in custody” for purposes of *Miranda* and *Shatzer* on March 3, 2009, but the superior court never addressed that specific issue.

*supra*, 130 S.Ct. at p. 1224.) Given the absence of a Supreme Court opinion on the issue, California courts followed the Ninth Circuit’s holding in *Cervantes*, *supra*, 589 F.2d 424, to determine whether a prison inmate was “in custody” and thus required to receive *Miranda* warnings. (See, e.g., *People v. Macklem* (2007) 149 Cal.App.4th 674, 687, 695-696 (*Macklem*); *Fradiue*, *supra*, 80 Cal.App.4th at pp. 20-21; *Anthony*, *supra*, 185 Cal.App.3d 1114, 1122.)<sup>19</sup>

In *Cervantes*, the Ninth Circuit rejected the argument that “any investigatory questioning inside a prison requires *Miranda* warnings. Such a rule could totally disrupt prison administration. *Miranda* certainly does not dictate such a consequence.” (*Cervantes*, *supra*, 589 F.2d at p. 427.) *Cervantes* recognized, however, that “[w]hen prison questioning is at issue ..., [the] ‘free to leave’ standard ceases to be a useful tool in determining the necessity of *Miranda* warnings. It would lead to the conclusion that all prison questioning is custodial because a reasonable prisoner would always believe he could not leave the prison freely.” (*Id.* at p. 428.)

Instead, *Cervantes* focused on “[t]he concept of ‘restriction,’ ” which “implies the need for a showing that the officers have in some way acted upon the defendant so as to have ‘deprived (him) of his freedom of action in any significant way.’ [Citation.] In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. [W]e look to some act which places further limitations on the prisoner.” (*Cervantes*, *supra*, 589 F.2d at p. 428.)

---

<sup>19</sup> In *Shatzer*, the Supreme Court observed: “We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue. [Citations.]” (*Shatzer*, *supra*, 130 S.Ct. at p. 1224.) As we will explain, the court finally addressed this issue in 2010 and 2012. (*Ibid.*; *Howes*, *supra*, 132 S.Ct. at pp. 1183-1185.)

*Cervantes* set forth a four-part test to determine whether an inmate's "freedom of action" has been restricted so that he is "in custody" for purposes of *Miranda*.

(*Cervantes, supra*, 589 F.2d at p. 428.)

"[T]he language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him must be considered to determine whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting." (*Cervantes, supra*, 589 F.2d at p. 428.)

As we have explained, the *Cervantes* test was adopted by California courts to determine whether an inmate was "in custody" for purposes of *Miranda*. For example, in *Anthony, supra*, 185 Cal.App.3d 1114, the defendant was arrested for murder and taken to the police department. An officer advised the defendant of the *Miranda* warnings. The defendant declined to talk about the crime and said he wanted to think about it. The officer told him they had incriminating evidence and a warrant to search his residence, explained special circumstance murder, and advised him to think about it. The next day, the defendant was booked into jail, and officers again interviewed defendant. They falsely said that he had been identified, and that if he got a lawyer, the police would never hear his side of the story. The defendant said he did not know what they were talking about. On the following day, however, the defendant called the police from the courthouse's lock-up facility, asked to speak to the officers, and made incriminating statements. The officers did not advise him of his *Miranda* rights during the telephone conversation. At trial, defendant moved to exclude his incriminating statements and argued he should have been advised of the *Miranda* warnings during the telephone conversation. (*Anthony, supra*, 185 Cal.App.3d at pp. 1118-1119.)

*Anthony* agreed with *Cervantes's* conclusion that an incarcerated prisoner "is not automatically in 'custody' within the meaning of *Miranda*." (*Anthony, supra*, 185 Cal.App.3d at p. 1121.) *Anthony* relied on the *Cervantes* factors and held the defendant

was not in custody, and *Miranda* warnings were not required, during the telephone conversation. (*Anthony, supra*, 185 Cal.App.3d at p. 1122.) The defendant “was not summoned” to speak to officers, but instead “initiated” the telephone calls. He was not in the presence of the investigating officers when he placed the telephone calls. The officers may have assumed he was placing the calls from jail but they did not know his exact location. The officers did not confront defendant with “evidence of his guilt while they were speaking with him nor could they have, under the circumstances, exerted additional pressure to detain him. Thus, [the defendant’s] freedom of movement during these conversations cannot be characterized as *more* restricted than the usual restraint on a jail inmate’s liberty to depart. [Citation.]” (*Ibid.*) The defendant “was not compelled to speak with the police; he *voluntarily* initiated the telephone calls and could have terminated them at any time he desired. [Citation.]” (*Id.* at pp. 1123, original italics.)

In *Fradiue, supra*, 80 Cal.App.4th 15, a correctional officer found drugs in the prison cell occupied by the defendant and another inmate. Disciplinary charges were filed against the defendant for a prison infraction. A prison investigator was assigned to the defendant in order to interview and assist him in obtaining witnesses and gathering evidence for the infraction hearing. (*Id.* at pp. 17-18.) The investigator interviewed the defendant through the bars of his cell. “At the time, defendant was being housed in the administrative segregation section of the prison because of the charges against him,” and the investigator interviewed him through the food tray port. (*Id.* at p. 18.) During the interview, the defendant admitted that he possessed the drugs but denied trafficking. The defendant’s primary concern was to recover his personal property in case he was transferred to a different prison or SHU. The defendant was charged with possession of heroin in prison. He moved to suppress his confession and argued the investigator should have advised him of the *Miranda* warnings. (*Id.* at p. 18.)

*Fradiue* relied on the *Cervantes* factors and held the defendant was not “in custody” when the investigator interviewed him in his administrative segregation cell.

*Fradiue* rejected the defendant's arguments that he was subject to coercive pressures because the investigator announced that he was the "fact finder" in his prison infraction proceeding, and interviewed him "through a slot in his administrative segregation cell door." (*Fradiue, supra*, 80 Cal.App.4th at p. 20.)

"[D]efendant was not even summoned for questioning. [The investigator] came to defendant's cell. Defendant's cellmate was also present at the time. Defendant was not handcuffed or otherwise restrained inside the cell. [The investigator] remained outside during the interview and informed defendant he was free to reject [him] as the investigating employee. ... Defendant acknowledged he was free to walk away from the door of the cell and stop talking to [the investigator] at any time. Finally, defendant was not confronted with any evidence of his guilt." (*Fradiue, supra*, 80 Cal.App.4th at pp. 20-21.)

*Fradiue* concluded that no restraints were placed on defendant "to coerce him into participating in the interrogation over and above those normally associated with his inmate status." (*Id.* at p. 21.)

In *Macklem, supra*, 149 Cal.App.4th 674, the defendant was housed in a detention facility pending trial on a first degree murder charge, when he was involved in a jailhouse attack on his cellmate. (*Id.* at pp. 678, 681.) Several days after the incident, he was interviewed by a detective at the detention facility and was not advised of the *Miranda* warnings. He made incriminating statements about the jailhouse assault. The defendant later moved to suppress his statements and argued he was in custody for purposes of *Miranda*. (*Macklem, supra*, 149 Cal.App.4th at pp. 678, 682, 688.)

*Macklem* relied on the *Cervantes* factors and held the defendant was not in custody for purposes of *Miranda* because under the totality of these circumstances, a reasonable person in the defendant's position would have realized he could end the questioning and leave before the interview was completed. (*Macklem, supra*, 149 Cal.App.4th at p. 696.) The defendant was contacted and asked if he wanted to talk to a detective, and told that he was not required to do so. The defendant arrived for the

interview in handcuffs, but he was then uncuffed and left there with the door ajar. The interview occurred in a jailhouse interview room, which was “as close to neutral territory as is available in the detention facility.” The defendant was asked whether he wanted to answer questions, which permitted a reasonable inference he was willing to participate in the interview and weighed against any finding of coerciveness. There was “no clear indication” the defendant was confronted with evidence of his guilt, and the circumstances did not disclose any additional pressure was exerted to detain the defendant in a coercive manner. (*Id.* at pp. 695-696.)

### **C. *Shatzer and Howes***

While courts in California and other jurisdictions have relied on the *Cervantes* factors to determine whether an inmate is “in custody” for purposes of *Miranda*, the United States Supreme Court has finally filled the void and resolved the appropriate legal standard to address the issue.

As explained *ante*, *Shatzer* addressed whether a custodial inmate could be subject to a break-in-custody for purposes of *Miranda* and *Edwards*. In doing so, *Shatzer* recognized that all forms of incarceration restrain an inmate’s freedom of movement, but did not necessarily constitute “custody.” (*Shatzer, supra*, 130 S.Ct. at p. 1224.)

“Our cases make clear ... that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it ‘talismanic power,’ because *Miranda* is to be enforced ‘only in those types of situations in which the concerns that powered the decision are implicated.’ [Citation.]

“Here, we are addressing the interim period during which a suspect was not interrogated, *but was subject to a baseline set of restraints imposed pursuant to a prior conviction*. Without minimizing the harsh realities of incarceration, *we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in Miranda.*” (*Shatzer, supra*, 130 S.Ct. at p. 1224, italics added.)

*Shatzer* reiterated that the determination of whether an inmate was in custody depended on “whether [incarceration] exerts the coercive pressure that *Miranda* was designed to

guard against--the ‘danger of coercion [that] results from the *interaction* of custody and official interrogation.’ [Citation.]” (*Ibid.*, original italics.)

In *Howes*, *supra*, 132 S.Ct. 1181, a prison inmate was interviewed about an offense unrelated to the term he was serving. He was escorted by armed officers from his cell and interviewed by sheriff’s deputies in an average-sized, well-lit conference room in the prison, for five to seven hours and past the defendant’s bedtime. The defendant was not physically restrained or threatened, and he was not advised of his *Miranda* rights or told that he could decline to speak. He was told that he could return to his cell whenever he wanted and was offered food and water. (*Id.* at pp. 1185-1186, 1193.)

*Howes* acknowledged the holding in *Shatzer*, and held that “[i]f a break in custody [for purposes of *Edwards*] can occur while a prisoner is serving an uninterrupted term of imprisonment, it must follow that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*.” (*Howes*, *supra*, 132 S.Ct. at p. 1190.)

“[S]tandard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial interrogation. Thus, service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody.” (*Howes*, *supra*, 132 S.Ct. at p. 1191.)

*Howes* further held:

“When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. *These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.* [Citation.] An inmate who is removed from the general prison population for questioning and is ‘thereafter ... subjected to treatment’ in connection with the interrogation ‘that renders him “in custody” for practical purposes ... will be entitled to the full panoply of protections prescribed by *Miranda*.’ [Citation.]

“ ‘Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.’ [Citations.] *Confessions*

*voluntarily made by prisoners in other situations should not be suppressed.” (Howes, supra, 132 S.Ct. at p. 1192, italics added.)*

*Howes* held the defendant in that case was not in custody when he was interviewed in prison because the “ ‘objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.’ [Citation.]” (*Howes, supra, 132 S.Ct. at p. 1193.*) While the defendant could not have left the prison, he could have returned to his cell, which “would merely have returned him to his usual environment. [Citation.]” (*Id. at p. 1194.*) “Taking into account all of the circumstances of the questioning--including especially the undisputed fact that [the defendant] was told that he was free to end the questioning and return to his cell--we hold that [the defendant] was not in custody within the meaning of *Miranda.*” (*Ibid.*)

#### **D. Analysis**

As applied to the instant case, defendant was not “in custody” on March 3, 2009, for purposes of *Miranda*, based on either the *Cervantes* factors as applied by California courts, or the United States Supreme Court’s recent clarification in *Howes* of when an inmate is “in custody.”

First, based on the *Cervantes* factors, defendant was not “summoned” to a meeting with investigators. As in *Anthony, supra, 185 Cal.App.3d 1114*, he initiated the meeting when he wrote a note to Investigator Avila, requested to meet with him, and said he wanted to talk about the homicide. In contrast to *Fradiue, supra, 80 Cal.App.4th 15*, the meeting was not held in defendant’s administrative segregation cell or conducted through the food port. Instead, the meeting was held in a prison conference room, described by *Macklem* “as close to neutral territory as is available” in a detention facility. (*Macklem, supra, 149 Cal.App.4th at p. 696.*)

Defendant was not confronted with evidence of his guilt, but instead immediately and voluntarily launched into a lengthy narrative because he wanted to explain why he killed Jensen. It was only toward the end of the meeting that an investigator advised

defendant about the ligature marks on Jensen's neck and asked whether he strangled him. By that time, however, defendant had already explained how he fatally hit and kicked Jensen. The investigators did not exert any "additional pressure" to detain defendant during the meeting, which would have led a reasonable person to believe "there had been a restriction of his freedom over and above that in his normal prisoner setting." (*Cervantes, supra*, 589 F.2d at p. 428.)

Second, defendant was not "in custody" based on the analysis in *Shatzer* and *Howes*. As already noted, defendant was not summoned to the meeting. It was conducted in a conference room rather than in his cell. He was removed from administrative segregation and brought to the meeting. The record is silent as to whether he was subject to restraints during the meeting, or whether he was told that he could leave at any time. The entirety of the record, however, demonstrates that defendant sought out and was extremely willing and eager to go to the meeting, talk with the investigators, and tell them why and how he killed Jensen. Indeed, defendant seemed to boast about and justify the fatal beating. As *Shatzer* explained: "Voluntary confessions are not merely 'a proper element in law enforcement,' [citation], they are an 'unmitigated good,' [citation], 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law,'" [citations]." (*Shatzer, supra*, 130 S.Ct. at pp. 1222.) *Howes* similarly held that a prisoner who initiates contact with officers is not in custody, because "[c]onfessions voluntarily made by prisoners in other situations should not be suppressed." (*Howes, supra*, 132 S.Ct. at p. 1192.)

Defendant argues that he was subject to coercive influences based on the impact of his 36-day stay in administrative segregation. Defendant cites to his initial questions to the investigators, that he heard some of the correctional officers say he committed a capital offense, and asserts that other correctional officers must have "planted" concerns about the death penalty with him, which triggered his note to Investigator Avila and his request for the interview. At the beginning of the meeting, defendant made very vague

and brief statements that he had heard something on that topic, but he did not offer any specifics as to who might have said that to him. More importantly, however, defendant only asked one question about whether he committed a capital offense. Investigator Hershberger asked defendant if that was the only reason he requested the meeting. Defendant immediately changed the subject and said that he wanted to “let you know why I did it.” Defendant’s initial statements during the meeting are consistent with the note he sent to the investigators—that he wanted to meet with them to talk about the homicide.

We thus conclude that the court properly denied defendant’s motion to exclude the statements he made on March 3, 2009, because defendant initiated the meeting, he was not “in custody,” there were no events which occurred or statements which were made to have changed the nature of the meeting to a “custodial” situation, and *Miranda* warnings were not required.<sup>20</sup>

---

<sup>20</sup> As we have explained, defendant was not subject to custodial interrogation on March 3, 2009, because he was not “in custody” within the meaning of *Miranda*, and officers were not required to advise him of the *Miranda* warnings. We further note that an officer’s brief, responsive reply to a suspect’s questions about the nature of the charges against him may not constitute an interrogation within the meaning of *Miranda* and *Innis*, *supra*, 446 U.S. 291. (*United States v. Briggs* (7th Cir. 2001) 273 F.3d 737, 740; *United States v. Foster* (9th Cir. 2000) 227 F.3d 1096, 1103-1104.) An officer’s “mere description of the evidence and of potential charges against a suspect, in direct response to the suspect’s importuning, hardly can be classified as interrogatory. [Citations.]” (*United States v. Conley* (1st Cir. 1998) 156 F.3d 78, 83; see, e.g., *People v. Clark* (1993) 5 Cal.4th 950, 981-985; *Mickey*, *supra*, 54 Cal.3d 612, 649-650.)

We further note that “[v]olunteered statements of any kind are not barred by the Fifth Amendment” and are not subject to *Miranda* warnings. (*Miranda*, *supra*, 384 U.S. at p. 478.) A defendant is not subject to interrogation within the meaning of *Miranda* and *Innis* when a law enforcement officer asks reasonable follow-up questions to the defendant’s volunteered statements. (*Andersen v. Thieret* (7th Cir. 1990) 903 F.2d 526, 531-532; *United States v. Rhodes* (4th Cir. 1985) 779 F.2d 1019, 1032; *Turner v. Sullivan* (E.D.N.Y. 1987) 661 F.Supp. 535, 538.) In such situations, an officer may make “ ‘neutral inquir[ies]’ ... for ‘the purpose of clarifying [statements] or points that [he] did not understand.’ [Citation.]” (*Ray*, *supra*, 13 Cal.4th at p. 338.) An officer’s “reflexive

#### **IV. Jury misconduct**

As explained *ante*, defendant's March 3, 2009, meeting with the investigators was digitally recorded. The court ruled that the jury could review transcripts of defendant's March 3, 2009, statements while they listened to the recording, but the transcripts would not be admitted into evidence or sent into the jury room.

Defendant contends the court should have granted his motion for mistrial based on jury misconduct, because the court learned that the March 3, 2009, transcripts were inadvertently left in the jury's deliberation room during the course of trial. Defendant further argues the court should have conducted an evidentiary hearing to determine whether misconduct occurred.

##### **A. Admission of the digital recording**

During trial, Investigator Hershberger testified about her interview with defendant on March 3, 2009, and that it was digitally recorded. She identified exhibit No. 20 as the compact disc which contained the interview, and exhibit No. 20A as the typed transcript of the interview. Hershberger testified she had compared the transcript with the CD, and the transcript was accurate.

The prosecutor moved to introduce exhibit Nos. 20 and 20A into evidence, and to play the CD for the jury. Defense counsel objected as to foundation and relevance regarding the content of the interview.

The court overruled the objections and admitted both exhibits into evidence. The parties stipulated that the court reporter did not have to transcribe the CD, and that they

---

question[s]" to a defendant's voluntary statements, "intended to clarify" the defendant's declarations, do not constitute interrogation for purposes of *Miranda*. (*Andersen v. Thieret, supra*, 903 F.2d at pp. 531, 532; see also *United States v. Gonzales* (5th Cir. 1997) 121 F.3d 928, 940.) "An officer's attempt to seek clarification of an ambiguous statement is not generally construed as interrogation for *Miranda* purposes if the question does not 'enhance the defendant's guilt or raise the offense to a higher degree....' [Citations.]" (*Butzin v. Wood* (8th Cir. 1989) 886 F.2d 1016, 1018.)

would use the transcript which had been provided by the prosecutor. Defense counsel accepted the prosecutor's representation that the transcript was accurate.

In the jury's presence, the prosecutor advised the court that it should tell the jurors "that the only copy that they will have of this transcript in the jury room would be the one that is actually placed into evidence rather than the other copies from it." Defense counsel agreed. The court asked the parties if they were stipulating for the transcripts to go into the jury room. The prosecutor replied that the original transcript admitted into evidence would go into the jury room, but "unfortunately because of the evidentiary issue that the copies that have been provided to the jury individually would not be provided additionally beyond that."

The court called for a recess and advised the jury to leave the transcripts in the courtroom and not to take them into the deliberation room. After the jury was excused, the court modified its previous ruling, and only admitted the CD into evidence and not the transcript. The court clarified that the transcript would not be sent into the jury room, but the jurors could listen to the CD if they wanted to during deliberations.

After the recess, the jury returned and the court gave the following instruction:

"As I stated before we have all been given copies of a transcript of an interview. I do want to make you aware that *these transcripts will not be sent back to the jury deliberation room with you, they will be collected after you listen to the tape.* They are for the purpose of just assisting you in listening to the tape, and so that way it is advisable that you don't write, take any notes on those transcripts. If you want to take notes, take them on the notepad you have been given." (Italics added.)

Thereafter, the prosecutor played the CD of defendant's interview for the jury. After it was finished, the court called the evening recess, and advised the jurors to leave their notebooks and transcripts on their chairs.

#### **B. Defendant's motion for mistrial**

The next day, the parties rested and the court was about to instruct the jury. However, defense counsel moved for a mistrial and argued the jury had been improperly

tainted. Defense counsel stated that when the jurors arrived that morning, “they were allowed to have the transcript [of defendant’s interview] that the Court ordered yesterday that they were not to see beyond their following along when it was presented in court. They had it for an unknown period of time in the jury room ....” Defense counsel argued the jurors could have discussed or reviewed the transcripts in violation of the court’s admonishments. Defense counsel asked the court to ask the bailiff “how [the transcripts] were delivered, how long [they were] there and when they were taken from [the jurors] and in what manner.”

The court asked the bailiff to respond. The bailiff stated that he took the transcripts into the jury room “before the jury came, and then the jury came in [the transcripts] were there. They were not touched, one of the jury members told me we are not supposed to have these so I collected them and brought them back in [to the courtroom].” The bailiff believed the transcripts were in the jury room for 15 or 20 minutes that morning.

“THE COURT: And were they in the same condition when—

“THE BAILIFF: Exactly the same, they had not been touched. They were in the exact same pile I put them in and they hadn’t been moved.

“THE COURT: And a juror brought it to your attention, what did that juror say?

“THE BAILIFF: He says I don’t think we’re supposed to have these in here and I said okay and I took them.”

Defense counsel argued that the bailiff was not in the jury room for the entire time to know whether any of the jurors had looked at the transcripts.

“THE COURT: [H]ow many jurors were in the jury room with these transcripts?

“THE BAILIFF: Two or three.

“THE COURT: Did you ever see a juror with any of the transcripts in their hand?

“THE BAILIFF: No.

“THE COURT: And did the transcripts appear they had never been touched?

“THE BAILIFF: They were never touched.

“THE COURT: Where did you have these transcripts in relation to the other jurors while they were in the jury deliberation room, where were they placed?

“THE BAILIFF: They were placed on the table with all the files, they had them placed with all their notes, they had not touched the notes, they had not touched anything on it. And one of the jurors says we’re not supposed to have these transcripts, and I said okay and hand them to me and I handed them and I brought them in.”

Defense counsel asked the bailiff if he could identify the juror who spoke to him. The bailiff knew the juror’s face but not his name. The court declined to bring that juror in for questioning.

Defense counsel again moved for a mistrial because it appeared the jurors had access to inadmissible materials, and the bailiff was not a witness because he was not in the jury room for the entire time that the transcripts were there. The prosecutor argued there was no evidence of juror misconduct because the transcripts had not been touched or moved.

The court denied defendant’s motion for mistrial:

“There is no evidence that any jurors saw or looked at the transcripts, and these are transcripts that these jurors had an opportunity to view for an hour-and-a-half yesterday. They will be allowed to look at these transcripts again if they wish during their deliberations to listen to the tape. There is no prejudice involved in this at all, there is no evidence that they have been it and looked at these transcripts ....”

**C. Motion for mistrial and jury misconduct**

“A trial court should grant a mistrial only when a party’s chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. [Citation.]” (*People v. Bolden*

(2002) 29 Cal.4th 515, 555.) It is not an abuse of discretion when a trial court denies a motion for mistrial after being satisfied that no injustice has resulted and the party's chances of receiving a fair trial have not been irreparably damaged. (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 330.)

“ ‘When a trial court is aware of *possible* juror misconduct, the court “must ‘make whatever inquiry is reasonably necessary’ ” to resolve the matter.’ [Citation.] Although courts should promptly investigate allegations of juror misconduct ‘to nip the problem in the bud’ [citation], they have considerable discretion in determining how to conduct the investigation. ‘The court’s discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.’ [Citation.]” (*People v. Prieto* (2003) 30 Cal.4th 226, 274, original italics.)

“[W]hen a court is put ‘on notice that improper or external influences were being brought to bear on a juror ... “it is the court’s duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of the other jurors has been affected.” ’ [Citation.] Such an inquiry is central to maintaining the integrity of the jury system, and therefore is central to the criminal defendant’s right to a fair trial. [Citation.]” (*People v. Kaurish* (1990) 52 Cal.3d 648, 694.)

However, “not every allegation of [jury] misconduct justifies [an evidentiary hearing]. We have emphasized that evidentiary hearings should not be used as fishing expeditions to search for possible misconduct. Instead, such hearings should be conducted only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Moreover, even when the defense has made such a showing, an evidentiary hearing will generally be unnecessary unless the evidence presents a material conflict that can be resolved only at such a hearing. [Citation.]” (*People v. Yeoman* (2003) 31 Cal.4th 93, 163.)

#### **D. Analysis**

Defendant contends the court abused its discretion when it denied his motion for mistrial without conducting an evidentiary hearing as to whether any of the jurors read or discussed the transcript when it was inadvertently left in the jury deliberation room. To the contrary, however, the court immediately conducted an inquiry as to how and why the transcripts were left in the jury room, whether any jurors could have examined them, and the length of time the transcripts were there. The incident occurred before deliberations had started. The bailiff explained he had inadvertently placed the transcripts in the jury deliberation room before the court convened that morning, the transcripts had not been disturbed from the location he placed them, two or three jurors were in the jury room, and a juror brought the mistake to his attention within a few minutes of his mistake.

Defendant argues the court was required to do more than merely rely on “a report from the bailiff to determine the full extent of the damage.” Defendant’s argument “overlooks the starting point of the analysis—whether the information the trial court was aware of when it made its decision warranted further inquiry. Adopting defendant’s position would, in essence, mandate that the trial court conduct an inquiry whenever it becomes aware of any indication of a possibility that there might be good cause to remove a juror. That is not the law. [Citations.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 703.) In this case, the bailiff was the responsible party and fully responded to the court’s inquiry. The court’s quick response to the issue resolved the matter, refuted any possibility of juror misconduct, and eliminated the need for any type of evidentiary hearing.

Moreover, it is difficult to determine the prejudice that might have resulted if any of the jurors had examined or read the transcripts during the short period of time they were in the jury room. While the court decided that only the recording of the interview would be admitted into evidence, the transcripts had already been distributed to the jurors during the previous day’s proceedings so they could follow the recording. The court had

admitted the entirety of the recording into evidence, and the transcripts did not contain any deletions or redactions which the jury was not supposed to hear. Thus, even if one or two jurors had looked at the transcripts for the brief time they were in the deliberation room, they were not exposed to any evidence which had been stricken or deemed inadmissible.<sup>21</sup>

**V. Defendant was properly convicted of count II**

In count II, defendant was charged and convicted of assault with a deadly weapon or by means of force likely to produce great bodily injury on Jensen, while serving a life sentence, in violation of section 4500, and sentenced to life without the possibility of parole.

Section 4500 states in pertinent part:

“Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; *however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.*” (Italics added.)

Defendant contends he was improperly convicted and sentenced to life without parole for count II, because the information did not alleged that Jensen died within a year and a day and as a proximate cause of the aggravated assault, and the jury did not find that fact true, in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

“The ‘preeminent’ due process principle is that one accused of a crime must be ‘informed of the nature and cause of the accusation.’ [Citation.] Due process of law

---

<sup>21</sup> Given our rejection of defendant’s *Miranda* and jury misconduct contentions, we similarly reject his related claim that these alleged errors constituted cumulative errors in violation of his due process rights.

requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citation.]” (*People v. Jones* (1990) 51 Cal.3d 294, 317.) The same rules apply for sentencing allegations. (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.)

Nevertheless, “[u]nder the generally accepted rule in criminal law a variance [in pleadings] is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense....” [Citations.] And “[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” [Citation.]” (*People v. Peyton* (2009) 176 Cal.App.4th 642, 659.)

In *Apprendi, supra*, 530 U.S. 466, 490, the court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In *Blakely v. Washington* (2004) 542 U.S. 296, 303, the court further stated that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]” (Original italics.)

As noted by the People, however, defendant’s due process, notice, and *Apprendi* contentions are refuted by the entirety of the information, trial evidence, and verdicts in this case. The information charged defendant with count I, murder of Jensen on January 26, 2009, and count II, assault with a deadly weapon or by means of force likely to produce great bodily injury on Jensen, while serving a life sentence, also on January 26, 2009. Defendant was thus provided notice that he was charged with committing both the murder and fatal aggravated assault on the same victim and on the same day. The trial evidence showed that defendant, a prisoner serving a life term, fatally assaulted Jensen by

repeatedly hitting and kicking him, and using a ligature to strangle him, on January 26, 2009; correctional officers found Jensen's body on the cell floor around 4:00 p.m.; medical personnel were unable to revive him; Jensen died shortly after his body was found; and the cause of death was cardio-respiratory arrest "due to or as a consequence of cerebral phasing hypoxia, lack of oxygen due to blunt force tra[u]ma to the head in association with ligature strangulation." Defendant was not only convicted as charged in count II, but he was also convicted in count I of the second degree murder of Jensen.

Thus, the jury necessarily found that defendant's aggravated assault of Jensen on January 26, 2009, as charged and convicted in count II, was the proximate cause of Jensen's death on the same day, as charged and convicted in count I. Given the nature of the charges and evidence, defendant had notice of the charges, the jury necessarily found true every fact required to impose the life sentence for count II, and the court properly imposed the term of life without parole for count II.

**VI. CALCRIM No. 3100**

Defendant contends the court improperly instructed the jury with CALCRIM No. 3100, that it had already been determined that defendant was the person identified in the evidentiary exhibits which had been introduced to prove the fact of defendant's prior convictions. Defendant argues this instruction improperly removed the issue of identity from the jury and thus violated his due process rights under *Blakely* and *Apprendi* to have the jury decide every fact necessary to increase the length of the maximum term that could be imposed.

As given in this case, CALCRIM No. 3100 states:

"It has already been determined that the defendant is the person named in exhibit 21. You must decide whether the evidence proves that the defendant was convicted of the alleged crimes."

Defendant contends that CALCRIM No. 3100 violated his due process rights under *Apprendi* and *Blakely* because the jury should have determined his identity for

purposes of the prior conviction allegations. As defendant admits, however, the California Supreme Court has addressed and rejected this identical issue. (*People v. Kelii* (1999) 21 Cal.4th 452, 458; *People v. Epps* (2001) 25 Cal.4th 19, 23-28; *People v. McGee* (2006) 38 Cal.4th 682, 685-686; see also *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.) We are bound by the Supreme Court rulings on this issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) The instruction was appropriate.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
Poochigian, J.

WE CONCUR:

\_\_\_\_\_  
Levy, Acting P.J.

\_\_\_\_\_  
Franson, J.