S097414

DEATH PENALTY CASE

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

KIM RAYMOND KOPATZ,

Defendant and Appellant.

Automatic Appeal from the Superior Court of Riverside County
Honorable W. Charles Morgan, Trial Judge
Riverside County Case No. RIF086350

APPELLANT'S OPENING BRIEF

DAVID P. LAMPKIN
Attorney at Law
P.O. Box 2541
Camarillo, CA 93011-2541
Telephone: (805) 389-4388
State Bar Number 48152

Attorney for Appellant Kim Raymond Kopatz

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTION

FEDERAL STATUTES

CALIFORNIA CONSTITUTION

CALIFORNIA STATUTES

OTHER STATE STATUTES

CALIFORNIA RULES OF COURT

CALIFORNIA JURY INSTRUCTIONS

OTHER AUTHORITIES

S097414

DEATH PENALTY CASE

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

KIM RAYMOND KOPATZ,

Defendant and Appellant.

Automatic Appeal from the Superior Court of Riverside County
Honorable W. Charles Morgan, Trial Judge
Riverside County Case No. RIF086350

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

The case commenced with the complaint filed on June 2, 1999. (1 CT 1.) The operative accusatory pleading was the information filed on September 30, 1999. It charged appellant with the willful, deliberate, and premeditated murders of Mary Kopatz (Count 1, Pen. Code, § 187) and Carley Kopatz (Count 2, Pen. Code, § 187). The information alleged as special circumstances that Counts 1 and 2 were committed intentionally and carried out for financial gain (Pen. Code, § 190.2, subd. (a)(1)) and that appellant was convicted of multiple murders in this proceeding (Pen. Code, § 190.2, subd. (a)(3)). (1 CT 98-99.) The prosecutor gave notice of his intention to seek capital punishment. (1 CT 95.)

Jury trial in the guilt phase commenced on January 3, 2001. (3 CT 449.) A jury and alternates were sworn on January 16, 2001. (13 CT 3458-3460.) On February 8, 2001, the jury found appellant guilty of murder as charged in Counts 1 and 2, fixed the degree of the murders as first degree, and found the allegations of special circumstances true. (14 CT 3800-3804, 3810-3811.)

Jury trial in the penalty phase began on February 13, 2001. (14 CT 3812.) On February 15, 2001, the jury returned verdicts fixing the penalty for each murder conviction as death. (14 CT 3859-3861, 3865-3867.)

On March 21, 2001, the court sentenced appellant to death. (14 CT 3903-3911.) This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF APPEALABILITY

This is an automatic appeal following a judgment of death, which lies within the original jurisdiction of the California Supreme Court. (Cal. Const., art VI, § 11; Pen. Code, § 1239, subd. (b); *In re Carpenter* (1995) 9 Cal.4th 634, 646.)

STATEMENT OF FACTS

A. Introduction.

So far as the evidence shows, in April 1999, the Kopatz family was an ordinary family that, but for the homicides that underlie this case, would not have attracted any attention. In April 1999, appellant was 47 years of age. (14 CT 3891.) In or about 1990, he had suffered an accident that "crushed [his] head" (13 CT 3476) and disabled him. (14 CT 3891; 6 RT 726-727; 11 RT 1515.) Due to his disability, he stayed at home and did not work. (14 CT 3891; 9 RT 1183.) He was active around the house and the garden. (6 RT 725.) He received Social Security and insurance payments on account of his disability. (11 RT 1515; Exhibit 83.)

Appellant married Mary Kopatz, nee Foley, in 1989, when he was about 36 and she was about 25. (5 RT 681; Exhibit 14A.) In 1990, their first daughter, Ashley, was born, and they purchased a home in Riverside, a single-family, three-bedroom, two-and-a-half-bath residence located at 9188 Garfield Street, at the southeast corner of Garfield Street and Donald Avenue. (5 RT 681-682; 6 RT 722-724.) Their second daughter, Carley, was born in 1995. (4 RT 504; Exhibit 14B.)[1]

In April 1999, Mary worked as the manager of a Jenny Craig weight-loss center located at the intersection of Magnolia Avenue and Tyler Street in Riverside. (5 RT 583-587.) She joined Jenny Craig in January 1997. (11 RT 1601.) As manager, she supervised one employee, Mary Burdick, who had been with the company for seven years (5 RT 584) and another, Jean Black, who had been with the company for 13 years (5 RT

---

[1] Since several persons important to these facts are surnamed Kopatz, appellant usually refers to them by their first names.

668).

In April 1999, Ashley, age eight, attended Riverside Christian School, located on Monroe Avenue near Magnolia Street. (4 RT 501.) Carley, age three, stayed at home. (4 RT 504-505.)

The guilt-phase record reveals little about the Kopatzes. There is no evidence any of them had any contact with the criminal justice system. There is no indication of alcohol or substance abuse or marital infidelity. (See 14 CT 3891, 3898.)

On the afternoon of Thursday, April 22, 1999, the bodies of Mary and Carley were found in the family's teal-green 1996 Dodge Caravan parked on Duncan Avenue between Van Buren Boulevard and Nellie Street. (7 RT 942-943; 11 RT 1500-1501; Exhibit 68.) The location is about one mile from the Kopatz residence. (13 RT 1771.) Both Mary and Carley had been strangled to death. (8 RT 1110, 1125.)

The prosecution evidence that these crimes were committed by appellant is entirely circumstantial. It is discussed below.

B. Appellant takes Ashley to school (8:00 AM).

On the morning of April 22, 1999, appellant took Ashley to school at Riverside Christian School. (4 RT 501, 506.) They arrived before classes began at 8:00 AM. (4 RT 508.) Appellant rapped on the window of the principal's office, and he and the principal, Patricia VanDyke, exchanged waves and smiles. (4 RT 531.) Ashley's teacher, Janis Owen, saw appellant that morning and noticed nothing unusual about his behavior, except that he did not bring Carley with him. (4 RT 506-507.) According to Ms. Owen, that day was the first day since Ashley began attending the school in December 1998 (4 RT 503 [Owen]) or January 1999 (4 RT 529 [VanDyke]) that appellant brought Ashley to school and did not bring

Carley. (4 RT 506-507, 511.) She conceded, however, that there could have been days when appellant brought Ashley to school and she was not present due to illness. (4 RT 520-522.) [2]

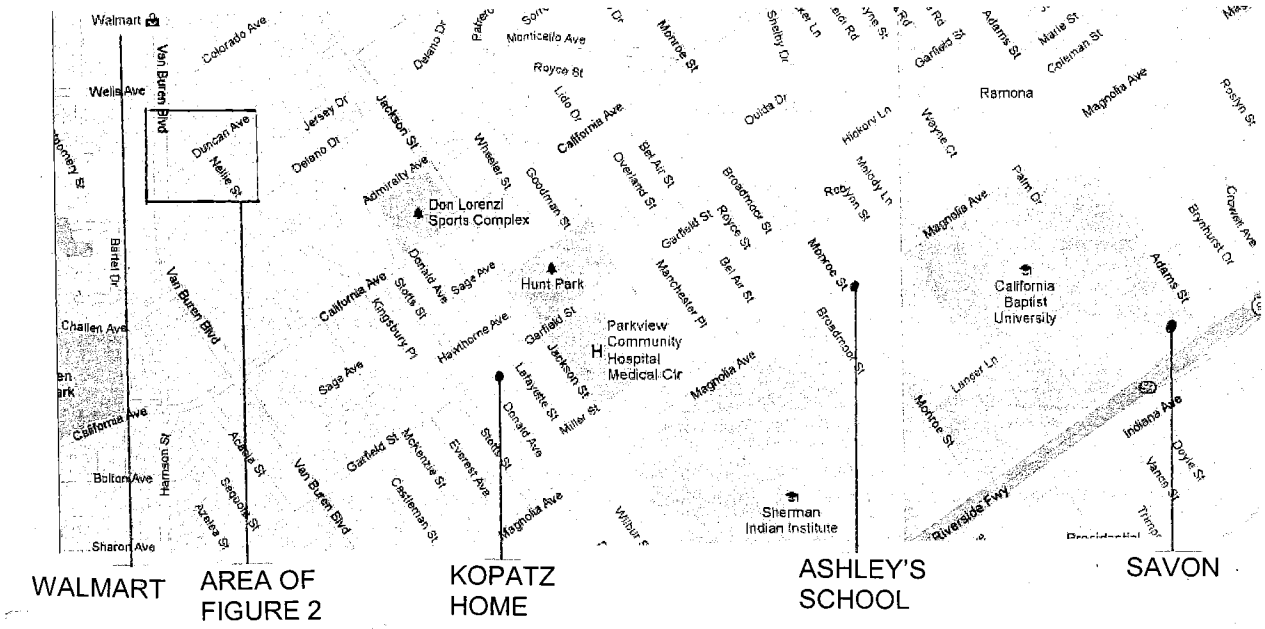
At about 8:55 AM, David Laird was driving westbound on Garfield Street headed toward Donald Avenue. (9 RT 1182-1184.) He was a debt collector for Heilig-Meyers Furniture, located at Magnolia Avenue and Donald Avenue, a block from the Kopatz home. (9 RT 1177-1178.) He did not know any of the Kopatzes, but, while driving through the neighborhood for his job, he had observed that appellant was a stay-at-home father, and he was envious. (9 RT 1179-1183.) He was familiar with the Kopatz family vehicles. (9 RT 1185.) At 8:55 AM, he saw the blue or gray car in the driveway and did not see the van. (9 RT 1186.) He did not see anyone out and about on the property. (9 RT 1188.)

C. Residents of Duncan Avenue notice the van (8:50 AM to noon).

People who lived on Duncan Avenue, where the van was found in the afternoon, noticed it in the morning. John and Connie Lopez live at 9387 Duncan Avenue. Theirs is the house closest to Van Buren Boulevard. It is slightly to the west of where the van was found. (6 RT 767, 770, 779; 7 RT 947.) On the evening of April 22, 1999, Mr. Lopez told Riverside Police Department (RPD) Detective Cobb he first saw the van parked on Duncan Avenue between 10:00 AM and 11:00 AM. (6 RT 774-775; 7 RT 947.) When RPD Detectives Shumway and DeVinna interviewed Mr.

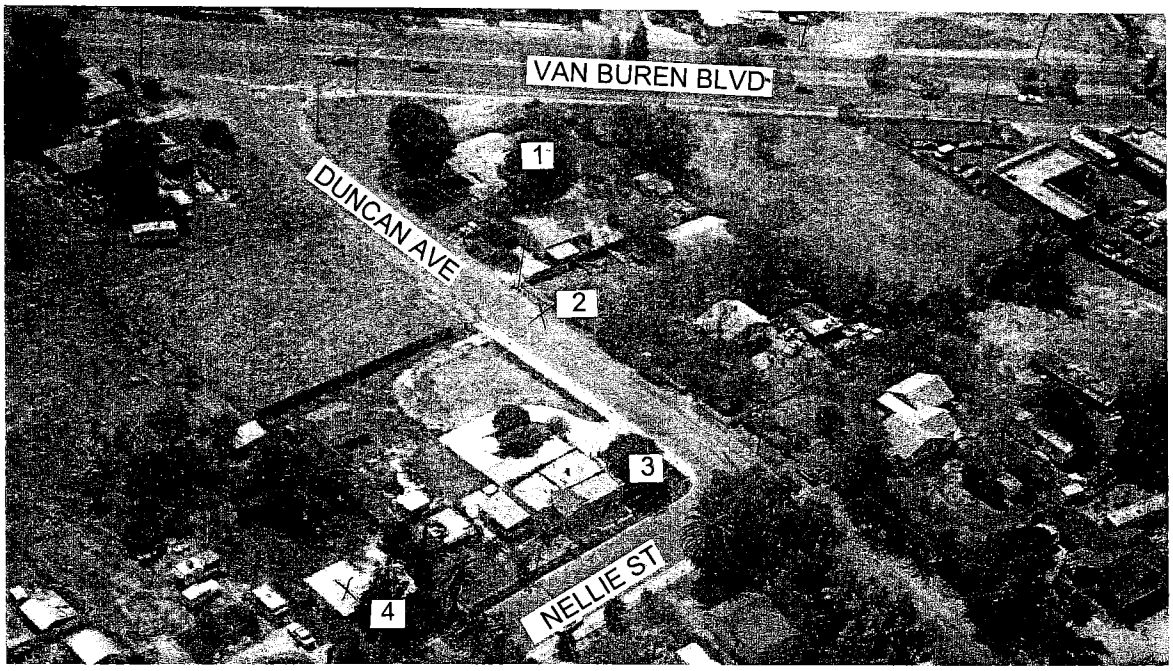
---

[2] Figures 1 and 2 on page 7 show the areas discussed in the Statement of Facts. Figure 2 is prepared from Exhibit 17. Figure 1 is taken from Google Maps. It is not an exhibit. It is provided solely to make the Statement of Facts easier to understand.



WALMART | AREA OF FIGURE 2 | KOPATZ HOME | ASHLEY'S SCHOOL | SAVON

FIGURE 1 – AREA OF CRIME SCENE
AND KOPATZ HOME, RIVERSIDE, CA



1 -- LOPEZ HOME
2 – LOCATION OF VAN
3 -- HENRIQUEZ HOME
4 -- BALLOU HOME

FIGURE 2 – CRIME SCENE (EXHIBIT 17)

Lopez on April 23, 1999, he was sure he had seen the van around 8:40 AM when he took his granddaughter to school. (6 RT 775; 7 RT 970-971.) When Detective Shumway interviewed him again on April 28, 1999, he was no longer sure he saw the van early in the morning, but he was positive it was there after 11:00 AM. (7 RT 970-971.) At trial, Mr. Lopez testified he first saw the van when he took his granddaughter to her school a few blocks from the Lopez house at 8:30 or 8:45 AM, in time for start of classes at 8:50 AM. He saw it again when he returned from taking his granddaughter to school. He saw it again when he took his wife to an eye exam scheduled for 10:00 or 10:30 AM. When he returned at 11:30 AM or noon, it was still there. He noticed it, because "it was a nice van." (6 RT 770-772.) After he first saw it, it was there all the time. (6 RT 775-776.)

On the evening of April 22, 1999, Ms. Lopez told Detective Cobb she never noticed the van. (6 RT 786; 7 RT 948.) When Detective Shumway interviewed her on April 28, 1999, she had no recollection of seeing the van on April 22, 1999. (7 RT 971.) At trial, Mrs. Lopez testified she did not notice the van when they left for the eye exam around 8:50 AM, but she saw it when they returned home around 11:30 AM. (6 RT 781, 784.)

Alvaro and Grace Henriquez live at 9354 Duncan Avenue, the house at the southwest corner of Duncan Avenue and Nellie Street. (6 RT 790, 808-809; Exhibit 20A.) On the morning of April 22, 1999, Mr. Henriquez was getting ready to leave for a business appointment in Rancho Cucamonga, and he was late. (6 RT 791-792, 810; 7 RT 972.) When Detective Cobb interviewed Mr. Henriquez on the evening of April 22, 1999, he said he first saw the van between 11:00 AM and 12:00 noon. (7 RT 949.) When Detective Shumway interviewed Mr. Henriquez on April

28, 1999, he said he thought he saw the van driving around between 10:30 and 10:45 AM. (7 RT 972.) It was driving eastbound on Duncan towards the intersection of Duncan and Nellie, and it made a U-turn to head back westbound towards Van Buren. (7 RT 972-973.) He waved at the driver, but the driver ignored him and kept driving. (7 RT 973-974.)

At trial, Mr. Henriquez testified he first saw the van between about 10:30 and 10:45 AM. (6 RT 792.) The van drove north on Nellie to Duncan, turned left on Duncan and went to Van Buren, turned left on Van Buren and went to California Avenue, turned left on California and went to Nellie, turned left on Nellie and went to Duncan again. The round trip took five or seven minutes. (6 RT 795, 802-804.) (It is obvious from the evidence that Mr. Henriquez could not have actually seen the van except when it was on Duncan or Nellie.) The second time it was on Duncan, the van pulled into Mr. Henriquez's driveway, and he waved and said "hi" to the driver, because he thought the driver was his neighbor. The driver waved back, but the driver was not his neighbor. (6 RT 792-797, 804; 7 RT 974.) The driver was a white male with brown hair. (6 RT 797; 7 RT 973.) Mr. Henriquez thought the driver had a little beard on his chin. (6 RT 805-806; 7 RT 973.) He wore a white T-shirt. (6 RT 796, 802; 7 RT 973.) Mr. Henriquez did not see anyone else in the van. (6 RT 796.) The van backed out of his driveway and headed towards Van Buren Boulevard. (6 RT 797.) Mr. Henriquez went inside his house for about five minutes. (6 RT 798-799.) When he left his house at 10:45 AM to go to his appointment, the van was parked on Duncan Avenue where officers later found it. (6 RT 798, 801; 7 RT 974.) He did not see the driver get out of the van. (6 RT 799.)

Mrs. Henriquez managed a construction business from the house. (6 RT 810, 828.) Seated at her desk with her back to Duncan, she could look

to her left through French doors to Nellie Street and the corner of Nellie and Duncan. (6 RT 810-814, 832, 842-843.) When Detective Cobb spoke to her on the afternoon or evening of April 22, 1999, she told him she was not paying attention to the street. (7 RT 952.) When Detective Shumway interviewed her on April 28, 1999, she said she saw the van around 10:30 AM, driving slowly on Nellie Street northbound. (7 RT 975-976.) It stopped at the stop sign at Nellie and Duncan for a few minutes. Then it parked in front of a white picket fence catty-corner from her house. (7 RT 975-977.)

At trial, Ms. Henriquez testified that, around 10:15 AM, she was busy doing paperwork, working on the computer, watching a telephone man who had come to install extra lines, and telling her husband he had to leave for his appointment. (6 RT 810, 812, 830-831.) She saw the van driving north on Nellie towards Duncan very slowly. (6 RT 812.) A few minutes later, the van came around again. (6 RT 814, 818-820, 822-824.) The van's reappearance and its slow speed concerned her, because she thought it might be casing her house for a burglary. (6 RT 815.) As the van turned left towards Van Buren, she stepped outside and watched it and brought it to her husband's attention. (6 RT 821-822.) Then, while she and her husband were still outside, the van came by a third time. (6 RT 822, 833-835.) It stopped at the stop sign and remained there for several minutes. (6 RT 818-820, 822-824, 826-827.) Ms. Henriquez conceded that her tally of three appearances might be wrong, because the van "was going around so many times." (6 RT 829.) At one point she testified that, after stopping at the stop sign at the corner of Nellie Street and Duncan Avenue, the van turned right onto Duncan and drove away from Van Buren. (6 RT 814.) At another point, she said she saw it make several U-turns. (6 RT 829.) She did not see the van in her driveway. (6 RT 827.)

Ms. Henriquez said she saw only a profile of the driver. (6 RT 820-821, 826.) The driver was a fair-skinned, white male with brown hair wearing a white T-shirt. (6 RT 814-815, 821, 826, 838-839; 7 RT 978.) She could tell the driver's beard grew really fast. (6 RT 826.) She did not see anyone else in the van. (6 RT 815.)

Ms. Henriquez continued to watch the van after she returned to her office. (6 RT 823, 826, 827-828.) The last time she saw it go by, the van turned left on Duncan Avenue and parked in front of a white picket fence between the intersection with Nellie Street and the Lopez home. (6 RT 819, 824-825.) When the van first pulled up to the white picket fence, it was partially on the pavement, but at some point it was repositioned to be totally on the gravel shoulder. She did not see this happen. The last time she saw it with the driver in the driver's seat, it was partially on the pavement. (6 RT 828-829.) When her husband left at 10:45 AM, the van was parked and the driver was still in it. (6 RT 839-840, 844-845.) She continued to look out the window periodically to see if the man was still in the van. (6 RT 845-846.) She did not see him get out of the van or walk away, but, after around 11:00 AM, there was no one in the van. (6 RT 827-828, 830-831, 839-841, 844-846.) When she left her office around 12:00 noon, the van was still there. (6 RT 828.) [3]

---

[3] While they were outside their house, Mr. and Mrs. Henriquez saw a white Mercedes Benz diesel stop momentarily by the driver's side of the van when it was parked partially on the pavement in front of the white picket fence (6 RT 799-800, 825, 829; 7 RT 974-975.) Mrs. Henriquez said she saw the driver of the Mercedes lean towards the passenger side of her car, although she could not tell if there was any conversation between the Mercedes and the van. (6 RT 825.) Colleen Morgan, a witness contacted by police in or about June 1999, testified that she drove a white 1982 Mercedes and, on April 22, 1999, she drove on Duncan Avenue

D. Les Ballou sees a person he identifies as appellant walking southbound on Nellie Street (10:30 AM).

Les and Mae Ballou lived at 4466 Nellie Street, the house just to the south of the Henriquez home. (6 RT 856-857; 12 RT 1613-1614.) Les Ballou was in his 90's. (6 RT 877 [92]; 12 RT 1614-1615 [90].) Officer May questioned the Ballous as part of a neighborhood canvass on April 23, 1999. After establishing that they were home the previous day, he asked them questions including, "Did you see anyone unfamiliar to you" and ""Did you notice anything out of the ordinary during the early morning hours up until the late afternoon." (13 RT 1789-1790.) The Ballous told him that the only unusual thing was that there were two AT&T men who spent hours and hours on a roof doing repairs on telephone lines. They did not say anything about a man walking past their house. (12 RT 1627-1628; 13 RT 1790-1791.)

But, on June 3, 1999, after appellant had been arrested and arraigned, an article about the homicides appeared in the Riverside *Press-Enterprise* with a photo of appellant. (6 RT 850-851.) Seeing the article and photo made Mr. Ballou recall that he had seen appellant before. (6 RT 860.) Mr. Ballou did not contact the police with this information, but, through serendipitous circumstances,[4] it came to the attention of Detective

---

sometime between 9:30 AM and 11:00 AM, because Duncan is a shortcut from her house at 4020 Kingsbury Place to the Walmart store on Van Buren. (10 RT 1414-1419.) There was no evidence that Ms. Morgan had any further connection to this case.

[4] Detective Shumway testified he was at a girls' softball game in Corona when he saw a woman named Geralynn Gorham, whom he recognized from a softball league his daughter played in. She was at appellant's arraignment in June 1999. She told him something that made him go that day to contact Ballou. He went within an hour of getting the

Shumway, who interviewed Mr. Ballou on June 26, 1999. (6 RT 860-861, 865; 13 RT 1777; but see 6 RT 851-852 [July 1, 1999], 853-854 [June 22, 1999], 870 [same]).

At the preliminary hearing on August 31, 1999 (1 CT 92), Mr. Ballou testified that, on the morning of April 22, 1999, he was outside his home working on his front yard, as was his habit, probably around 10:00 or 10:30 AM. (6 RT 856-857, 861-862, 877.) A man whom Mr. Ballou identified in court as appellant walked by him. (6 RT 858, 877.) Mr. Ballou said "hi," and the man looked at him very dourly and responded as if he were angry about something. (6 RT 858-860.) Mr. Ballou's attention was attracted because the way the man answered him wasn't very friendly, and Mr. Ballou was not used to that. (6 RT 859-860, 867.) Mr. Ballou, who was colorblind, paid particular attention to the man's shirt, which was a slipover shirt with a dark front. The sleeves were halfway down, but they were light colored. Mr. Ballou did not notice the man's pants or shoes. (6 RT 858-860, 866.) When Mr. Ballou saw the photograph, he told his wife, "That's the man I saw walking down the street." (6 RT 860.)

Mr. Ballou died before the trial, but his testimony at the preliminary hearing was read into the record. (6 RT 854, 856-879).

Mae Ballou testified at trial that, when she was working in the rear yard on April 22, 1999, Mr. Ballou came back to her sometime between 10:30 AM and noon and told her he had said "hello" to a man who walked by, as he did to everyone, and the man just ignored him and walked away. (12 RT 1615-1616.) After he saw the picture in the newspaper, he said, "You know, honey, that's the man that I saw when I told you about the man

---

information. (6 RT 851-854.) The story is told in more detail in the prosecutor's opening statement. (See 4 RT 488-490.)

that passed by that didn't say, `Hello,' to me." (12 RT 1617.)

E. Mary fails to report to work, and Ashley develops a high blood-sugar level (11:00 AM to 12:30 PM).

Meanwhile on the morning of Thursday, April 22, 1999, two circumstances led to a series of telephone calls and visits to the Kopatz residence. One was that Mary failed to arrive for work at Jenny Craig when she was scheduled to do so at 11:00 AM. She was rarely or never late to work, but she did not arrive at work that day. (5 RT 585-586, 670.) The Jenny Craig employees called the Kopatz home several times and did not receive an answer. (5 RT 587-592, 670-671.)

The other circumstance arose because Ashley has diabetes. Around 11:00 or 11:30 AM, while she was at school, she developed a high blood-sugar level. Her teacher, Ms. Owen, took her out of class and sent her to the principal's office. (4 RT 507-508.) Although Ms. Owen had made approximately three calls to the Kopatz home concerning Ashley over the previous four months, there is no evidence she made any phone call on April 22, 1999. (4 RT 525-526.) She testified she would not call Mary at work, because she had an "order of numbers to call." (4 RT 525.)

The principal, Patricia VanDyke, also has diabetes. She could give Ashley an insulin injection if necessary, but she needed permission from one of Ashley's parents. (4 RT 529-530.)

When Ashley reached Ms. VanDyke's office, Ms. VanDyke was not there, having gone to lunch at 11:30 AM. (4 RT 532-533, 569.) Ms. VanDyke's secretary, Linda Lee, consulted with Ashley and then called the Kopatz home. There was no answer or answering machine response after six or seven rings. She checked the number with Ashley and called again. As before, there was no answer after six or seven rings. She called again

in five minutes, and there was still no answer. (4 RT 570-571.) At 11:45 AM, Ms. Lee called Mary's work, Jenny Craig. The call was answered, but she did not get to speak to Mary, and the record does not show what was said. (4 RT 571-572.) Ms. Lee called the home a fourth time at 11:45 AM and got no answer. (4 RT 572-573.) Ms. Lee testified with the aid of notes she made about three days after April 22, 1999. (4 RT 568-569.)

When Ms. VanDyke returned from lunch at 12:00 noon, Ms. Lee told her Ashley had been in with a blood-sugar level of 424, which Ms. VanDyke described as a "very high level." (4 RT 532-533.) Ms. VanDyke called the Kopatz home at about 12:05 PM, using a list of numbers she kept under her desk mat. The phone ring seven or eight times, and there was no answer and no answering machine. (4 RT 533-534.) Then, as she usually did when she could not reach anyone at home, she called Mary at work at about 12:10 PM. The people at Jenny Craig told her they were concerned because Mary had not arrived. (4 RT 533-534.) She called Mary's cell phone, the first time she had ever done so, but there was no answer. (4 RT 535-536.) She testified, without objection, that she was irritated she could not reach anyone, and "it was strange this entire group of people just dropped off the planet of the earth." (4 RT 536.)

Ms. VanDyke called Mary's work again at 12:30 PM. They still had not heard from her. They were going to send someone to the home. She again tried the home phone and the cell phone, and she put the school number on the pager, the first time she had ever done that. (4 RT 536-537.) Ms. VanDyke testified with the aid of notes she made on April 23, 1999. (4 RT 534-535.)

The testimony of the two employees who were present at the Jenny Craig center that morning conflicts with the evidence summarized above. Mary Burdick testified she received calls from the school between 10:00

AM and 11:00 AM. (5 RT 587-589.) She said that, when the school mentioned Ashley's diabetes, she told them she was expecting Mary at 11:00 AM. (5 RT 588.) When Mary did not appear at 11:00 AM, she went to speak with her co-worker, Jean Black. (5 RT 590-591.) Jean Black testified Mary Burdick interrupted her during a client consultation about 11:10 AM and asked if she knew if Mary Kopatz was going to be late, because the school had called. (5 RT 670-672.) Ms. Black testified that she herself received calls from the school between 11:30 AM and 11:45 AM. She said the school said Ashley needed insulin, and she told the school to give the shot, and she would take responsibility for it. (5 RT 671-672.).

After Ms. Black and Ms. Burdick spoke, they took turns calling the Kopatz house every 10 or 15 minutes until Ms. Burdick left at 12:15 or 12:30 PM, although they did not try the pager or cell phone numbers. (5 RT 591-592, 670-672.)

F. Appellant goes to the dry cleaners and is seen outside his home (10:30 AM to 1:00 PM).

At some point, appellant went to Classic Cleaners, which is in a shopping center close to the intersection of Arlington Avenue and Madison Street. (6 RT 881-882.) He dropped off four men's Members-Only sports-type jackets and two ladies suits and received receipt number 2067. (6 RT 885-887, see Exhibit 28B.) The clerk who waited on appellant, Brenda Godoy, was familiar with him. (6 RT 883.) She said it was rare for him to bring in men's clothes. (6 RT 884, 887.) They chatted about the Columbine school shootings, which occurred on April 20, 1999, although she said they were "the day before." (6 RT 887-888.) She said it was unusual for him to talk to her. (6 RT 896.) She did not notice any scrapes

or abrasions or bruises on him. (6 RT 897.)

Ms. Godoy was sure appellant came in before noon. (6 RT 888, 890.) The cleaner's receipts do not show the time of day, but she testified the receipts are used in numerical order. (6 RT 884, 890.) After Detective Shumway came in on May 11, 1999 and asked her for the receipts, she called the customers who received receipts numbered 2062 to 2072. (6 RT 891-892; 13 RT 1788.) She testified that customers with receipt numbers between 2064 and 2070 all told her they were there before noon. (6 RT 892-895.) One such customer, Clyde Shupe, who received receipt number 2064, was called as a witness for the prosecution and testified that he went to the cleaners between approximately 10:30 AM and 12:00 noon. (7 RT 914-917; see Exhibits 28A, 28B.)

At about 12:15 PM, a neighbor of appellant to the east at 9178 Garfield Street, 16-year-old Maria Montoya, left her house to walk to probation school. (7 RT 920-922, 925-926, 933-934, 937.) Walking westbound on Garfield to Van Buren, she saw appellant working in his front yard, and they said "hi" to one another. (7 RT 926, 929-930, 932, 938.) He was wearing shorts. She did not remember the color of the shorts. (7 RT 932.)

At about 12:15 or 12:20 PM, Mary Burdick left the Jenny Craig center. She drove by the Kopatz home about 12:30 PM. (5 RT 593, 596.) She drove slowly but did not stop. (5 RT 597.) She did not see anyone in front of the house or in the driveway. (5 RT 596-597.) She saw the family's gray Chrysler sedan but not the teal-green Dodge Caravan. (5 RT 594-596.) The gray car was the only one Mary drove to work. (5 RT 596, 676-677.) Ms. Burdick went to her home at 4837 Luther Street, in the vicinity of Arlington Avenue and Madison Street, arriving around 12:30 PM or later. (5 RT 597-598, 620-621.) At home, she told her husband,

Doug Burdick, about her concern for Mary and Ashley. She called the police, but they would not take a missing person report from her. She continued to call the Kopatz home. (5 RT 597-598, 622-623.)

At about 1:00 PM, David Laird, the travelling debt collector, drove past the Kopatz home for a second time. He saw appellant working on a sprinkler in the front yard. (9 RT 1190-1192.) Appellant was wearing a T-shirt and blue pants. He was squatting or kneeling, and Mr. Laird could not tell if the pants were long or short. (9 RT 1192, 1195-1196.)

G. Appellant has telephone conversations with Ashley's school and Mary's co-workers at Jenny Craig (1:00 PM to 1:40 PM).

At some point, appellant called the school and left a message on the school's answering machine. (4 RT 574-575.) As Ms. VanDyke's secretary, Linda Lee, described the message, appellant said he was responding to a page. He sounded out of breath. He said he had been out working in the yard, and he was winded. He seemed frantic, in that he was talking quickly and tripping over his words or repeating his words. He did not mention that Mary and Carley were missing. (4 RT 577-579.) He said he did not know what the page was about, but, since it was almost the end of the school day, he would let Ashley finish the day and then either he or Ashley's mother would be there to pick her up. (4 RT 578.) School ends at 2:30 PM. (4 RT 537.) Ms. Lee retrieved the message about 2:15 PM. (4 RT 575.) She did not check the answering machine feature that would have told her when the message was left. (4 RT 574-575.)

At about 1:15 PM, Jenny Craig employee Jean Black received a telephone call from appellant. (5 RT 673.) He asked her very calmly if his wife had brought Carley to work with her. She told him his wife had not

come to work. She asked him where Mary Kopatz's cell phone and pager were, and he said they were both on the kitchen counter. (5 RT 673.) Ms. Black thought this was odd, because she never saw Mary Kopatz away from Ashley without the cell phone (5 RT 674), and Mary Kopatz had told Ms. Black she always carried the cell phone (5 RT 677-678). He told her he had been out back digging all day and had lost track of time. He said he had just come in to get a glass of water. Appellant told Ms. Black his wife had gone to run errands at Sav-on and Walmart, and he said he would call those places. He remained calm until he knocked over a glass of water. He said, "Oh, shit," and after that he sounded panicked. (5 RT 673-674.)

Between 1:30 PM and 1:40 PM, appellant answered a telephone call from Mary Burdick. (5 RT 598, 622-623.) As soon as he said hello, she told him she was concerned about Mary, because she had not come to work, and Ashley's school had called about a problem with her diabetes. He said he knew, because he had talked to Jean Black. (5 RT 598.) He sounded concerned and upset, as if he was going to cry. He said he was scared and worried. He said he had been working in the back all day. He said Mary and Carley had left the residence between 8:30 and 9:00 AM to do errands, and he thought then Mary had taken Carley to work, because it was "take your daughter to work" day. Although there had been mother-daughter days at Jenny Craig in the past, Ms. Burdick did not think Mary Kopatz would have taken Carley to work, because Mary had told Ms. Burdick and Ms. Black in a recent staff meeting it would not be appropriate to bring children to Jenny Craig. (5 RT 599-602.)

H. Doug Burdick goes to the Kopatz home, and appellant makes a missing person report (2:00 PM to 3:30 PM).

After the phone call, Ms. Burdick and her husband discussed going to the Kopatz home. (5 RT 602-603, 622-623.) She was going to go, but Mr. Burdick convinced her that he should go, because she had said appellant was upset, and, from his "prior meetings and prior knowledge of [appellant]," Mr. Burdick did not want her there. (5 RT 623.) Mr. Burdick did not explain his "prior knowledge." He had met Mary one or two dozen times before and appellant two or three times. (5 RT 621.) He had been inside the Kopatz home before, the last time being about a month ago when he dropped off a baby cradle they had borrowed from Kopatzes. (5 RT 624.)

About 2:00 PM, Principal VanDyke received a call from appellant. He sounded "very highly upset and frantic." (4 RT 538.) He said over and over again he could not find his wife. (4 RT 538-539.) He said the cell phone was on the sink and he could not hear it because he was in the backyard. He had called the police, and they told him to call the hospitals. He had called the hospitals, and he could not find Mary. (4 RT 539.) He said her purse was on the kitchen sink, and she had just taken her wallet, as she often did. (4 RT 540.) The conversation ended when appellant said that Mr. Burdick was pulling up outside. Ms. VanDyke said she spoke on the phone with Mr. Burdick, and he assured her he would stay with appellant, and she assured him she would keep Ashley with her. (4 RT 541.)

Doug Burdick arrived at the Kopatz house around 2:15 PM. The only car there was the gray Dodge. (5 RT 624-625.) Appellant met him at the door and seemed surprised to see him. (5 RT 625-626, 628.)

Appellant was "upset to a certain degree." (5 RT 628.) When Mr. Burdick asked him if he had heard anything about Mary, appellant started shaking and crying and said something was really wrong. (5 RT 627-628.) His whole body shook. (5 RT 628.) His body continued to shake most of the time Mr. Burdick was there, although he was able to fold children's clothes at the kitchen table from time to time. Mr. Burdick did not hear appellant complain of a backache, and he did not think appellant was suffering from a backache. (5 RT 636-637, 646-647.)

Mr. Burdick said appellant was not on the phone with anyone when he arrived, but, soon after he arrived, the phone rang, and it was Ms. VanDyke. Mr. Burdick heard appellant tell her Mary had some errands she was going to run. (5 RT 625, 628-629.) After that, the phone rang nonstop all the time Mr. Burdick was there, and appellant made some calls. (5 RT 632, 635.)

After he spoke to Ms. VanDyke, appellant told Mr. Burdick Mary was supposed to go to Sav-on to fill a prescription and to Walmart. (5 RT 629-630.) Mr. Burdick saw Mary's purse on the sink with a banana in it, and he asked appellant why it was there. Appellant said Mary normally took the baby bag with her wallet inside and left the purse at home. (5 RT 630-631.) Mr. Burdick saw a cell phone and pager on a shelf just to the left as he walked in the front door. (5 RT 630-632.)

Mr. Burdick asked appellant what he had been doing all day. Appellant said he had been digging in the backyard and putting in sprinkler pipe. (5 RT 640-641.) Mr. Burdick thought appellant did not look as if he had been digging. He was wearing a white T-shirt with a brown logo on the front, white shorts, white socks, and white tennis shoes. (5 RT 639, 654.) His clothes were not dirty. (5 RT 640.) He was not sweaty. (5 RT 648.) His hands were not dirty. (5 RT 640, 648.) He had what looked like

blue paint on top of his hands and on his forearms. Mr. Burdick thought the blue stuff on his arms "kind of looked out of place." (5 RT 640-641.) Mr. Burdick did not see any scratches or marks on appellant's hands or any bruising or bumps on his forehead. (5 RT 654.)

When Mr. Burdick approached the house, he did not see any sign of work in the front yard. At the top of the driveway, close to the house and up against the chain link gate, he saw a red wagon holding a plastic bag of PVC fittings and, on the ground next to the wagon, a rake, some hand tools, and a tied-up bundle of lengths of PVC pipe similar to the pipe that can be seen in Exhibit 15A. There were no tools in the wagon. (5 RT 637-638, 651-652, 659-661.) When Detective Shumway interviewed Mr. Burdick shortly after the incident, he said there were a lot of tools in the wagon, but, at trial, he said that was not his recollection. (5 RT 651-652.)

Around 2:50 or 3:00 PM, appellant called his parents, Arthur and Betty Kopatz, who live in Torrance. (7 RT 955, 958, 961; 8 RT 1001.) Arthur was not home when appellant called. (7 RT 955, 962.) Betty testified that appellant told her that Mary was missing and Carley was with her, and he did not say anything about where they were supposed to be. (7 RT 962.) When Arthur came home 10 or 15 minutes later, Betty told him appellant had called. She said there was trouble at appellant's house, and they should get there as soon as possible. (7 RT 955, 962-963.) Arthur and Betty testified that Arthur did not speak with appellant until he arrived at appellant's house. (7 RT 955-958, 963.)

Sgt. Watters testified that, when he interviewed them outside appellant's residence that evening, Arthur and Betty told him that, when appellant first spoke to Betty, he told her he wanted to talk to Arthur, not her, and, after Arthur came home, there was a call between appellant and Arthur in which appellant told Arthur that a coworker of Mary had come by

the house and said Mary had not arrived for work, he took Ashley to school at about 8:00 AM, and Mary was going to take Carley to work with her, and that was the last he had seen them. (8 RT 1000-1001.)

Appellant also telephoned Mary's parents, Robert and Hazel Foley, who live in Long Beach. (7 RT 962; 8 RT 1058; 15 RT 2083.) He telephoned his younger brother, Alan Kopatz, and his wife, Susan, who live in Riverside. Alan was out working, but Susan got a message to him. (5 RT 681, 683-684.)

Mr. Burdick told appellant he should make a missing persons report. He said Mary Burdick had tried to make a report but the police would not take it from her. Appellant responded that it was a "fucking pain in the ass," and he did not want to do it. He became really agitated and angry, and he started spitting in the sink. (5 RT 633-634.) After Mr. Burdick prodded him for about 10 minutes, appellant called the police around 3:15 PM. (5 RT 635.) The call took at least 15-20 minutes. (5 RT 641.) At one point appellant told Mr. Burdick he was on hold, and he was very upset about it. He hit the kitchen cabinet with his fist and said, "Fuck, here we go again." (5 RT 642.)

In the call, appellant told the dispatcher his wife was going to be running around with his daughter, and she never came back and never went to work. (13 CT 3468.) He said he had called all the hospitals. (13 CT 3470.) The dispatcher told him she did not take missing persons reports and gave him another number. Appellant thanked her and the call ended. (13 CT 3471.) Sometime later appellant called back and asked for the number again, saying, "I thought I wrote it down." Calling the new number, he told the operator his wife was supposed to go to work but did not show up. He said everything was fine between Mary and him. (13 CT 3471-3472.) The operator took a description of the van, appellant's

address, and the names, dates of birth, and descriptions of Carley and Mary. (13 CT 3472-3479.) Appellant said he had called his parents and Mary's parents. (13 CT 3475.) The operator gave him a report number, P299112162. (13 CT 3480.) The operator explained the procedures her department would follow. Appellant said Mary had left to run errands at 8:30 or 9:00 AM, and the last time he saw her was about 7:30 AM when he left to take his other daughter to school. (13 CT 3481-3482.) The operator suggested he might want to call the hospitals, and he said he already had called all the hospitals. (13 CT 3482-A.) The operator told him his report would be given to a detective. (13 CT 3482-3485.)

I. Doug Burdick sees a woman's rings in the hallway bathroom (2:00 PM to 4:00 PM).

Jean Black testified she had socialized with Mary Kopatz and appellant, and Mary always wore her wedding rings. (5 RT 674-676.) Mary's wedding ring is pictured in Exhibit 23A, and her anniversary band is pictured in Exhibit 23B. (5 RT 675-676; 11 RT 1573-1574.) Ms. Black described Mary's wedding ring as "huge," with a large stone in the middle and round stones and baguettes coming up the sides, and she said Mary's anniversary band was a gold band of diamonds. (5 RT 676.) The wedding ring was insured for $10,948 and the anniversary band for $2,680. (11 RT 1573-1574.)

At some point while he was at the Kopatz house, Mr. Burdick used the front restroom, which is down the hall from the kitchen, past the entry, and on the left. (5 RT 649; see Exhibit 26.) He testified that, in the restroom, in a white, ceramic dish on the left-hand side of the sink, he saw two rings that looked like Mary's rings. (5 RT 649-650, 661-662.) He was allowed to testify over defense counsel's objection that he would not let his

wife leave her rings around like that. (5 RT 649.) Shown Exhibit 23A, he said that one of the rings he saw in the bathroom "had a similar cut," and there were "diamonds and gold." The other ring he saw would be "very, very similar" to the anniversary band shown in Exhibit 23B if the ring in Exhibit 23B had diamonds around the outside, which he could not tell from the photograph. (5 RT 662-664.)

Mr. Burdick did not say anything to appellant about the rings. (5 RT 650.) Testifying on January 17, 2001, he said testified he told his wife (who was then sitting in the audience, having completed her own testimony, see 5 RT 582-618, 658-659) about the rings on the evening of April 22, 1999. He said he raised the subject of the rings with Detective Shumway and the prosecutor in the court hallway a few days before he testified . He was uncertain whether he told Shumway about them in April 1999. (5 RT 653-654, 664-665.) (The prosecutor represented to the court in a sidebar that Mr. Burdick's testimony was the first time he had heard that Mr. Burdick saw rings in the bathroom, and "it took [him] by surprise." (5 RT 655.))

Called as a defense witness on February 1, 2001, Mr. Burdick testified that he thought he had told Detective Shumway about the wedding ring when Shumway interviewed him on April 23, 1999, but "apparently [he] didn't." (13 RT 1794; see 13 RT 1797.) On May 20, 1999, an article about the case, titled "Murdered Woman's Ring is Sought," appeared in the Riverside *Press-Enterprise.* (13 RT 1795; see Exhibit F.) Mr. Burdick testified his wife had shown the article to him, but only after he testified as described above in the prosecution case-in-chief on January 17, 2001. (13 RT 1796.) Before he testified that day, he had asked Detective Shumway out in the hallway if the rings had been recovered, and Shumway told him they had not. (13 RT 1796-1797.)

J. Alan Kopatz arrives at the Kopatz home (3:20 PM).

Alan Kopatz testified that, from 3:30 AM until around 2:00 PM on April 22, 1999, he was in Apple Valley, Lucerne Valley, and Phelan doing his job for Dreyer's Grand Ice Cream. (5 RT 682.) After he got his wife's message, he went to the Kopatz residence, arriving around 3:20 PM. (5 RT 682-684.) Appellant was on the phone making the missing persons report when he arrived. (5 RT 684-685.) Mr. Burdick, however, testified that no one arrived at the house while appellant was making the missing person call, appellant did not even call Alan's wife until after the missing persons call, and Alan showed up later. (5 RT 642-644.)

While appellant was talking on the phone, Mr. Burdick told Alan that Mary did not show up for work and was missing. (5 RT 685.) When appellant finished his call and Alan asked him what was going on, appellant said all he knew was that Mary was missing. (5 RT 686-687.) He said Mary was going to go shopping, then go to Sav-on to pick up a prescription for Ashley, and then run a few errands. (5 RT 644-645, 686.) He said he had called Sav-on, and they said she had not picked up the prescription. He said he had called the police and checked with all the hospital emergency rooms, although Alan did not see any phone numbers for hospitals. (5 RT 686-687.)

Alan pulled appellant aside and asked if he and Mary had fought. Appellant said no, everything was fine with them, especially since Las Vegas. (5 RT 688, 701.) He was referring to a trip to Las Vegas over the previous weekend in connection with a special birthday party for Alan and appellant's sister, Patricia, who lives in Las Vegas. Mary, appellant, Ashley, Alan, and Susan were all in Las Vegas from Friday to Sunday or Monday, and Arthur and Betty paid for everything. (5 RT 701-702; 6 RT

724-725; 7 RT 958-959.) Carley stayed with the Foleys. (5 RT 702.))

Alan said he would go to Sav-on and look for the van in the parking lot. (5 RT 689.) He went to take a set of keys from a window ledge by the door, but appellant told him not to take all the keys, to leave the others in case he had to go somewhere. (5 RT 689.) Mr. Burdick testified appellant told Alan, "I don't want you taking the whole fucking set of keys." (5 RT 645.) Appellant took off the van key or showed Alan which one it was. (5 RT 645, 688-689.)

Alan drove to the Sav-on on Adams Street by the 91 Freeway. (5 RT 690.) He drove through parking lot in front and then in back of store. He did not see anything. He drove to the corner and used a pay phone and a calling card to call his wife, Susan, at 3:30 PM. He said he later confirmed the time from his phone bill. (5 RT 690-692.) He arrived back at the Kopatz residence about 3:40 PM and put the van key back on the key chain. Doug Burdick was still there when he returned. (5 RT 645, 692-694.)

Alan realized a lot of cars would be coming, so he cleared the driveway. PVC pipe, a red wagon, shovels, a rake, and tools for PVC work were spread all over the driveway. (5 RT 694-695.) They were not up by the chain-link gate and garbage cans, but close to the front of the house, where the hood of a car is shown in Exhibit 15A. (5 RT 694.) Alan put the tools in the wagon, which already held plastic bags of PVC pipe fittings, and took the wagon into the backyard. (5 RT 695, 699.) The PVC pipe was not in a bundle, but spread out all over the driveway. He gathered it together and placed it next to the block wall to the left of the driveway, where it is shown in Exhibit 15A. He leaned the rakes up against the wall. (5 RT 695, 700.)

Unlike Mr. Burdick, Alan saw evidence of work in the front yard.

Alan testified that appellant was putting a pipe under the driveway to get water to the rose bushes on the far side. Exhibit 15J shows a car blocking the view to where the work was done. (5 RT 696.) He saw three holes, each about 1-1/2 feet deep and 1-1/2 feet around, two near the front of the house and the third on the left side of the driveway by the rose bushes. In the two holes by the house, he saw fresh PVC pipe that was pure white with blue glue on it and no dirt. (5 RT 696-698.) He did not see any evidence of digging in the backyard. (5 RT 699-700.)

K. Alan finds the van and calls 911 (4:30 PM to 5:00 PM).

After clearing the driveway, Alan went back inside. Appellant and Mr. Burdick were standing in the kitchen. (5 RT 700.) Wanting to do more to find Mary, Alan asked appellant where she could have gone. (5 RT 702-703.) Appellant told him she shopped at the Galleria and Walmart. Alan called the Galleria and spoke to a Riverside police officer who said he would search the parking lots of the mall and Target, and if he did not call back, it would mean he had not found anything. (5 RT 704-705.) Detective Cobb recalled, however, that Alan told him he went to the Galleria and drove through the parking lot but did not see the van. (7 RT 943-945.)

David Laird, the travelling debt collector, testified he drove by the Kopatz house yet again a little after 4:00 PM. He said he saw appellant in the same place he saw him before, i.e., working in the front yard. (9 RT 1197.) The prosecutor disavowed this testimony in his closing argument to the jury, saying Laird had his days mixed up. (14 RT 1944-1945.)

About 4:20 PM, Mary's father, Bob Foley, arrived at the Kopatz residence. (5 RT 705.) Around the same time, Doug Burdick left. (5 RT

643-644, 646.) (Mr. Burdick testified he left as one of appellant's parents arrived, and he thought it was Mr. Kopatz (5 RT 646), but all other indications are it was Mr. Foley.)

Around 4:30 PM, Alan left to drive to Walmart. (5 RT 693, 705.) Walmart is on the west side of Van Buren about a mile north of Garfield Street. Alan drove west on Garfield Street and turned north on Van Buren Boulevard. (5 RT 705.) As he drove, he looked up and down the side streets. As he passed Duncan Avenue, he saw a van similar to Kopatz's van. He was unable to make a right turn onto Duncan due to traffic, but he drove around the block to get to it, turning right on Colorado Avenue and making more rights until he reached the van. (5 RT 705-707; 7 RT 944.)

Around 4:30 or 4:40 PM, Alan parked his car several car lengths in front of the van. He had the license number of the Kopatz van, and he verified that the van he found had the same license number. Taking a towel from his car, he went up to the van and looked in the driver's side window. (5 RT 707-708.) He did not see anything. (5 RT 709.) He tried to open the driver's door using the towel, but he could not, even though, as he learned later, the van was not locked. (5 RT 715-716.)

Alan ran to the first house on Duncan west of the van. Nobody answered. He went to the next house west, the home of John and Connie Lopez (previously mentioned as having seen the van that morning while on their way to the eye doctor and other errands). He told them he might have an emergency and asked to use their phone. They brought him a cordless phone. Standing outside, he called the Kopatz home, but the line was busy, so he called the operator for an emergency break-through. (5 RT 709-711.)

Appellant answered the phone. Alan told him he found the van. Appellant sighed and said, "Oh, my God." (5 RT 711-713; 7 RT 943-944.) Alan asked to talk to Mr. Foley, and he gave him directions to the van. (5

RT 711, 713-714.) Mr. Foley said, "OK, I'll be there, but it may take a couple of minutes, because [appellant] wanted to go, and he was in no shape to go anyplace." (13 RT 1799-1800 [stipulation].)

Alan remembered he had only looked through the driver's window. He went to the side window behind the driver's side window and cupped his hands around his eyes to look in. He saw a body lying lengthwise on the floorboards with the head right below him and the feet pointing away. He ran back to the Lopezes and yelled, "There's a body in the back." (5 RT 715.) He grabbed the phone from Mr. Lopez and called 911. While on the phone with 911, he realized he still had not looked in the rear seat of the van. Going back to the van, he looked in the rear side window and saw a baby laying face down. (5 RT 716-718.)

Alan continued to talk to 911 and walked back to his car, where Mr. Lopez and another man were standing. The operator asked Alan if the van was unlocked, and he said he did not think so. Either Mr. Lopez or the other man walked up to the van on the passenger side and opened the sliding door, declining Alan's offer of the towel. At that point, Alan recognized the body as Mary. (5 RT 717-718.)

Detective Cobb's testimony about Alan's statements to him at the Duncan Avenue crime scene is somewhat different from Alan's testimony. Cobb said Alan told him he went inside the Lopez home to call 911, and he went inside the Lopez home again after he saw the two bodies in the van. And, Cobb said Alan told him he did not attempt to open the driver's door until after he had made the first call to 911. (7 RT 944-945.)

L. Firemen and police officers respond to the van's location on Duncan Avenue, and appellant's parents arrive at the Kopatz home (4:30 PM to 5:30 PM).

While Alan was still on the phone with 911, a fire truck pulled up on Duncan Avenue, bringing Riverside firefighters Martyn Reiss and Scott Wilson and Captain Tony Robbins. (5 RT 718; 8 RT 984.) Reiss went to the sliding door on the driver's side, opened it about a foot, shut it right away, looked at Alan, and shook his head. (5 RT 718; 8 RT 992.) Reiss and Wilson entered the van and confirmed that Mary and Carley were dead. (8 RT 985-986, 992-993.)

Bob Foley arrived at Duncan Avenue about 30 seconds after the firefighters arrived. (5 RT 719; 7 RT 946.) Appellant did not come with him. (5 RT 713-714.)

RPD Detective Cobb was the first uniformed officer at the Duncan Avenue crime scene, arriving at 4:55 PM. Firefighters, paramedics, and Alan Kopatz were already there when he arrived. (7 RT 940-941.) Bob Foley arrived while he was there. (7 RT 946.) Cobb viewed the interior of the van, spoke to Alan, and contacted people in the surrounding neighborhood, including John and Connie Lopez and Alvaro and Grace Henriquez. (7 RT 942-943, 947-953.)

Appellant's parents arrived at appellant's house about 5:00 PM, as Sgt. Watters testified they told him a couple of hours later (8 RT 1000), or 5:30 PM, as Arthur testified (7 RT 955). When they arrived at the house, Alan and Bob Foley were not there, and Alan's wife, Susan, was there but outside the house. Appellant was alone in the kitchen. Arthur spoke with him there, but he could not recall what was said, except that appellant was feeling very bad and said Mary and Carley were missing. (7 RT 956.)

Alan called from Duncan Avenue, and Betty spoke with him. He said an officer had told him that she and Arthur could not come to the scene but she could tell appellant that Mary and Carley were dead. (7 RT 967.) Betty gave the bad news to appellant while he was standing by the kitchen sink. (7 RT 965-966.) He said something like, "Oh, no, not my baby, too." (7 RT 967-968.) He grabbed his face and started hitting his head against the cupboard. She told him not to do that and got him to sit down in a chair by the sink. (7 RT 965-966.)

M. Paramedics and police officers arrive at the Kopatz home (5:30 PM to 8:00 PM).

Sometime before 6:00 PM, two firemen, two paramedics with an ambulance, and four police officers (McGowan, Dinco, Kendall Banks, and Donald Goodner) arrived at the Kopatz home, having been directed there to contain the location and contact appellant. Officer Goodner arrived at 5:49 PM. (13 RT 1724.) Goodner's partner, RPD Officer Patrick McCarthy, arrived about 6:00 PM. When McCarthy arrived, appellant was seated at the kitchen table being checked by paramedics and fire department personnel. (8 RT 1014-1015.) About 6:30 PM, the paramedics told McCarthy appellant was fine, and they left. (8 RT 1002.)

Appellant moved slowly to the couch in the living room. He kept repeating he had back pain and head pain. Officer McCarthy said he was "showing somewhat spasms and flexing his arms inconsistently." Although McCarthy was in close proximity to appellant all during the time he was at the house, appellant did not ask any questions about what had happened to Mary and Carley, what the investigation was showing, or how they had been killed. (8 RT 1016-1018.)

Carlton Fuller, a supervising evidence technician for RPD, was sent

to 9188 Garfield by Detective Kensinger, arriving at 6:43 PM. (9 RT 1207.) He found appellant laying on his back on a couch in the living room. (9 RT 1208, 1210.) He told appellant he was there to perform a gunshot residue collection. Appellant was not cooperative with Fuller. He shook his hands when Fuller was trying to photograph them. Fuller asked him questions, like "Are you right-handed or left-handed" and "When did you last wash your hands," but appellant did not respond. (9 RT 1210.) Fuller completed his examination of appellant and left the Kopatz residence at 7:15 PM to return to the Duncan Avenue crime scene. (9 RT 1209-1210.)

N. Appellant asks to be seen again by paramedics and is taken to the hospital (8:00 PM to midnight).

During the early evening of April 22, 1999, appellant demanded to be seen again by paramedics. Sergeant Watters, who had arrived at the residence about 6:30 PM, called paramedics to the house at about 8:00 PM (8 RT 998, 1001-1002.) Officer McCarthy thought the paramedics who responded were not the ones who had been there before. (8 RT 1016.) They evaluated appellant and transported him to Riverside Community Hospital at 14th Street and Magnolia Avenue. (8 RT 1016, 1018-1019.) Watters said the paramedics transported appellant between 8:00 and 9:00 PM, but McCarthy and Goodner said it was around 7:30 or 8:00 PM. (8 RT 1003, 1016; 13 RT 1720, 1727.)

Officer McCarthy went with appellant and remained with him the entire time he was at the hospital. Appellant was complaining of back pain. (8 RT 1018-1020.) Tim Ellis, a senior evidence technician for the RPD, was sent to the hospital to take photographs of appellant, arriving at approximately 9:02 PM. (4 RT 551; 8 RT 1019.) Ellis testified that

appellant was cooperative but did not speak to him. (4 RT 553.) McCarthy testified that appellant was "somewhat" cooperative and spoke with them "a little bit, but not much." (8 RT 1019.) Ellis said appellant was shaking a lot. He was attempting to hold his hand steady, but it still shook rather badly. (4 RT 556.)

After Ellis took his photos, appellant was evaluated by the emergency room staff, given medication for pain, and cleared. (8 RT 1018-1020.) McCarthy did not know what the medication was, but he thought it was a "painkiller sedative," and it was given by IV. (8 RT 1022-1023.) While appellant was at the hospital, McCarthy asked him for permission to search his residence, and appellant gave permission. (8 RT 1022.) Also, McCarthy received directions from Detectives DeVinna and Shumway to transport appellant from the hospital to the detective bureau for an interview. There was a long wait for appellant to be released from the hospital. (8 RT 1023-1025; 13 RT 1739.)

O. Police officers take appellant from the hospital to the Spruce Street detective bureau, where detectives interview him for approximately one hour (midnight to 2:00 AM).

McCarthy and his partner, Officer Goodner, transported appellant from the hospital to the detective bureau on Spruce Street in Riverside, arriving about 12:15 AM. (8 RT 1021, 1027.) The interview of appellant by Detectives Shumway and DeVinna began around 1:00 AM. (13 RT 1773.)

Appellant's statement was as follows: He last saw Mary and Carley around 8:30 or 9:00 AM, when he was returning home from taking Ashley to school, and they were leaving on their errands. They could have gone to Sav-on, Walmart, Target, or Mervyns. They should have been back in

time for Mary to go to work at 11:00 AM. (13 CT 3640-3641.)

He spent the morning cleaning around the pool in the back and working on the sprinklers in the front. He went inside to get a drink of water around 1:00 or 1:30 PM, and he saw Mary's purse on the counter. He realized he had messages from her work. He had not heard the phones ring when he was outside. He called Sav-on to see if Mary had picked up a prescription. He called the police, and they told him to call the hospitals. He called five hospitals. (13 CT 3642-3643.)

Doug Burdick came over. Doug helped him do a couple of things with phones. Appellant made a missing persons report. He called his parents, his brother, and Mary's parents. (13 CT 3642-3644.)

Detective Shumway commented that appellant's hands were shaking. He asked why that happened. Appellant said he could not explain why it sometimes came upon him, but he attributed it to his head injury. He said that, when it comes on, it just "rips me up." (13 CT 3644.)

Appellant said his brother, Alan, arrived at the house and then went to Sav-on. Doug drove to a mall. Alan came back and went out again. That time he called and said he found the van. Alan talked to his father-in-law. Only his father-in-law went to the van. Appellant's parents were there and his sisters-in-law. They did not want appellant to go, because they did not know there was anyone in the van, and they thought appellant should stay at home in case Mary and Carley came back. He found out Mary and Carley were dead when Alan called again and talked to his mother. (13 CT 3646-3647.)

Detective DeVinna asked appellant how he got the injuries on his hands and wrists. Appellant said he got cuts from cutting the roots of two large trees in his front yard. (13 CT 3648.) He hit his head when he was reaching into a hole under the brick planter bed by the long driveway. (13

CT 3649.) Appellant said he had been working in the dirt all day, and he had not taken a shower since he worked. Detective Shumway commented that his hands were pretty clean for having worked in the dirt. Appellant said he had been washing his hands. (13 CT 3648-3651.)

The detectives asked about his marriage. Appellant denied that he and Mary were having marital problems. He said they were doing great lately. (13 CT 3651-3652.)

Detective Shumway asked again about appellant's shaking. Appellant said it happened quite a bit after he was injured, but now it only happened twice a year or so. (13 CT 3652.) He was consulting a neurologist about it and last saw the doctor about six months earlier. The medications he took for migraines were Imatrex, Inderol, and Naprosyn. They did not make him drowsy, but, if he had a bad migraine, he might have to lie down. (13 CT 3654.)

Detective Shumway remarked that appellant stuttered. Appellant said he could not explain what caused him to shake and stutter. (13 CT 3655.) Detective Shumway said he found it hard to believe that appellant was licensed to drive, because the way he was acting he couldn't operate a motor vehicle. Appellant said his back was sore from the shaking, and the pain went down to his hamstring area. (13 CT 3656.)

Detective Shumway asked appellant where he got the scratch on his face. Appellant said his mom told him he did it when he grabbed his face when he was told about Mary and Carley. Shumway said, "You don't have any fingernails, how the hell could you have done that?" (13 CT 3657.)

DeVinna asked him a "preemptive" question why the neighbors would say they heard arguing that morning, although in fact the neighbors had not said that. (13 CT 3657-3658; see 13 RT 1785-1786.) Appellant answered, "Huh? I don't know what they heard." He said they kept the

stereo on all the time. (13 CT 3658.)

Appellant said he got up about 5:00 AM, showered, read the paper, and watched the news. Mary got up about 6:50 AM, and Carley got up later. Appellant got Ashley ready for school. He combed her hair, as he usually does. Usually he drives the van and Mary drives the car, but this morning he used the car to take Ashley to school, because Mary wanted to go running around. (13 CT 3660.) He usually parked the van in the driveway outside the gate, but that day, after he took Ashley to school, he pulled the van up inside the gate pretty close to the garage so he could check the oil. (13 CT 3661.)

Mary and Carley left around 9:00 AM. The detectives asked what kind of errands Mary was going to run. Appellant started to say they were going to get something, but then he said they had just gotten Carley potty trained. She had a little trouble with it at first, but she had not had a wet diaper for a long time. Potty training is not something you can discipline a child for. (13 CT 3662.) Both he and Mary disciplined the children, but there was very little spanking. Punishment was more likely sending the child to her room. (13 CT 3663.)

When Mary left, she said she would go to Sav-on or Target or Walmart. He thought she might take Carley to work with her, because she had taken Ashley to work a couple of weeks ago, but when he called Jenny Craig around 1:00 or 1:30 PM, they told him Mary had not come to work. Jenny Craig had tried to call appellant at home, but he was outside and did not hear the phone. There is an answering machine, but they did not leave a message. (13 CT 3663-3665.)

Appellant said he was getting his worst headache at this point. When that happens, he has trouble remembering and concentrating, but he does not get black-outs. He might forget why he went to the store.

Sometimes he forgets what he and Mary have talked about, but they have not had any arguments for a long time, they have been getting along great. (13 CT 3666.)

Mary did not have a boyfriend. He had no idea who would have killed Mary and Carley. He said, "I know nothing about what, how, how it happened, what's happened, what's going on with her, them. How, how they how they did, were, where it is, nothing." (13 CT 3667.) He said Mary wore a very nice wedding ring he just bought for their 10th anniversary, and she wore earrings, but not necklaces or bracelets. (13 CT 3667-3668.) She had a couple of watches, but he does not know which one she wore.

Appellant said to the detectives, "Oh, God. I'm starting to feel real bad. Can we tape this tomorrow? .... I'm very, I wanna, I would like to call it a day. I'm, I am dead tired. .... And my headache is very bad, please." (13 CT 3668.) The detectives stepped out of the room for a moment. While they were gone, appellant said, "Oooh. Don't leave me in here for 30 fucking ... minutes. I gotta go. I gotta go." (13 CT 3669.)

When the detectives returned, they asked what Mary was wearing. Appellant said he thought it was a short-sleeve top and navy or khaki pants. He did not know what Carley wore except it had a bear on it. He said Mary's purse was in the house but she would take just her wallet and a diaper bag. Her wallet was reddish or brown. Her keys were on a little round hook with store-reward cards on it. (13 CT 3669-3671.)

Appellant said that, when Alan told appellant he found the van, appellant gave the phone to Alan's wife, because he was crying very badly. (13 CT 3672.) He was crying, because she would not take a day off or not go to work. (13 CT 3674.) Mary did have a disagreement with appellant's parents a while ago, because they thought she was not bringing the children

to their house enough. (13 CT 3674.) He supplied his parents' address and telephone number. (13 CT 3675.)

The detectives asked if appellant had any questions for them, and he said he did not know what to ask. Shumway said, "The murderer always leaves 25 clues. In this one they left 30. ... [W]e guarantee we're gonna make ... an arrest on this case." (13 CT 3675.) The interview ended with Shumway telling appellant they would give him a ride to his brother's house. (13 CT 3676.)

The interview ended at about 2:00 AM. Officers McCarthy and Goodner transported appellant to his brother Alan's house. (8 RT 1030-1031.)

P. Appellant attends a gathering of Mary's family in Long Beach on April 24, 1999.

On Saturday April 24, 1999, Mary's family gathered at her parents' house in Long Beach. Appellant asked if he and Ashley could come over. They arrived between 10:00 and 11:00 AM. (8 RT 1058-1059.) He asked Mary's brother, Robert Foley, if he could pull his car to the back of the driveway. He said he thought he was being followed by the police, and he thought the car might have been bugged, and he wanted to check it. He said there had been a lot of police around his house. (8 RT 1060.) He said if the police contacted Robert or his father, they should refer the police to Attorney Jaffe, and he gave Jaffe's card to Robert. (8 RT 1061.)

Robert's older sister, Janet Foley, was also present. She and Robert both noticed scars and scratches on appellant's hands, arms, and face. (8 RT 1061-1067.) Appellant told Janet he had been digging in the backyard and scratched his hands while putting in pipe, and he had bent down deep in a hole he dug and hit his head on a brick. (8 RT 1067.)

Janet testified appellant had helped her move her furniture three times between 1995 and 1999. He had helped carry couches up stairs, and he had never complained about back pain or physical disability. (8 RT 1068-1070.)

Q. Physical evidence.

1. Appellant's appearance.

On the evening of April 22, 1999, appellant had a red mark on his left eyelid, a red mark on his left cheek about ¾" diagonally below the left corner of the eye, and a faint red diagonal line on his left forehead with a dark spot in the middle. (4 RT 554; 9 RT 1280; Exhibit 9A, Exhibit 45A.) Fuller called the red line a "scratch." (9 RT 1280.)

Appellant's left hand had red marks on the back of the hand near the wrist, a splotch of blue glue or paint above the middle knuckle, and another blue splotch on the pinky side of the hand near the wrist. (4 RT 555-556; 9 RT 1280-1281; Exhibit 9C; Exhibit 9F; Exhibit 45B.) Ellis said the red marks were scratch marks. (4 RT 555.)

Appellant's right hand had bruising on the pinky side and middle knuckle, cuts on the middle and ring fingers, and spots of blue glue or paint on all four fingers. There were red marks, linear-type abrasions or scratches, above the wrist. There were indentations or marking on the index, ring, and little fingers across the lower knuckle. (9 RT 1281; Exhibit 9D; Exhibit 9E;Exhibit 45C.)

The inside of one elbow had two or more red marks, which Fuller described as "some sort of injury," and more blue paint or glue on the upper forearm. (9 RT 1281; Exhibit 45D.)

2. Bodies in the van.

RPD Det. Keith Kensinger was tasked with processing the Duncan Avenue crime scene, including the vehicle, victims inside, and surrounding area. (8 RT 1033.) He worked with Detective Callow; the supervising forensic investigator, ID Tech Carlton Fuller; and a DOJ forensic technician, Phillip Pelzel. (8 RT 1034-1035.)

Mary's body was found on the floor of the van between the front and middle seats, face up, with her head on the driver's side and her feet on the passenger side. Her knees were raised. Her right arm rested in her lap. Her left arm was by her side. (7 RT 942; 9 RT 1220-1223; Exhibit 3A; Exhibit 3B; Exhibit 3E; Exhibit 4A.)

She was wearing dark blue walking shorts with a brown and black leather belt and a white or cream-colored ribbed-knit sweater with a zipper at the neck. She had on white socks but no shoes, although her white Skecher tennis shoes were found in the van (9 RT 1220, 1222, 1231, 1236, 1249-1250, 1265-1266; Exhibit 3A; Exhibit 3B.) Fuller thought her socks were remarkably clean. (9 RT 1232-1233, 1322; Exhibit 4H.) She had no jewelry. (9 RT 1232.)

The belt, button, and zipper of her shorts were undone, and the shorts were spread open, but the shorts were not ripped. Her panties were in place and not torn. Her bra was undone. Her blouse was pushed up so her midsection was exposed, part of her bra was sticking out, and part of her right breast was exposed. (7 RT 942; 9 RT 1224-1225, 1229-1230; 10 RT 1436; Exhibit 3E, Exhibit 4C.)

Her face was bruised and bloodstained. The neck of her sweater was bloodstained. There were ligature marks around the neck. Her knees and the back of her right hand were bruised. There were red marks on her

upper right arm and right side of her back. ((9 RT 1224-1225; Exhibit 4A; Exhibit 4C; Exhibit 3E.) A stripe of blood began at her right ear and ended at the right side of her nose, but it was interrupted on her cheek. (9 RT 1226; Exhibit 3F; Exhibit 3H; Exhibit 4J.) Fuller interpreted this evidence to mean that the travelling of the blood was interrupted by some hard surface and, because the nose was higher than the ear when the body was found and blood does not flow uphill, she was in a different position when the blood flow was interrupted by a hard surface. (9 RT 1225-1227.) There was no pool of blood or bloodstain evidence under the body, although it was obvious that at some time close to death or after death she had been bleeding. (9 RT 1246.)

Carley's body was found on the floor between the middle and rear seats of the van. She was face down with a large pool of blood beneath her face. Her left arm was bloodstained. (7 RT 942; 9 RT 1221, 1223, 1236; Exhibit 3A; Exhibit 3C; Exhibit 3G; Exhibit 7D.)

Carley was wearing a red ribbon in her hair, a blue top with a figure on the front, blue shorts figured with red, orange, and green flowers, white socks, and white plastic sandals. Her shirt up around her head was blood-soaked. There was no blood on the top of her body or on her back, her shorts, her socks, or her sandals. (9 RT 1242-1243; Exhibit 3I; cf. 9 RT 1223 [Ex. 3I shows "bottom of Mary Kopatz' shoes"]; Exhibit 7D.)

3. Van.

The front driver's seat was in its farthest position back. (9 RT 1245.) The mileage on the van was 24,240 miles. (9 RT 1248.)

Mary's maroon wallet was found under the left rear corner of the front passenger seat with its contents intact, including driver's license, social security card, cash, and credit cards. (9 RT 1250-1252; Exhibit 10E,

Exhibit 10H.) Numerous business cards, receipts, and similar items, including two torn, blank checks on the Kopatz family checking account, were found loose on the floorboard near the wallet. None of the receipts in the wallet and on the floor was dated April 22, 1999. (*Ibid.*; 9 RT 1230-1231, 1258-1261; Exhibit 10H.)[5]

A blue Samsonite diaper bag was found on the floorboards in front of the front passenger seat. It contained diapers and feminine pads. (9 RT 1246-1247, 1250, 1263-1264; Exhibit 10I.)

The glove box on the front passenger side of van was closed. There was no sign it had been ransacked. (9 RT 1248-1249; Exhibit 10F.)

There was a blood transfer on the back of the driver's seat, above Mary's head. (9 RT 1272; Exhibit 12A.) Based on his experience and training, Fuller believed it was a smear from an object that had blood on it coming in contact with the seat in a swiping motion, but he could not say whether the object was Mary's face. (9 RT 1272.) Swabs from this smear were labeled V-15. (9 RT 1274-1275; Exhibit 12D.) Blood smears were also found on the inside handle of the driver's-side sliding door and on the interior frame of the window in that door. Swabs from these smears were labeled V-26 and V-27. (9 RT 1275-1276; Exhibit 12F.) There was a smear in a crease in the passenger-side armrest of the middle seat. A swab from this smear was labeled V-25. (9 RT 1275; Exhibit 12I.)

4. Autopsy results.

Dr. Aruna Singhania, a forensic pathologist, autopsied the bodies of

---

[5] Fuller's testimony describes in detail the contents of the wallet (9 RT 1250-1257; Exhibit 37) and the items found on the floorboard (9 RT 1258-1261; Exhibit 38).

Mary and Carley on April 28, 1999 at the Riverside Coroner's Office. (8 RT 1081, 1113; 9 RT 1305-1306.) On Mary's body, she found a one-centimeter-wide ligature mark going across the neck from one side to the other. The mark could have been made by any kind of string or smooth cord, such as an electrical cord or nylon rope. (8 RT 1088-1089.) It was consistent with her having been strangled from behind. (8 RT 1096.) The seventh and eighth ribs on her right side were broken. (8 RT 1105-1107.) The fractures could have been caused by a knee forcefully placed against her rib cage as she was on the ground. (8 RT 1141-1142.) The cause of death was asphyxia due to ligature compression of the neck. The fractured ribs were a contributing condition. (8 RT 1110.)

Mary's body showed a lot of blood smearing on the face and a black eye on the right side with a bruise going to the right cheek. (8 RT 1082-1084.) These injuries could have been caused by a fist or a hard surface like a floor. (8 RT 1086-1087.) They were "acute," meaning they were inflicted within half an hour before death. (8 RT 1096.) There were three marks between the breasts. These were inflicted postmortem and were very superficial. There was no evidence of sexual assault or injury to the vaginal area. (8 RT 1104.)

Carley's body had a one-centimeter-wide ligature mark going from the front to the right side of the neck. The ligature was identical to the one used on Mary. The marks go from front to back, and there are some clear areas at the back of the neck, suggesting the assailant was behind the body. (8 RT 1114-1116.) There was a slash wound through the muscular area of neck. (8 RT 1119-1120.) The slash is most likely postmortem but very close to the time of death, as shown by the seepage of blood . (8 RT 1123, 1134-1135.) It is not a fatal injury, because, although the respiratory passage, vocal cord and thyroid can be seen, the larynx, voice box, carotid

artery, and jugular veins were not cut. (8 RT 1119-1120.) The cause of death was strangulation. (8 RT 1125.)

5. DNA evidence.

(a) Summary.

DNA evidence was obtained from five sources: (1) material found under Mary's fingernail, (2) blood stains in the van, (3) a blood stain on a doorjamb in the front hallway of the Kopatz home, (4) a blood stain on the carpet in the same hallway, and (5) reference blood samples prepared from the blood of appellant, Mary, and Carley.

The evidence as to who could have contributed the DNA was as follows: (1) the DNA in the material found under Mary's fingernail could not have been contributed by Mary or Carley but could have been contributed by appellant. (2) The blood stains in the van and on the doorjamb match Mary's blood and could not have come from Carley or appellant. (3) The blood stain on the hallway carpet is human blood but the analyst could not determine from whom it could have come.

(b) Evidence collection.

Rape kits for Mary and Carley were processed at the Riverside County Coroner's office at 11th Street and Orange Street on April 23, 1999. The processing was done by Dr. Garber, who is a pathologist with the Riverside County Coroner's office, and Deputy Coroner Birdsall, and it was witnessed by Detective Kensinger, who collected the kits as evidence. Exhibit 31 is the rape kit for Carley. (8 RT 1045-1046.) Exhibit 29 is the rape kit for Mary. (8 RT 1036-1039, 1045-1046.) The rape kit for Mary included fingernail clippings, with the clippings from the right hand being labeled KI7 and the clippings from the left hand being labeled KI10. (8 RT

1041-1043.) The kits were sent to the Riverside lab of the DOJ. (8 RT 1038-1039.)

Swabs were taken of suspected blood and blood smears in the van, as discussed in subsection R.3, *ante*. (9 RT 1272-1275.)

Searching the Kopatz home on May 5, 1999, Fuller saw a suspected bloodstain on the carpet in the front hallway. He could not tell how long it had been there. He had not seen it when he was there on April 23, 1999. The stained portion of the carpet was cut out and labeled S-5. (10 RT 1288, 1320, 1335-1336, 1339; Exhibit 25C.)

Also on May 5, 1999, a possible bloodstain was found on a hallway door jamb close to the stained section of carpet. A swab from this stain was labeled S-6. (9 RT 1288-1289; Exhibit 25C.)

Samples of Mary and Carley's blood were taken at their autopsies. (8 RT 1127-1128; 12 RT 1648.) Blood was drawn from appellant on May 5, 1999 pursuant to a search warrant. (13 RT 1769-1770.)

(c) Processing the evidence at the Riverside lab.

California DOJ criminalist Michele Louise Merritt in the Riverside lab received Mary's rape kit, Exhibit 29, and Carley's rape kit, Exhibit 31, on April 27, 1999. (10 RT 1422-1423, 1436-1437.) Examining the fingernail clippings from Mary's left hand, she saw that one fingernail had been broken off, but it was not a fresh break. Two other nails were broken, and she could not tell if they were worn or freshly broken. Under one of the latter two nails, she found a small amount of an unknown substance adhering to the fingernail tissue. (10 RT 1425-1426.) The substance could have been tissue, but she could not identify the cellular material. There was no blood associated with the substance. She could not say how long

the substance had been under the nail. (11 RT 1459-1461.) She placed the substance on a slide and labeled it KI12-11. (10 RT 1425-1426, 1428-1429.)

Examining the clippings from Mary's right hand, Merritt saw that the pinky nail was broken, but she did not find anything similar to the unknown substance in the clippings from the left hand. (10 RT 1434-1435.)

Merritt prepared reference bloodstains using blood samples that were provided to her on May 5, 1999. (10 RT 1429-1433; 11 RT 1457.)

Merritt examined the piece of carpet labeled S-5 on May 19, 1999. It had drop-like stains that tested positive for blood. The bloodstain was on the top, the carpet side. There was a ring on the back side. She said that, if the ring was cleaning solution, it was applied after the blood had dried completely. Fibers were missing about halfway down in the stained areas, as if they had been cut from the carpet. (10 RT 1446-1447; 11 RT 1461-1462.)

Merritt tested the wall sample labeled S-6. It tested positive for blood. (10 RT 1449-1450.)

Merritt examined the vaginal, rectal, and oral swabs and other items in the rape kits for Mary and Carley. They were all negative for semen. (10 RT 1435-1437.)

(d) Processing at the Fresno DOJ lab.

On May 6, 1999, Merritt sent the reference bloodstains and the slide of the material from under the fingernail to the DOJ's Fresno lab for DNA analysis. (10 RT 1427-1431; 11 RT 1460-1461.)

Rodney Hubert Andrus testified at the trial. He supervised the DNA Sexual Assault Unit at the Fresno lab of the DOJ. (10 RT 1349-1352.) He

received the slide and the bloodstains prepared by Ms. Merritt on May 7, 1999 and worked with them on May 18 and 24, 1999. He personally performed the samplings and extractions. (10 RT 1388-1389.) The amount of material on the slide was very small, "less than the size of the head of a pin." (10 RT 1368.) To his surprise, the extraction contained enough DNA to present an identifiable genetic profile. (10 RT 1367-1371, 1410.) He also did DNA extractions of the reference bloodstains and obtained genetic profiles. (10 RT 1363-1366, 1378-1381.) He made his findings using a polymarker and DQA1 typing kit. (10 RT 1374-1377; Exhibit 59.) His conclusion was that Mary and Carley could not have been contributors to the fingernail scraping, and appellant could not be eliminated as a possible contributor. (10 RT 1382, 1408.)

When its testing was complete, the Fresno lab returned the envelope, the bloodstains, and the "empty" slide to Ms. Merritt at the Riverside lab. (10 RT 1388, 1427-1428, 1431; Exhibit 61.)

(e) Processing at the San Bernardino lab.

Ms. Merritt sent the reference bloodstains returned by the Fresno lab and the swab from the door jamb labeled S-6 to the San Bernardino lab on July 29, 1999. (10 RT 1431, 1448-1450; Exhibit 60.) Daniel John Gregonis, a criminalist with San Bernardino County Sheriff's Department, received the reference bloodstains and the door jamb sample on November 15, 1999. (11 RT 1585-1586; Exhibit 60.)

At some point Ms. Merritt sent the carpet sample labeled S-5 and the swab from the back of the driver's seat labeled V-15 to the DNA lab in San Bernardino for analysis. Mr. Gregonis received them on February 29, 2000. (10 RT 1448; 11 RT 1455, 1589-1592; Exhibit 66.)

Later Ms. Merritt sent more swabs of blood stains in the van to the

San Bernardino lab. Mr. Gregonis received them on January 22, 2001, while the trial was ongoing. (11 RT 1591-1594; Exhibit 67.) These swabs were V-25 from a crease in the passenger-side armrest of the middle seat, V-26 and V-27 from the window frame and handle of the driver's-side sliding door, and V-29 from a location in the van not shown by the testimony or exhibits. (11 RT 1593-1594.)

Gregonis testified at the trial. He was able to get DNA profile results from the reference bloodstains, swab S-6 from the door jamb, and swabs V-15, V-26, V-27, and V-29 from the van, except that he could not obtain a result for the D1S80 type for V-15. (11 RT 1585-1586, 1593.) He made his findings using PM+DQA1 and D1S80 typing kits. (11 RT 1584, 1586-1587, 1591- 1594; Exhibit 85. He could not obtain any DNA profile for swab V-25, which he determined was negative for blood. (11 RT 1596.) He could not obtain any DNA profile for the carpet sample V-5, although he determined that the blood was human blood, and he was able to obtain human DNA. (11 RT 1589-1590, 1597-1598.) He said one possible cause of his inability to get a profile is that the carpet could have been treated with a substance that inhibits the reaction in the test, and that cleaning solution could have acted as an inhibitor. (11 RT 1591.)

Gregonis said he could exclude appellant and Carley as sources of the blood from the door jamb and the van. Mary's reference blood exactly matched the blood from the door jamb and the van, except as to the D1S80 type in swab V-15. (11 RT 1587-1589, 1592-1593, 1596-1597.) He could not exclude Mary as a source of the blood and, based on generally recognized statistics, it was likely that Mary was the source. (11 RT 1587-1588.)

6. Fingerprint evidence.

Investigators lifted numerous fingerprints from the exterior and interior of the van. (9 RT 1245, 1292-1305; 10 RT 1325-1326, 1343-1344.) Mary's wallet and its contents, her shoes, the car keys, and the baby bag and its contents were checked, but no latent prints were found. (9 RT 1258, 1262-1265.) The torn checks found on the floorboards were not checked for fingerprints, although they might have retained prints. (10 RT 1328.)

RSD fingerprint examiner Eilene Tan testified that, of the lifts taken from the van, some are from appellant (12 RT 1634-1637), some are from Mary (12 RT 1641-1642), and some are from Ashley (12 RT 1638). Many could not be compared. (12 RT 1638-1640.) Some could be compared but not identified. (12 RT 1641.)

7. Passenger-side side-view mirror of van.

On January 19, 2001, while the trial was ongoing, RPD Officer Tim Ellis (who photographed appellant when he was in the hospital) was directed to take the van from its storage place in a hangar at the airport to the Kopatz home to take photographs of it there. (12 RT 1649, 1651, 1663.) He noticed that the passenger-side side-view mirror of the van bore a scratch and a whitish mark beginning 44-3/4 inches above the ground. (12 RT 1653, 1661; Exhibit 86.) The mark is visible in a photo taken at the Duncan Avenue crime scene on April 22, 1999. (12 RT 1657, 1662; Exhibit 1E.) Ellis observed that the van could be pulled up into the driveway of the Kopatz home so that the passenger-side mirror clipped the wall at the southeast corner of the house It could be pulled up even farther so that the mirror hit a white post supporting a rear patio cover, at which point the van would be in close proximity to the back porch and barely visible from the street. (12 RT 1651-1652, 1656, 1662; Exhibit 26; Exhibit

44C; Exhibit 44F.) Ellis saw a mark on the wall about 44 inches above the ground, and he took scrapings from the wall at that point. (12 RT 1652-1653, 1661-1662; Exhibit 44G.) He did not see any mark on the post, but he took scrapings. (12 RT 1656, 1662.)

The scrapings and the side-view mirror were analyzed by DOJ criminalist Marianne Stam, who was asked to determine if the scrape mark on the mirror was paint and if it could have come from either the house or the wooden post. (12 RT 1698-1699.) Stam said the scrape on the mirror could not have come from the house, because the color is different. (12 RT 1704-1705.) The post scraping is a color similar to the mark on the mirror, and it has similar chemistry, but it fluoresces differently than the scrape on the mirror. Stam said it is inconclusive whether the paint on the mirror could have come from the post. And, if the contact did come from the post, close examination of the post should show a mark. (12 RT 1699-1700, 1706.)

8. Fibers.

Investigators collected fibers from the victims' bodies and clothing, the van, and the Kopatz home using tape lifts. (8 RT 1045, 1047-1048; 9 RT 1237-1238, 1266-1270.) Ms. Merritt analyzed the lifts and compared them to exemplars from seat covers, carpet, and other fabrics in the van and the carpet in the Kopatz home, (10 RT 1440-1443.) Fibers on Mary's body and clothing included fibers similar to the house carpet and the van carpet. (10 RT 1443-1444.) They also included six fibers that were inconsistent with the house carpet, the van carpet, and the van seats, and were all different from one another. (10 RT 1452-1453, 1464-1465.) Fibers on Carley's body and clothing included fibers similar to a seat cover in the van. (10 RT 1444.)

9. Other.

When appellant was interviewed by the detectives, he told them he had pulled the van up close to the garage so he could check the oil. (13 CT 3661.) To impeach this statement, the prosecutor introduced evidence that the van received an oil change on March 24, 1999, when the odometer read 22,930 miles, and, on April 22, 1999, the odometer read 24,240 miles. (9 RT 1248; 11 RT 1500-1501; Exhibit 68.)

The prosecutor took pains to present evidence that appellant stuttered, eliciting testimony on that subject from at least eight witnesses. Ashley's teacher Janis Owen and her principal Ms. VanDyke testified that appellant usually stuttered when he spoke to them but not when he spoke to his children in their presence. (4 RT 509-510, 522-523, 541-542.) Appellant's brother Alan and Mary's sister Janet testified that appellant stuttered, and it began when appellant was injured in November 1991. (6 RT 726-727; 8 RT 1068.) State Farm claims agent William Mendiola said appellant stuttered in their telephone conversation. (11 RT 1577-1578.)

On the other hand, Doug Burdick said appellant did not stutter when he was with him at his house. (5 RT 635.) And Frank Lombardo, a pharmacist at Sav-on, and Mercedes Brand, a pharmacy clerk, both testified they had conversations with appellant every few weeks and did not notice any speech impediment. (6 RT 749, 763-764.)

R. Statements and testimony of Sav-on pharmacy employees.

As mentioned above, when Detectives Shumway and DeVinna interviewed appellant in the wee hours of Friday, April 23, 1999, he told them that, on the afternoon of April 22, 1999, he called Sav-on to see if Mary had picked up a prescription. (See 13 CT 3642.)

The Sav-on pharmacy is located at 3530 Adams Street in Riverside, in a shopping center at Adams and the 91 Freeway. It is a busy place, handling 350-400 prescriptions and receiving 100 or more telephone calls each day. (6 RT 764; 9 RT 1166.) There is an automated telephone system customers can use to learn if a prescription is ready but not if it has been picked up. (6 RT 756.)

The pharmacists on duty on April 22, 1999 were Kevin Rawls and Frank Lombardo. (6 RT 752-753; 9 RT 1147.) Lombardo testified he had "about eight" employees. (6 RT 751.) Rawls testified that "a minimum six to seven" employees besides him would have been working that day during the daytime hours. (9 RT 1147.) One of the clerks testified that "usually about five" people work the early shift. (9 RT 1165.) Another clerk testified that, in April 1999, the pharmacy staff was Rawls, Lombardo, Sally Swor, Tina Shaw, Juana Longoria, Mercedes Brand, and Jennifer Fleming. (6 RT 764.) Rawls remembered that, in addition to him, Lombardo, Swor, Shaw, Brand, and Longoria worked that day, and he was unsure whether Jennifer Fleming worked that day. (9 RT 1147-1148.)

On April 26, 1999, RPD Detective Robert Shelton interviewed Rawls, Longoria, Shaw, Brand, and Fleming. The interviews were in person, one on one, at the pharmacy. On May 5, 1999, Shelton interviewed Lombardo in person at the pharmacy and interviewed Swor by telephone. None of the interviewees had any recollection of appellant's coming in or calling on April 22, 1999. (6 RT 746; 12 RT 1678-1680.)

All of the interviewees except Jennifer Fleming testified for the prosecution. All said they knew appellant as a regular customer. (6 RT 747, 760-762; 9 RT 1145, 1154, 1161, 1168.) The two pharmacists and one clerk said they never met Mary. (6 RT 748-749, 762; 9 RT 1146.) Two clerks said they had seen Mary in the pharmacy a few times. (9 RT 1163,

1169-1170.) Rawls, Lombardo, Swor, and Shaw were certain they worked on April 22, 1999. (6 RT 752-753; 9 RT 1147, 1156, 1162, 1168.) Brand and Longoria did not know if they did . (6 RT 763; 9 RT 1156.) None of them recalled receiving any telephone call from appellant on April 22, 1999. (6 RT 750, 763; 9 RT 1147, 1156, 1162-1166.)

Two clerks, Swor and Shaw, recalled seeing appellant and Arthur in the pharmacy on Friday, April 23, 1999. (9 RT 1164-1165, 1172-1173.) Shaw testified on cross-examination that appellant appeared "mildly" upset. 1165

S. Expert opinion re "staging."

Over defense objection, Detective Shumway testified to his expert opinion that the van and the bodies inside had been "staged" in an attempt to divert attention from the "logical suspects" and create a motive that did not actually exist, such as theft, robbery, or sexual assault. In crime scene analysis, "staging" means purposeful behavior by suspects to alter a crime scene. (13 RT 1777-1779.)

Shumway noted that, although there were suggestions of sexual assault, in that Mary's bra was cut and her shirt was lifted up partially exposing her breasts, no sexual assault had occurred. Mary's pants were neatly unbuttoned, which is not consistent with an actual rape case. There was no tearing of her clothing other than the cut bra. There was no forensic evidence of sexual assault, even though the assailant had overpowered the victims and had total control of them. The victims' genitalia were not exposed. (13 RT 1779-1780.)

Similarly, in Shumway's opinion, although there were indications in the van of an apparent motive of robbery, there was evidence inconsistent with robbery. Shumway said that, in his 20 years of police experience, a

robber will take a wallet to a place of safety and go through it, not do it at the scene. And, credit cards and $20 in cash were not taken. (13 RT 1780-1781.)

Similarly, in Shumway's opinion, there was no evidence that Mary and Carley were victims of a carjacking. Leaving the victims in a neighborhood instead of a remote area is inconsistent with carjacking. When carjackers realize there is a child in the car, they will abandon the car a couple of blocks away. Shumway said it was "obvious to us that Carley was a liability to somebody who knew her. And that is not consistent with a carjacker killing a 3-year-old." And, the van was not stolen. (13 RT 1782.)

Shumway said it was obvious the victims had not been killed in the van, because there was no indication that the violent assault that led to Mary's injuries took place in the van. There was no blood trail leading into the van. There was evidence that the injuries to Carley's neck occurred after she was placed in the van, however, because the pathologist testified that the cut on her neck was a postmortem injury. (13 RT 1781-1782.)

Shumway stated that an offender's spending time with the victims after he accomplishes the motive for his crime increases the risk he will be caught, and staging the scene involves spending undue amounts of time with victims, so staging increases the risk the offender will be caught, especially in a neighborhood. (13 RT 1782-1783.)

T. Evidence of motive of financial gain.

1. Kopatz family finances.

The prosecutor introduced evidence of the financial condition of the Kopatz family. The principal evidence was the testimony of Detective Kevin Dargie, a specialist in financial crimes (11 RT 1496-1528, 1541-

1561); documentary evidence including credit reports, brokerage statements, bank statements, and credit card statements (Exhibit 77); and a chart purporting to show the monthly income and expense of the Kopatz family. (11 RT 1514-1518; Exhibit 83.)

This evidence showed that the Kopatz family was suffering from negative cash flow and heavily in debt. In April 1999, monthly income from Mary's salary and appellant's disability benefits was $4,259. Monthly expense, including monthly credit card payments of $5,580, was $8,620. Although two mortgages on their residence were current, the Kopatzes had 13 credit card accounts. In April 1999 the total balance due was $118,050, which was significantly higher than in April 1998, and several accounts were over limit or overdue. (11 RT 1514-1518, 1545-1546, 1559.)

Appellant traded stocks and commodities. He had an account at Charles Schwab that once had a balance over $20,000, but, in April 1999, the balance was $335. (11 RT 1512-1513; Exhibit 77, tab #2.) He had deposited over $46,000 in an account at a commodities company, but, in April 1999, the account balance was $125. (11 RT 1513-1514; Exhibit 77, tab #3.) His federal tax return for 1998 showed short-term capital losses of $71,955. (11 RT 1507-1508; Exhibit 78.) On April 21, 23, and 29, 1999, he printed out the positions of several "fantasy" stock portfolios he kept on an account at AOL. (11 RT 1501-1502; Exhibit 69.)

2. Insurance policies.

The Kopatzes maintained nine insurance policies covering family members. Four of the policies provided basic life insurance; the other five provided accidental death insurance. The policies were acquired between 1993 and 1998. Total benefits payable to appellant in the event of the accidental death of Mary and Carley were $812,827. Also in force was a

State Farm policy insuring Mary's rings for $13,628. In addition, appellant stood to receive an investment account Mary acquired when she worked at Mattel, the balance of which in April 1999 was $17,772. (11 RT 1478-1487, 1492, 1502-1506, 1534, 1538-1539, 1554, 1559-1579, 1599-1607; 12 RT 1607-1612, 1665-1671.)

Appellant made a claim for Mary's rings under the State Farm policy on Monday, April 26, 1999. (11 RT 1574.) The following day, State Farm claims specialist William Mendiola telephoned appellant. Mr. Mendiola remembered that appellant was stuttering. He asked appellant if he was up to going through with the claim, and appellant said he was. Appellant told Mendiola that Mary and Carley had been murdered, and the bodies were found in van about a mile from their home. He said Mary was wearing both rings when she was murdered, but when her body was found the rings were not on it. At the time of the trial in January 2001, State Farm had not paid on the policies, because the loss was still under investigation. (11 RT 1577-1579.)

A representative of Benefit Consultants testified her records showed that "a claim was made" under the Benefit Consultants policies. On April 30, 1999, appellant placed a call to Benefit Consultants. A representative of Benefit Consultants testified that a person who called customer service would be informed the call was being recorded. An audio tape of the call was played for the jury. (12 RT 1671-1672; Exhibit 88A.)

In the call, appellant told the claims representative that his wife and youngest daughter had been killed in an accident on April 22. (Exhibit 88A.) He gave the representative Mary and Carley's names, ages, and Social Security numbers. The representative asked him if he would like her to send the forms to his residence. He said he would, and he gave her his home telephone number. She said she would mail him the forms. He asked

if he needed to make the mortgage payment due on the first of the May. She explained that her insurance company was separate from the mortgage company, so she could not help him with that, but she would send him the forms. (Exhibit 88A.) There was no evidence appellant submitted any forms to Benefit Consultants. (12 RT 1664-1677.)

Except as mentioned above, appellant did not make any claim on the life and accidental death insurance policies. (11 RT 1483, 1490-1494, 1535, 1550-1551, 1568-1569, 1599-1606; 12 RT 1607-1612.)

U. Defense evidence – guilt phase.

Defense witness Kimberly De la Hoya came into contact with the police on April 29, 1999, when the police were stopping everyone at a traffic light on Van Buren Boulevard. (12 RT 1688-1689.) The police showed motorists a flyer (Exhibit 89) with photos of the Kopatz van, including a photo showing a K-Frog sticker on the rear bumper, and asked if they had seen that van. (12 RT 1687-1690.) She told the officers that around 9:20 AM on Thursday, April 22, 1999, she was driving northbound on Van Buren, going home from dropping off her child at school in the Woodcrest area, and she saw a van of that color with that bumper sticker parked near the Perfect Auto facility, which is located [on] [at 4811]Van Buren, on the east side of the street just north of Duncan Avenue. (12 RT 1685, 1687, 1689-1691.) She did not see anyone in the van. (12 RT 1687, 1691-1692.) A couple of months later, she told Detective Shumway there is a house near her house where there is always a blue van, and she thought it was that van she was thinking of when she spoke to the officers on April 29th. (12 RT 1688, 1694.) Ms. De la Hoya's home is at 8751Wells Avenue in Riverside, about 0.9 mile west of the Duncan Avenue crime scene. (12 RT 1685.) At trial, she had no recollection of April 22, 1999.

(12 RT 1690.) She did not remember seeing the bumper sticker, and she was certain the van she saw was parked in front of a residence, not a business. (12 RT 1691-1692, 1694.) She conceded she was married to a member of the RPD, and her husband told her it might be a good idea not to get involved. (12 RT 1693.)

Arthur Kopatz testified for the defense that sending the premium notice back to JC Penney Life with a notation that Mary was deceased (see Exhibit 73A and 11 RT 1492-1493) was his doing, not his son's. The notification purported to be signed by appellant, but Arthur said he wrote it. He explained that he and Betty had put their names on two of appellant and Mary's bank accounts, and he, Arthur, was in charge of the accounts. The premiums for the JC Penney policy were paid by deductions from one of the accounts. He wanted to cancel the premium notices and stop the deductions from the account. He had tried calling the insurance companies to tell them Mary was deceased, but they would not talk to him, so he wrote the notification. (13 RT 1801-1802.)

The defense called Mary Rolle, who lives across the street from appellant. She testified that on the morning of April 22, 1999, she was outside her home gardening and waiting for her sister to come pick her up at 9:15 AM to go have breakfast at the Food Connection. At about 9:00 AM, appellant came across the street to ask her advice about whether he should install high or low sprinklers. She recommended high. She had not conversed with him before, but he was calm, and there was nothing unusual about his manner. She said she had a distinct recollection of the conversation, because it was the first time appellant had ever come across the street to talk to her, and, when she learned of the homicides that evening, it made her recall the conversation. She could not recall whether she saw the van in appellant's driveway at 9:00 AM, but her view of the

driveway is blocked by her fence. When she returned from the Food Connection about 11:30 AM, she did not see appellant out front working on sprinklers or see anything else going on at appellant's house. (13 RT 1805-1810.)

V. Penalty phase – prosecution evidence.

Mary's oldest sibling, Sandra Zalonis, testified she and Mary shared a room until Sandra got married when she was 20 and Mary was 15 or 16. Sandra now lives in Florida. She last saw Mary and Carley in June 1998. She had a very hard time moving to Florida, and the killings just about killed her. She got divorced and had to be forced into grief counseling by her lawyer. She misses them every day. (15 RT 2076-2082.)

Mary's mother Hazel Foley testified that Mary's best qualities were that she was dependable, happy, thoughtful, forgiving, and friendly. She was a good mother. She would rather have stayed home with children than go to work, but she had to work because appellant wasn't working. It tore her up to hear that Mary had been killed. She hoped whoever did it would get the same thing. (15 RT 2088-2092.)

Mary's sister Janet Foley testified. She said Mary met Kim when Mary, Janet, and Kim all worked at a high-tech company. Kim was a computer programmer. When they first got married they lived in a trailer. They moved to Riverside a year or year and a half after they got married. Mary's marriage to Kim was her first marriage. She wanted it to be forever. Mary wanted to be a mom like their mom. Mary and Carley's death has devastated both parents. They are raising Ashley. Her dad is 70 and mom is 69. They worry about her diabetes and cope with it. Her brother Russell is angry that someone could do this to his sister and niece and he was not there to stop them. They have lots of family gatherings, and

you can see the pain in everyone's eyes. The pain from the loss of Mary and Carley will never stop, they all trusted appellant to take care of Mary and the children. (15 RT 2095-2110.)

Ryan Foley, the 9-year-old son of Mary's younger brother Russell, testified that he misses his little cousin Carley, and he talks to Aunt Mary almost every night at bedtime. With Mary and Carley being killed, there is an open space no one can fill. (15 RT 2111-2112.)

Kyle Foley, Ryan's 12-year-old brother, testified that he missed Carley because she would just lighten up your day. He remembered she was shy, but then she would come over and give him a big smile. Mary would sneak sodas for him. She was always really happy. His mom and dad are sad that Aunt Mary got killed. (15 RT 2115-2116.)

Vanessa Soto, the 14-year-old daughter of Mary's sister Janet, testified that family gatherings used to be a good time, but now they are a reminder that Mary and Carley are not there anymore. (15 RT 2117-2120.)

Mary's brother Robert Foley testified that the hardest thing for him was the way they were murdered and that he failed to see anything that would have prevented it. He has extreme guilt he could not help Mary. His father is raising Ashley, he has always been the strongest, and he doesn't get to enjoy retirement anymore. In his mother's eyes there is nothing but sadness. Ashley is very quiet, she has to cope with being in a new school and a new home. He hears his son crying himself to sleep trying to talk to Mary and Carley. His best memory of Mary is when he took her out for dinner on her 19th birthday because she wasn't dating anyone, she said the main thing she wanted to do was be a mom and a wife. As to whether it appeared to him that Mary's marriage was good, he would classify it as her not coming to him with problems. Mary and Kim had been married for about 10 years, and early on in the marriage, after Ashley was born, Kim

got hurt on job, stopped working, and collected disability. A lot of the financial burden shifted to Mary, but she did not show frustration about this. (15 RT 2120-2128.)

W. Penalty phase – defense evidence.

Defense witness Hilda Haraka testified that she lived at 3907 Donald Street, about seven houses away from appellant's home. She and her husband became good friends with the Kopatzes when she was taking her husband for walks in his wheelchair after he had a stroke and Kopatzes were taking their children for walks. Appellant would visit with her husband and tease him, and it made her husband feel good. When appellant's knee was hurt, he would sometimes ask Hilda to keep Carley for an hour or so while he went to the doctor, and he always came back when he said he would. Once the Kopatzes took them out to dinner because she would not take any money for watching the children. She saw appellant and Mary together and at their house, and they seemed a very loving couple. She was shocked when she heard about the killing, because she could not believe he would do it. She never saw him act in an angry or temperamental way. Sometimes when Mary took the children for a walk they would tell her that appellant didn't go because he had a headache. (15 RT 2130-2133.)

Hilda Haraka's son Larry Haraka testified that he moved in with his parents after his father had his stroke. Larry said that, in social settings, appellant was quiet and mellow. There were times when his eyes were drawn and he would rub his temples. He knew appellant had had an industrial accident and had migraines, so he would ask him how he felt, and appellant would say it was a tough day. Larry never saw appellant in a fit of rage or heard Mary complain about a fit of rage. He did not see any

pronounced problems in their marriage. (15 RT 2135-2138.)

Appellant's mother, Betty Kopatz, testified that, after high school, appellant went in the Army for three or four years. Afterwards, he sold cutlery, and he worked at a bowling alley. He was on track to become a professional bowler, but, in the early 1990's, he stopped working because of an accident at work and went on disability. Mary had been working, but then she started working full time. (15 RT 2142-2143.)

Appellant's sister, Patricia Lilore, testified that theirs was a close family with strong church involvement. (15 RT 2146.) Appellant was never in any trouble as he was growing up or as a young adult. (15 RT 2149.) She got married and moved out in 1971. (15 RT 2146.) She was close to Kim's first wife Cheryl, because they lived close to where she lived at the time. Kim and Cheryl were married for about two years. (15 RT 2150.) Patricia moved to Arizona in 1979. (15 RT 2146.) She was not close to Kim's second wife, Jan, and did not know how long Kim and Jan were married. Mary was appellant's third wife. Appellant and Mary got married in 1989. Patricia was not close to Mary, at first because she was out of the area, but, even when she moved back into the area, she did not get close to Mary, although she wanted to. (15 RT 2150-2151.) In 1990, appellant had a slip-and-fall accident at work, and he stopped working. He tried to go back to work in computers, but he could not because of his headaches. From 1990 until 1999, she saw changes in his behavior. Sometimes when they talked on the phone, he would stutter, and he could not finish a sentence. He had a lot of headaches, and when he had a lot of headaches, he would start slurring and stuttering. He had a lawsuit pending for his slip-and-fall since 1990 all the way through 1999. She never saw him become violent or lose his temper. (15 RT 2147-2148, 2151.)

Appellant's brother Alan Kopatz testified that appellant is seven years older than he. Appellant had never been in trouble with the law before. As an older brother, appellant took Alan under his wing and made him try harder. (15 RT 2153-2155.) After appellant had his accident, he stopped working, and more responsibility fell on Mary. Alan was the first one to see appellant after the accident, because he worked in the area where it happened. Appellant was in a lot of pain when it happened, and he was never himself after that. He played a lot of sports, but he pulled back from it after the accident. He tried to bowl again, changing from right handed to left, but he could not do it. He would hurt his back. Eventually his head would hurt so badly he could not finish the night. He started stuttering. (15 RT 2157-2158.) Appellant had a prior slip and fall in 1985 at the bowling alley, and he had two automobile accidents on which he filed claims. (15 RT 2160-2161.)

Appellant's life-long friend, Charles Marshall, testified that he saw a big change in appellant's personality in the last 10 years, and it started earlier than that. His accidents started in the late 1970's, and after the last one there were a substantial number of headaches and back problems. Appellant was taking medication. He withdrew. He became less assertive and less sure of himself. (15 RT 2168-2170.)

ARGUMENT

I. IT WAS ERROR TO DENY APPELLANT'S MOTION TO SUPPRESS EVIDENCE OF AN INTERVIEW OF APPELLANT BY DETECTIVES, BECAUSE THE INTERVIEW WAS THE PRODUCT OF AN UNLAWFUL SEIZURE AND A *MIRANDA* VIOLATION.

A. Introduction.

When the hospital emergency room released appellant in the early morning hours of Friday, April 23, 1999, two police officers placed him in a patrol car and transported him from the hospital to the detective bureau, telling him the detectives there "would like to talk to him." (13 RT 1721.) At the detective bureau, appellant was placed in a cell-like interview room and interviewed for over an hour by two detectives. (Exhibit 81B.) When he said at the beginning of the interview that he was "very sore, very tired," the detectives told him, "[W]e'll try and get this done as quickly as we can." (13 CT 3639 .) No *Miranda* warning was given (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)).

Appellant moved to suppress evidence of the interview, but the court denied the motion. (12 RT 1707; 13 RT 1761.) The prosecutor played an audio-video recording of the interview in its entirety as the finale of his case-in-chief, and he replayed portions of it during closing argument. (13 RT 1775; 14 RT 1907, 1941.)

Denial of the motion to suppress was error, for two reasons. First, the interview was the fruit of an unlawful seizure, because the police detained appellant by transporting him to the detective bureau and keeping him there for more than an hour, and the facts known to the police did not

provide probable cause or support a reasonable suspicion of wrongdoing. Second, the interview violated *Miranda*, because it was custodial interrogation, but no *Miranda* warning was given.

The error was not harmless beyond a reasonable doubt. The video presented appellant in a sad state, which, the prosecutor argued, was the manifestation of guilt. The interview included certain statements, which, the prosecutor argued, exposed appellant as a liar. The video demonstrated the detectives' scornful reaction to what appellant was telling them. These matters are discussed in detail below.

B. Proceedings below.

1. Motion to suppress.

On Wednesday, January 31, 2001, the penultimate day of the prosecutor's case-in-chief, the prosecutor called Detective Shumway for the purpose of laying a foundation for, and then playing, a videotape of an interview of appellant by Detectives Shumway and DeVinna. (12 RT 1706-1707.) In a sidebar, defense counsel Jaffe made an oral objection to introduction of the interview. He said he was "going to interpose an objection to the testimony of Detective Shumway and specifically object to the introduction of the taped interview with Mr. Kopatz on the grounds that I believe the interview[] is a result of illegal transport/detention" (12 RT 1707:21-22) and "a product of an unlawful arrest" (12 RT 1708: 25-27). At the court's request, he handwrote some citations and gave them to the court. The cases Jaffe cited were *People v. Harris* (1975) 15 Cal.3d 384, 391; *People v. Boyer* (1989) 48 Cal.3d 247; *People v. Aguilera* (1996) 51 Cal.App.4th 1151; *Dunaway v. New York* (1979) 442 U.S. 200; and *Hayes v. Florida* (1985) 470 U.S. 811. Later, the prosecutor phoned in citations in opposition. (13 CT 3680 [Jaffe's citations at top; prosecutor's citations at

bottom]; 12 RT 1712; 13 RT 1716.)

2. Hearing on motion.

A hearing outside the presence of the jury was held the next day. (13 CT 3681.) The court stated, "This is the time set aside for the issue on *Miranda*, whether or not it does apply, and if so, as to how much or all of any and all statements made by the defendant." (13 RT 1716:8-10.) The court said it had gone through the cases cited by the parties. (13 RT 1716:11-17.) There was testimony by Officer Goodner (13 RT 1718-1736) and Detective Shumway (13 RT 1736-1750). The court also considered the following: the trial testimony of Officer McCarthy (8 RT 1013-1031) and Sergeant Watters (8 RT 997-1012), which was stipulated to be part of the record of the motion (13 RT 1752-1753); the videotape, which the court viewed (Exhibit 81B; 13RT 1753-1754); and the transcript of the videotape (Exhibit 81A; 13 RT 1754).

In the aggregate, as relevant here, this evidence showed the following: In the late afternoon and evening of Thursday, April 22, 1999, there were numerous police officers in and around appellant's home. (8 RT 1015.) Appellant's movement within the kitchen/living room area was not restrained, but Officer McCarthy, a uniformed police officer, stayed in close proximity to him at all times. (8 RT 1013-1014, 1016:26-1017:1, 1017:23-1018:3; 13 RT 1719:21-27, 1726:6-9.)

At some point, appellant asked to be evaluated by paramedics. (8 RT 998, 1001-1002, 1016; 13 RT 1719.) Paramedics were summoned and arrived. They examined appellant and then took him by ambulance to Riverside Community Hospital at 14th Street and Magnolia Avenue sometime between 7:30 and 9:00 PM. (8 RT 1003, 1016, 1018-1019; 13 RT 1719-1720, 1727.) Officer McCarthy went with appellant in the

ambulance. There is no evidence appellant requested McCarthy's company. (8 RT 1016-1020.)

Appellant spent several hours at the hospital. (8 RT 1003, 1023; 13 RT 1739.) He was evaluated by the emergency room staff and given IV medication for pain. (8 RT 1022-1023.) A police evidence technician arrived at approximately 9:00 PM and spent 37 minutes taking photographs of appellant's hands, arms, and face. (4 RT 551-553; 8 RT 1018-1019.) Officer McCarthy was present with appellant the entire time he was at the hospital. (4 RT 553, 561; 8 RT 1016-1020.)

At some point, Detectives DeVinna and Shumway directed Officer McCarthy and his partner, Officer Goodner, to transport appellant from the hospital to the detective bureau to be interviewed. (8 RT 1020:14-19; 1024:12-15, 1025:11-17, 1027; 13 RT 1721-1722, 1729, 1739.) Goodner drove the patrol car to the hospital and joined appellant and McCarthy. (13 RT 1720.) When appellant was cleared from the hospital, McCarthy "told him [they] were taking him to the detective bureau." (8 RT 1024:16-17, :25-26, 1024:28-1025:2, :9-10.) Goodner told him the same thing and added that the detectives "would like to talk to him there." Appellant said, "Fine." (13 RT 1721:17-21, 1724:10-11, 1730:1-4, 1733:22-26.) He did not object to being taken to the detective bureau or ask why the police wanted to talk to him. (8 RT 1025:28-1026:7.) He did not express any desire to leave their company or ask if he was free to leave. (13 RT 1723:15-19.) He walked out of the hospital on his own, but in the company of McCarthy and Goodner. (8 RT 1020:20-26; 13 RT 1721:6-7.)

Although McCarthy and Goodner did not handcuff appellant or tell him he was under arrest or not free to leave (8 RT 1024:18-19, 1026:15-16 1721:10-13 1722:1-2 1723:20-21), they placed him in the cage in the back seat of the patrol car, which is locked and cannot be opened from the inside.

(13 RT 1721:24-26, 1730:10-23, 1731:11-15.) They took him from the hospital to the detective bureau, a 10-minute ride, arriving sometime between 12:15 and 1:00 AM. (8 RT 1021:5-8, 1027:10-12; 13 RT 1722:5-7, 1731:23-25, 1744.)

McCarthy's testimony concerning events at the detective bureau is sharply different from Goodner's testimony. McCarthy saw things Goodner did not see. Testifying during the prosecution case-in-chief, before there was any mention of a motion to suppress evidence, McCarthy described a period of waiting at the bureau before the detectives were ready to interview appellant. (8 RT 1027-1028.) He said appellant's demeanor changed when they arrived at the bureau. He started complaining of increased pain. There was a "dramatic change in his body where he had to lay down [and] required assistance of us to escort him into the station." (8 RT 1028:24-1029:27.) He complained of severe back pain that "limited his body function." (8 RT 1027:19-21.) "He started having spasms of his arms and legs, and he flexed his arms, like a posturing motion, raise the arms, flex them up to his chest area, and then that would subside." (8 RT 1029:12-15.) He insisted on sitting in a chair, but he became unable to sit, and then he lay on the floor. (8 RT 1028:5-7.) His complaints of pain increased just before his interview with the detectives, when they were "trying to get him ... into a room with the detectives." (8 RT 1027:22-25.) McCarthy said, "With me at this time was still my officer partner Godner [sic]." (8 RT 1028:12-13.)

Goodner, who testified only during the suppression hearing, said appellant "walk[ed] into the police station of his own accord." (13 RT 1722:11-12.) He said, "[W]e all walked up to the door together." (13 RT 1732:7-8.) He and McCarthy escorted appellant back to an office area where the detectives were, and after that Goodner was free to mill about.

(13 RT 1732:19-24.) Goodner did not have any physical contact with appellant, and he was not aware that McCarthy did. (13 RT 1732:1-4.) He did not recall escorting appellant into an interview room. (13 RT 1733:9-11.)

The interview of appellant by Detectives Shumway and DeVinna began around 1:00 AM. (13 RT 1773.) It took place in a police interview room about 10 feet by 10 feet. The walls were bare, and the room was furnished with only a small square table placed against the wall opposite the door and three metal chairs. (13 RT 1744; Exhibit 81B.) Although the door was not locked, it was kept closed. (13 RT 1738.)

As the interview began, appellant was in the chair on the left, sitting slumped over the table with his head turned away from the door and resting on his arms. The detectives walked into the room. Appellant was slow to react to the detectives' presence. (In this regard, it is significant that appellant was given an intravenous injection of a sedative while he was at the hospital. (8 RT 1022-1023.)) Detective DeVinna told appellant, "Hi Kim, sit up a little bit now. I'm going to ask you some questions and you can get out of here, ok?" (Exhibit 81B; 13 CT 3636.) The detectives spent a few minutes discussing a consent-to-search form with appellant and asking him questions to show he understood it. (13 CT 3636-3639.) Appellant signed the form. Then he said, "I'm very sore, very tired. I'm sorry." DeVinna replied, "[W]e'll try and get this done as quickly as we can." Without pausing, he continued, "Alright, your name is Kim Raymond Kopatz?" (13 CT 3639.) The interview continued for approximately one hour, ending around 2:00 AM. (Exhibit 81B; 8 RT

1030.)[6] Appellant had a cup of water in front of him and took several sips during the interview. (See video corresponding to 13 CT 3636, 3654, 3668, 3669.) At no time did the detectives give appellant a *Miranda* warning. (13 RT 1774-1775 [transcript accurately reflects everything that was said].)

After the interrogation was over, appellant asked to use the bathroom. (13 CT 3676.) Shumway escorted appellant to the bathroom, waited outside, and walked him back. (13 RT 1747:24-1748:2.) McCarthy and Goodner then drove appellant to his brother's house in Riverside. (8 RT 1026:24-27; 13 RT 1735-1736.)

3. Ruling.

After the court heard the testimony, it viewed the video and listened to argument. (13 RT 1750-1760.) The court then found that appellant was not in custody during the interview. The court stated:

> "[V]iewing the totality of the circumstances, given the situation that faced both Mr. Kopatz and the police at the time, as well as the totality of the circumstances of how this was conducted, would a reasonable person in Mr. Kopatz' position think that his freedom of movement was restricted such that he was in a custodial situation? And in answering that, in the totality of the circumstances, I find that a reasonable person would not have felt that he was in a custodial situation. And, therefore, *Miranda* would not have kicked in ...." (13 RT 1761:12-21.)

---

[6] Although Shumway testified the interview was less than an hour [13 RT 1746:18-19], the duration of the video is approximately 62 minutes.

Thus, the court ruled that the prosecution could use the interview in its case-in-chief "for whatever purpose they think is important in the presentation of evidence." (13 RT 1761:24-27.) The prosecutor played the entire interview for the jury during the testimony of the last witness in his case-in-chief, and he played portions of it during closing argument. (13 RT 1775:9; 14 RT 1907, 1941.)

C. Standard of review; applicable law; burden of proof.

Whether a seizure is unlawful under the Fourth Amendment or a *Miranda* violation has occurred is a mixed question of law and fact that qualifies for independent review. (*People v. Davis* (2009) 46 Cal.4th 539, 586 [*Miranda* issue]; *People v. Zamudio* (2008) 43 Cal.4th 327, 340 [seizure issue].) Where, as here, the trial court did not articulate any evaluations of witness credibility or findings of historical fact, the reviewing court must "'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' (Citation.) " (*People v. Hogan* (1982) 31 Cal.3d 815, 835-836 [considering conflicting testimony of police officers]; accord, *People v. Zamudio*, *supra*, 43 Cal.4th at 342.) The reviewing court gives independent review to the ultimate constitutional question of whether a seizure or a *Miranda* violation has occurred. (*People v. Zamudio*, *supra*, 43 Cal.4th at 340.)

In addressing issues related to the suppression of evidence, a California court applies federal constitutional standards. (Cal. Const., art. I, § 28, subd. (d); *People v. Carrington* (2009) 47 Cal.4th 145, 166; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1173; *People v. Sims* (1993) 5 Cal.4th 405, 440, , disapproved on another point in *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032; *In re Lance W.* (1985) 37 Cal.3d 873, 886-887.)

The prosecution bears the burden of proving by a preponderance of the evidence that no unlawful seizure or *Miranda* violation occurred. (*Missouri v. Seibert* (2004) 542 U.S. 600, 609, fn. 1; *Colorado v. Connelly* (1986) 479 U.S. 157, 166; *Lego v. Twomey* (1972) 404 U.S. 477, 488-489; *People v. Carrington, supra,* 47 Cal.4th at 169; *People v. Markham* (1989) 49 Cal.3d 63, 71.)

D. Appellant was seized within the meaning of the Fourth Amendment from the time the police officers took him from the hospital through and including the termination of his interview by the detectives at the detective bureau.

1. Appellant was seized by the police officers' show of authority and his submission to it.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures by law enforcement officials. (U.S. Const., 4th Amend.; *Herring v. United States* (2009) 555 U.S. 135, 139; *People v. Rogers* (2009) 46 Cal.4th 1136, 1156.)[7] The Fourth Amendment is binding on the states through the Due Process Clause of the Fourteenth Amendment. (U.S. Const., 14th Amend.; *Mapp v. Ohio* (1961) 367 U.S. 643, 655; *People v. Celis* (2004) 33 Cal.4th 667, 673.)

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, ' "by means of physical force or show of authority," ' terminates or restrains his

---

[7] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

freedom of movement, (citations), `through means intentionally applied,' (citation)" and the person submits. (*Brendlin v. California* (2007) 551 U.S. 249, 254; see *Florida v. Bostick* (1991) 501 U.S. 429, 434; *Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16.)

Under the rule stated in *Brendlin,* appellant was seized. There was a show of authority when McCarthy and Goodner told appellant they were taking him to the detective bureau. The officers were in uniform. (8 RT 1013-1014.) Only one officer, McCarthy, had been with appellant while he was in the emergency room, but, upon his release from the hospital, appellant was confronted with two officers, McCarthy and Goodner. A reasonable person confronted with two officers who are telling him they are taking him to the detective bureau would understand that the officers expect compliance. (*United States v. Mendenhall* (1980) 446 U.S. 544, 554-555 (opinion of Stewart, J.) [multiple officers, uniformed attire, and the use of language indicating that compliance with the officers' request might be compelled are factors contributing to finding of seizure].) There was a further show of authority manifested by means of confinement and control when appellant was placed in the locked cage of the patrol car and transported to the detective bureau. These shows of authority were intentionally applied, because McCarthy and Goodner had been directed by the detectives to bring appellant to the bureau. Once appellant was at the bureau, there was a further show of authority when appellant was placed in the interview room and DeVinna responded to his complaint of being tired and sore by saying they would go as fast as they could; in other words, the interview was going ahead. The setting and the detectives' behavior were intentionally applied, because the detectives wanted to question appellant as soon as possible. (13 RT 1750:7-9.) Appellant submitted. He said, "Fine," and he endured the interview. Therefore, he was "seized" within

the meaning of the Fourth Amendment. (*Brendlin v. California, supra,* 551 U.S. at 254.)

2. Appellant was seized, because a reasonable person would have felt he was not free to leave.

a) Objective test.

The discussion in the preceding section demonstrates that appellant was seized within the meaning of the Fourth Amendment by the statements and actions of the police. He was additionally seized within the meaning of the Fourth Amendment, because a reasonable person in his position would have believed he was not free to leave. "When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence," the test for a seizure is whether, "`in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,' (citation)." (*Brendlin v. California, supra,* 551 U.S. at 255.) (This test for a Fourth Amendment seizure is virtually the same as the test for "custody" within the meaning of *Miranda,* which is, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 663 (*Yarborough*); *Thompson v. Keohane* (1995) 516 U.S. 99, 112.) See discussion in part I. F, *post.*)

The test takes all circumstances into account, but only insofar as they act upon the perceptions of a reasonable person in the subject's position. "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would `have communicated to a reasonable person that he was not at liberty to ignore

the police presence and go about his business.'" (*Florida v. Bostick, supra,* 501 U.S. at 437, quoting *Michigan v. Chesternut* (1988) 486 U.S. 567, 569; see *California v. Hodari D.* (1999) 499 U.S. 621, 628.) "A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' (Citations.)" (*Kaupp v. Texas* (2003) 538 U.S. 626, 629.)

Because the test views the circumstances through the perception of a hypothetical reasonable person in appellant's position, it is obvious that much of the evidence presented at the hearing on the suppression motion was not pertinent to the question before the court. For example, Detective Shumway testified that appellant could have gotten up and left any time he wanted, and there would have been nothing the detectives could have done to prevent it. (13 RT 1739, 1748-1749.) He said appellant was being interviewed as a witness rather than a suspect and was not detained or placed in custody. (13 RT 1739.) He said he "assumed that [appellant] would have wanted to come down and give a statement to the detectives." (13 RT 1744:7-9.) This testimony reflects Shumway's beliefs and intentions and perhaps DeVinna's as well. These matters have nothing to do with a reasonable person's perception, however, because the detectives did nothing to communicate their beliefs and intentions to appellant. For example, they did not tell appellant that he was free to go.

The detectives' uncommunicated understanding of the reality of the situation has no bearing on the question whether appellant was seized. As the high court has said concerning *Miranda* custody, "[A]n officer's views concerning the nature of an interrogation ... may be one among many factors that bear upon the assessment whether that individual was in

custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." (*Stansbury v. California* (1994) 511 U.S. 318, 325.) *Stansbury v, California* notes the court's statement in *Miranda*, "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time." (*Miranda v. Arizona, supra,* 384 U.S. at 442, quoted in *Stansbury v. California, supra,* 511 U.S. at 323-324.) "[T]he subjective impressions of police officers regarding the defendant's custody status or status as a suspect are irrelevant unless they were communicated to the defendant. (Citation.)" (*People v. Stansbury* (1995) 9 Cal.4th 824, 827-828.)

Further examples of evidence not relevant to the seizure issue are Goodner's testimony that transport in the cage is "standard procedure" for both suspects and witnesses (13 RT 1730-1731) and Shumway's testimony that the interview room was used for both suspects and witnesses (13 RT 1747). These matters are not relevant to the question of seizure, because the officers and detectives did not explain that their actions were standard procedure. Even if they had, it would make no difference as to the cage, because a reasonable person would still understand he was locked in. There is no evidence that a reasonable person who, like appellant, had no prior contact with the criminal justice system would know what was a "standard" police procedure and what was not. A reasonable person would perceive, however, that he was locked in a cage or placed in a room as barren as a cell. The United States Supreme Court has rejected an argument that "standard procedure" undercuts a finding of seizure, saying, "Nor is it significant, as the state court thought, that the sheriff's department `routinely' transported individuals, including Kaupp on one prior occasion,

while handcuffed for safety of the officers .... The test is an objective one, (citation), and stressing the officers' motivation of self-protection does not speak to how their actions would reasonably be understood." (*Kaupp v. Texas, supra,* 538 U.S. at 632a.)

The evidence that *is* relevant to the suppression issue is evidence of facts that would have been known to a reasonable person in appellant's position and would have affected, one way or the other, his understanding of whether he was "'at liberty to ignore the police presence and go about his business.' " (*Id.* at 629.) The relevant evidence includes the conduct of the officers at the hospital, the transportation to the bureau in a patrol car, the conduct of the detectives at the detective bureau, and the physical environment of the interview room. As appellant now discusses, the relevant evidence is overwhelming that a reasonable person would have thought he was not free to go.

b) Officers' conduct at the hospital.

At the hospital, appellant was being released from a stay of several hours in the emergency room. Officer McCarthy had stayed with appellant all that time, although appellant had not requested McCarthy's company. Goodner joined McCarthy, doubling the police presence. They told him they "were taking him to the detective bureau." (8 RT 1024:16-17, :25-26, 1024:28-1025:2, 1025:9-10.) Goodner told him, "They would like to talk to him there." (13 RT 1721:17-21, 1724:10-11, 1730:1-4, 1733:22-26.) Appellant had no means of transportation, since he had been taken to the hospital by ambulance. (8 RT 1016, 1018.) It was after midnight. (8 RT 1021.) Goodner and McCarthy did not tell appellant he was free to go.

In these circumstances, no reasonable person would think he had any choice but to comply. A police officer's request to come to the police

station "'may easily carry an implication of obligation ....'" (*Dunaway v. New York, supra,* 442 U.S. at 207, fn. 6.) Appellant's being confronted with two officers who were telling him the detectives at the detective bureau "would like to talk to you," just as he was being released from the hospital after midnight, resembles the situation in *Kaupp*, in which a group of police officers roused an adolescent out of bed in the middle of the night with the words, "'[W]e need to go and talk.'" The Supreme Court held that this situation "presents no option but `to go.'" (*Kaupp v. Texas, supra,* 538 U.S. at 631; see *United States v. Mendenhall, supra,* 446 U.S. at 554 [presence of several officers and use of language indicating that compliance with the officers' request might be compelled are factors indicating a seizure]; *People v. Celis, supra,* 33 Cal.4th at 673 [same].) Here, also, a reasonable person would have thought he had to go with McCarthy and Goodner.

c) Transportation to detective bureau in patrol car.

Officers McCarthy and Goodner transported appellant to the detective bureau in their patrol car. (8 RT 1021:5-8, 1027:10-12; 13 RT 1722:5-7, 1731:23-25, 1744.) Transportation to a police station is a hallmark of a seizure. "[T]he [Fourth Amendment] line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." (*Hayes v. Florida, supra,* 470 U.S. at 816, fn. omitted.) Here, the hospital was a place in which appellant "[was] entitled to be." Furthermore, he had been taken to the hospital from his home, and a reasonable person's expectation would be that, upon release by the hospital,

he would return to his home. Therefore, he should not have been taken to the police station, not even for investigative purposes, without probable cause or a warrant. Here, as in *Dunaway v. New York, supra,* 442 U.S. 200, "the detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken ... to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was `free to go' ...." (*Id.* at 212; see *Hayes v. Florida, supra,* 470 U.S. at 815 ["transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment"]; *Yarborough v. Alvarado, supra,* 541 U.S. at 664-665 [that police did *not* transport defendant to the station is fact weighing *against* a finding that defendant was in custody]; *Rhode Island v. Innis* (1980) 446 U.S. 291, 298 [uncontested that the respondent was "in custody" while being transported to the police station].)

The transportation, moreover, was in the locked cage of a police patrol car. (13 RT 1721:24-25 1730:10-23 1731:11-15.) The record does not show whether appellant tried to open the doors of the patrol car, but any reasonable person would expect that, since the purpose of a cage is confinement, it could not be opened from within. (See *Brendlin v. California, supra,* 551 U.S. at 254 [relying on the reasonable expectations of a passenger in a traffic stop to find the passenger is detained].)

That these facts establish seizure is shown by comparing them to the facts in a case in which this Court found there was *no* seizure, *People v. Stansbury, supra,* 9 Cal.4th 824 [on remand from *Stansbury v. California, supra,* 511 U.S. 318].) There, this Court explained a finding of no detention in part by saying, "A reasonable person who is asked if he or she would come to the police station to answer questions, and who is offered

the choice of finding his or her own transportation or accepting a ride from the police, would not feel that he or she had been taken into custody. A police invitation to sit in the front of the car (which was not a marked police car) could only add to the objective impression that no custody had been imposed." (*Id.* at 831-832.) Here, the facts are the opposite of those in *People v. Stansbury.* The two officers told appellant they were taking him to the detective bureau, and appellant was not offered any alternative to a ride in the cage of the patrol car. Since the facts are opposite, the conclusion must also be opposite: A reasonable person in appellant's position would have thought he was not free to go.

d) Detectives' conduct at detective bureau.

Upon arrival at the detective bureau, appellant was taken into the station by McCarthy and Goodner. (13 RT 1722:8-12, 1731:26-28.) He was in the presence of numerous detectives until Shumway and DeVinna were ready to interview him. (13 RT 1732:22-23.) Having been told he was being taken for questioning and transported in a patrol car, no reasonable person would believe he was free to leave the detective bureau before the interview began.

The setting of the interview discouraged a feeling of freedom to get up and leave. The interview room was about 10 feet by 10 feet, with bare walls and a closed door. The only furnishings were a small square table placed against the wall opposite the door and three metal chairs. The room resembles a cell. (13 RT 1744; see Exhibit 81B [video tape].)

The detectives' manner towards appellant communicated that he was subject to their control. Almost the first thing DeVinna said to appellant was, "I'm going to ask you some questions ...." (13 CT 3636.) No

reasonable person hearing that would think he was free to go. That DeVinna followed these words with, "and you can get out of here" (*ibid.*), did not change the command to submit to questioning, because it was implicitly qualified by "when we're done," so that, even if appellant might be free to leave *later*, he was not free to leave *then*. (*Ibid.*) They told him things like, "sit up a little bit now" (*ibid.*), "open your eyes and look at this" (*ibid.*), "I wanna see you open your eyes and look at this" (13 CT 3637), "lean forward and look at this, OK, while the detective's explaining it to you" (*ibid.*), and, "you have to answer to me, Kim" (13 CT 3639). When appellant said, "I'm very sore, very tired," the detectives said, "[W]e'll try and get this done as quickly as we can ." (*Ibid.*) They again told him, "You have to speak up." (13 CT 3640.) The detectives' conduct would unmistakably communicate to a reasonable person that he was subject to the detectives' control and not free to leave so long as they were questioning him. The situation is like the facts in *Kaupp*, of which the Supreme Court said, "It cannot seriously be suggested that when the detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed." (*Kaupp v. Texas*, *supra*, 538 U.S. at 631-632.)

e) A reasonable person would have felt he was not free to leave.

For all these reasons, a reasonable person in appellant's situation would have believed he was not free to terminate the interview and go about his business. Therefore, appellant was detained and seized within the meaning of the Fourth Amendment

E. The seizure was unlawful.

1. There was no probable cause or reasonable suspicion.

The foregoing discussion demonstrates that appellant was seized within the meaning of the Fourth Amendment when he was interviewed by the detectives. Appellant now discusses why the seizure was unlawful.

There is no evidence of a warrant for appellant's arrest. Arrest without a warrant is permissible only if the arresting officer has probable cause. (*Kaupp v. Texas, supra,* 538 U.S. at 630.) Probable cause exists where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed by the person to be arrested. (*Carroll v. United States* (1925) 267 U.S. 132, 162; see *Brinegar v. United States* (1949) 338 U.S. 160, 175-176; *Dunaway v. New York, supra*, 442 U.S. at 208.)

An investigative detention is permissible only when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. (*Arizona v. Johnson* (2009) 555 U.S. 323, 326; *United States v. Sokolow* (1989) 490 U.S. 1, 7.)

There is no evidence of probable cause or reasonable suspicion at the time of the interview. McCarthy and Goodner testified that they were taking appellant to the detective bureau because the detectives told them to do so, not because he had done anything. Shumway testified that he and DeVinna were interviewing appellant as a witness, not a suspect. (13 RT 1739.) There is no indication in the record that anyone thought there was probable cause or reasonable suspicion at the time of the interview.

2. The detectives' desire to investigate does not change the character of the seizure or justify it.

The court's statements and questions during the suppression hearing suggest that the court may have thought that appellant's detention was justified by the officers' desire to investigate the homicides. When Shumway testified, the court asked him, "Is there any significance or importance in obtaining a statement from the last known person that had made contact with a murder victim?" (13 RT 1749.) The court also asked, "Is there importance of obtaining that statement as soon as possible in the investigation or not?" (13 RT 1750:5-6.) Shumway responded, "Yes ... it's extremely critical ... to solve a homicide within 72 hours. Because you lose a lot of things." (13 RT 1750:7-9.) And. when the court stated its finding that appellant was not in custody, it mentioned "the situation that faced ... the police at the time ...." (13 RT 1761.)

However, the detectives' need or desire to investigate the homicides does not affect the Fourth Amendment analysis. "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." (*Mincey v. Arizona* (1978) 437 U.S. 385, 393, quoted in *Arizona v. Gant* (2009) 556 U.S. 332, ___, 129 S.Ct. 1710, 1723.) "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" (*Davis v. Mississippi* (1969) 394 U.S. 721, 726-

727, fn. omitted; accord, *Dunaway v. New York, supra,* 442 U.S. at 214-215.)

Therefore, the sense of urgency the court elicited from Shumway neither changes nor justifies the fact that appellant was detained.

3. The seizure cannot be justified as an investigative detention.

Perhaps the court was thinking that the questioning of appellant could be analyzed as an investigative detention or *Terry* stop (*Terry v. Ohio, supra,* 392 U.S. 1). If so, the court was mistaken. The detention and transport of appellant cannot be justified as a *Terry* investigation, because a hallmark of a *Terry* investigation is that it is "limited in duration." (*People v. Hughes* (2002) 27 Cal.4th 287, 327; see *United States v. Sokolow, supra,* 490 U.S. 1, 7 [*Terry* grounds allow the police to "briefly detain" a person for investigative purposes]; *Terry v. Ohio, supra,* 392 U.S. at 30.) The period of detention here included at least a ten-minute car ride and a one-hour interview. It may have included an additional period of up to 45 minutes spent waiting for the interview to begin, since McCarthy said they arrived at the bureau at 12:15 AM (8 RT 1027), and Shumway said the interview began around 1:00 AM (13 RT 1744). Under any interpretation of the evidence, appellant's detention was outside the temporal bounds of a *Terry* detention. (*Dunaway v. New York, supra,* 442 U.S. at 212 [interrogation for an hour exceeded the bounds of a *Terry* detention].)

Furthermore, a *Terry* detention does not involve transportation of the person detained. In *Dunaway*, in holding that a seizure could not be justified as a *Terry* stop, the Supreme Court observed, "Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed

in an interrogation room." (*Dunaway v. New York, supra*, 442 U.S. at 212.) In *Hayes v. Florida*, the Supreme Court rejected a Florida court's attempt to justify a detention involving transportation to the police station as a *Terry* stop. (*Hayes v. Florida, supra,* 470 U.S. at 815.) The Supreme Court reviewed its recent decisions involving *Terry* stops and stated, "[N]one of these cases have sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes ... absent probable cause or judicial authorization." (*Id.* at 815.) The Supreme Court has allowed that some reasons of safety and security do justify moving a suspect from one location to another during an investigatory detention. (*Florida v. Royer* (1983) 460 U.S. 491, 504-505, citing *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 109-111.) The types of movement the court was discussing, however, were from the driver's seat of a stopped vehicle to the shoulder of the road (*Mimms* at 111) or a distance of 40 or 50 feet within an airport concourse (*Royer* at 495), not a distance requiring a 10-minute drive, and not a movement to a police station.

Finally, a *Terry* detention requires "a reasonable suspicion that the person apprehended is committing or has committed a criminal offense." (*Arizona v. Johnson, supra,* 555 U.S. at 326.) As discussed above, there was no reasonable suspicion at the time of the interview.

4. Appellant did not consent to being transported and interviewed.

A person may consent to his encounter with the police, and, if he does, there is no unlawful detention. (*Florida v. Royer, supra,* 460 U.S. 491; *People v. Hughes, supra,* 27 Cal.4th at 327.) Voluntariness of consent is a question of fact to be determined from the totality of circumstances.

(*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 233-234.)

During the suppression hearing, the prosecutor argued that the interview was consensual, because appellant initiated the police contact by calling 911, he was taken to the hospital as the result of his own request to be examined by paramedics, and, when the officers told him they were taking him to the station, he said, "Fine." He never voiced any objection. According to the prosecutor, appellant was "attempting, despite his medical condition, to cooperate as best he could, or appeared to do so, with the officers in their investigation." (13 RT 1754-1755.)

For several reasons, the prosecutor's argument fails to establish that the interview was consensual. First, neither appellant's calling 911 nor his request to be seen by paramedics can reasonably be equated to a general consent to submit to police control until such time as the police choose to release him. A reasonable person in appellant's position would not expect that calling 911 would lead to his detention. A reasonable person being taken to the hospital would expect to return home when the hospital released him.

Second, that appellant did not voice an objection to being transported (see 8 RT 1025:28-1026:7) shows no more than appellant's acquiescence to the officers' show of authority that they were taking him to the detective bureau. Passive acquiescence is not consent to seizure. "[F]ailure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer." (*Kaupp v. Texas, supra,* 538 U.S.at 632.) Speaking to the Fourth Amendment issue of a search, the Supreme Court has said, "[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by

showing a mere submission to a claim of lawful authority. (Citations.)" (*Florida v. Royer, supra,* 460 U.S. at 497.) The Supreme Court has rejected a suggestion that no seizure occurred just because the subject "did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation." (*Kaupp v. Texas, supra,* 538 U.S.at 632.)

Third, the prosecutor's argument put too much reliance on appellant's response, "Fine." It was simply acquiescence. It added nothing to the transaction between appellant and the officers, because the transport and interview of appellant would have taken place in the same way even if appellant had said nothing. It is like the acquiescence in *Kaupp*, where the officers told Kaupp they were taking him to the station, and Kaupp said, "Okay." The Supreme Court said, "Kaupp's` " 'Okay' "" ... is no showing of consent under the circumstances. .... There is no reason to think Kaupp's answer was anything more than `"a mere submission to a claim of lawful authority."' (Citations.)" (*Kaupp v. Texas, supra,* 538 U.S.at 631.)

Finally, it must be borne in mind that, when appellant said, "Fine," he was under the influence of a sedative that was injected intravenously at the hospital. (8 RT 1022-1023.)

For these reasons, the record does not support a finding that appellant consented to the interview.

F. There was a *Miranda* violation, because the interview was custodial interrogation, but no *Miranda* warning was given.

The Fifth Amendment to the federal constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." The rule secures to a criminal defendant "the right ... to remain silent unless he chooses to speak in the unfettered exercise of his own will,

and to suffer no penalty ... for such silence." (*Malloy v. Hogan* (1964) 378 U.S. 1, 3.)

To effectuate the constitutional guarantee, the Supreme Court held in *Miranda* that in certain circumstances a person questioned by law enforcement officers must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda v. Arizona, supra,* 384 U.S. at 444.) *Miranda* states a federal constitutional rule. (*Dickerson v. United States* (2000) 530 U.S. 428, 444; *People v. Davis, supra,* 46 Cal.4th at 585.) The rule is binding on the states through the due process clause. (U.S. Const., 5th and 14th Amends.; *People v. Huggins* (2006) 38 Cal.4th 175, 198; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1122 ["*Miranda* is a rule of constitutional magnitude"]).) Statements obtained in violation of *Miranda* are inadmissible to establish guilt. (*Miranda v. Arizona, supra,* 384 U.S. at 494; *People v. Bradford* (1997) 15 Cal.4th 1229, 1310; *People v. Sims, supra,* 5 Cal.4th at 440; see Part I.G, *post.*)

A *Miranda* warning is required when there is both "custody" and "interrogation." (*Illinois v. Perkins* (1990) 496 U.S. 292, 295; *Oregon v. Mathiason* (1977) 429 U.S. 492, 495.)

The standard for determining whether custody exists for *Miranda* purposes has evolved, as is discussed in *Yarborough v. Alvarado, supra,* 541 U.S. 652 (*Yarborough*). Early decisions described "custody" as analogous to formal arrest, using phrases such as "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest" (*California v. Beheler* (1983) 463 U.S. 1121, 1225), "context where [the

suspect's] freedom to depart was restricted in any way" (*Oregon v. Mathiason, supra,* 429 U.S. at 495), and "taken into custody or otherwise deprived of his freedom of action in any significant way" (*Miranda v. Arizona, supra,* 384 U.S. at 444). (*Yarborough* at 661-662.) These phrasings could be understood to mean that custody could be established or negated by the degree of restraint the police actually imposed or intended to impose. If that were so, evidence such as Shumway's testimony that he could not have prevented appellant from leaving would be relevant. But it is not so. *Yarborough* states, "[M]ore recent cases instruct that custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." (*Id.* at 662.) Those decisions use phrases such as "how a reasonable man in the suspect's position would have understood his situation" (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442) and "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action" (*Stansbury v. California, supra,* 511 U.S. at 322, 325). (*Yarborough* at 662-663.) The Supreme Court's most recent statement of the *Miranda* custody test is, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave" (*Thompson v. Keohane, supra,* 516 U.S. at 112). (*Yarborough* at 663.)

The reasons that a reasonable person in appellant's position would not have felt free to leave the interview are discussed in connection with Fourth Amendment seizure in part I.D.2 of this argument. Briefly, appellant was transported from the hospital to the detective bureau by two uniformed officers in a patrol car. They told him the detectives "would like to talk" to him. In the interview room at the detective bureau, the detectives took control. When appellant told them he was really tired and sore, they responded that they would go as quickly as they could, implying

he could not leave until they were done. For these reasons and more, appellant was "in custody" throughout the interview.

The interview was obviously "interrogation" within the meaning of *Miranda*. "'Interrogation' consists of express questioning, or words or actions on the part of the police that 'are reasonably likely to elicit an incriminating response from the suspect.' (Citations.)" (*People v. Cunningham* (2001) 25 Cal.4th 926, 993, quoting *Rhode Island v. Innis, supra,* 446 U.S. at 301.) Appellant's interview consisted almost entirely of questioning about the recent activities and whereabouts of Mary, Carley, and appellant. (13 CT 3640-3675.) Therefore, appellant was subjected to "interrogation."

Thus, appellant was in custody throughout the interview, and the interview was interrogation. Failure to give him a *Miranda* warning at the beginning of the interview was Fifth Amendment error.

This Court recently considered a *Miranda* custody issue in *People v. Leonard* (2007) 40 Cal.4th 1370. In that case, the interrogation was initiated by the deputies, the defendant was fingerprinted before being questioned, the interrogation took place in an interrogation room in the sheriff's department, the door to the interrogation room was closed, and when, on one occasion, defendant tried to go down the hall to the bathroom, the detective escorted him back to the interrogation room, asking him to wait in the interrogation room and not to "wander around." (*Id.* at 1400.) This Court found that defendant was not in custody for *Miranda* purposes. (*Id.* at 1401).

There are similarities between *Leonard* and the instant case, such as that appellant's interview was initiated by the detectives, it took place in an interrogation room with the door closed, and appellant was escorted to the bathroom. Those, however, are not the facts on which *Leonard* relied to

find no custody. As to the facts on which *Leonard* did rely, there are striking differences between *Leonard* and the instant case. In *Leonard*, the detective repeatedly told defendant that he was not under arrest and he was free to end the questioning at any time and leave. (*Id.* at 1401.) Also, the defendant asked to use the telephone and was permitted to do so, and, after using the telephone, he told the detective that the person he had spoken to had advised him to leave, but he preferred to remain and answer questions, and he later told his father on the telephone that he was "free to go." (*Ibid.*) This Court stated that the defendant's comments reinforced its view that a reasonable person in his position would have felt free to leave, even though it recognized that the determination of custody depends on the objective circumstances of the interrogation, not on the subjective views of the person being questioned. (*Ibid.*)

In the instant case, the officers and detectives did not tell appellant he was free to go; to the contrary, the detectives told appellant he could leave when they were finished questioning him. (13 CT 3636.) When appellant said he was very sore and very tired, the detectives said they would "try and get this done as quickly as we can." (13 CT 3639). Appellant subjectively believed he was *not* free to go, because, when the detectives left him alone for a while, he said to no one, but out loud, "Oooh. Don't leave me in here for 30 fucking ... minutes. I gotta go. I gotta go." (13 CT 3669.) Since appellant did not feel free to go, it stands to reason that a reasonable person in appellant's position would also have believed he was not free to go. (*People v. Leonard, supra,* 40 Cal.4th at 1401.)

For these reasons, the interview of appellant by the detectives was custodial interrogation. Since no *Miranda* warning was given, there was a *Miranda* violation. (*Miranda v. Arizona, supra,* 384 U.S. at 494; *People v. Bradford* (1997) 15 Cal.4th 1229, 1310; *People v. Sims, supra,* 5 Cal.4th

405, 440; see Part I.G, below.)

G. All evidence of the interview should have been excluded.

1. Fruit of unlawful seizure.

The discussion in Parts I.D and I.E, *ante*, demonstrates that the interview took place while appellant was detained and seized in violation of the Fourth Amendment.

Statements and other evidence that are the fruit of an illegal arrest are subject to exclusion from evidence unless the taint of the illegality has been dissipated. (*Wong Sun v. United States* (1963) 371 U.S. 471, 484-488; *Brown v. Illinois* (1975) 422 U.S. 590, 597, 601-602.) This Court has said: "We are of the view that the extrajudicial statements should have been suppressed by reason of having been procured as the result of illegal arrests (citation), and nothing having occurred which attenuated or dissipated the taint of such illegalities (citation)." (*People v. Devaughn* (1977) 18 Cal.3d 889, 893.) The rule requiring exclusion of such evidence is a federal constitutional rule implicit in the Fourth Amendment and binding on the states through the Fourteenth Amendment. (*United States v. Leon* (1984) 468 U.S. 897, 906; *Olmstead v. United States* (1928) 277 U.S. 438, 462; *Weeks v. United States* (1914) 232 U.S. 383, 393, 398.)

The interview is the fruit of the unlawful detention and seizure. As discussed above, the interview took place during the unlawful detention. "*Dunaway* and *Brown* hold that statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will. (Citations.)" (*Florida v. Royer, supra,* 460 U.S. at 501, citing *Dunaway v. New York, supra*, 442 U.S. at 218-219; *Brown v. Illinois,*

supra, 422 U.S. at 601-602.)

All evidence of the interview, including appellant's statements, the detectives' observations, and the memorialization of the event on the videotape, should be excluded. "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. ...[T]he Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. (Citation.)" (*Wong Sun v. United States, supra,* 371 U.S. at 485; see *McGinnis v. United States* (1st Cir. 1955) 227 F.2d 598, 603 [observations]; *Kirby v. Superior Court* (1970) 8 Cal.App.3d 591, 579, 597 [evidence suppressed included officer's observations and other things which have no physical form or substance]; *People v. Dory* (1983) 59 N.Y.2d 121, 126-127, 450 N.E.2d 673 [if officers' entry into home was illegal, "testimony from them concerning physical evidence observed or seized ..., or incriminating actions observed and not attenuated ... would be inadmissible"].)

Nothing occurred to dissipate the taint of the illegality. Attenuation exists when the "causal chain" between the illegal action and the seizure of the evidence is broken. (*Brown v. Illinois, supra,* 422 U.S. at 602; see *Wong Sun v. United States, supra,* 371 U.S. at 486 [events leading to defendant's arrest were fruit of unlawful arrest, but defendant's confession several days later, after he had been arraigned and released, was not].) Here, since the interview was held during a period of unlawful detention, nothing could have intervened.

The interview is subject to exclusion because of the manner in which it was obtained. "[T]he fourth amendment's exclusionary rule operates as a

`"judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."'" (*United States v. Leon, supra,* 468 U.S. at 906, quoting *United States v. Calandra* (1974) 414 U.S. 338, 348). "The exclusionary rule ... was applied in *Wong Sun* primarily to protect Fourth Amendment rights. Protection of the Fifth Amendment right against self-incrimination was not the Court's paramount concern there." (*Brown v. Illinois, supra,* 422 U.S. at 599; see *Wong Sun v. United States, supra,* 371 U.S. at 487 [statements that were arguably exculpatory are subject to exclusion].)

2. Product of *Miranda* violation.

Failure to provide a *Miranda* warning requires the exclusion of appellant's testimonial statements. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 590 ["Because Muniz was not advised of his *Miranda* rights ..., any verbal statements that were both testimonial in nature and elicited during custodial interrogation should have been suppressed."]; see *People v. Honeycutt* (1977) 20 Cal.3d 150, 159 ["In the normal case, failure to warn a suspect of his rights results in the total exclusion of any statements he might make. (Citation.)"]; *People v. Disbrow* (1976) 16 Cal.3d 101, 106.)

The high court has held that the definition of a testimonial statement includes, at a minimum, all responses to questions that place the suspect in the "trilemma" of having to choose among truth, falsity, or silence. (*Pennsylvania v. Muniz, supra,* 496 U.S. at 596-597.) This occurs whenever a suspect is asked "to communicate an express or implied assertion of fact or belief." (*Id.* at 597, fn. omitted.)

By this standard, all of appellant's statements during the interview were testimonial. Most of his statements were responses to interrogation

about the activities and whereabouts of himself, Mary, and Carley during the day. (13 CT 3640-3675.) These were express assertions of fact or belief. Even the discussion at the beginning of the interview about the consent-to-search form was testimonial, because it required appellant to state whether he remembered events from earlier in the evening, state whether he understood a consent-to-search form that was read to him, state what it meant, and state whether he was willing to give consent. (13 CT 3636-3639.) These are express assertions of fact or belief.

Appellant's responses to the detectives' questions are also evidence of appellant's mental processes, which are relevant to the prosecutor's theory that an innocent man would have behaved differently than appellant was behaving. This evidence was obtained in a manner that entailed a testimonial act on the part of appellant, and it, too, is testimonial. (*Pennsylvania v. Muniz, supra,* 496 U.S. at 593.) In this respect, the discussion of the consent to search form is like the facts in *Muniz* in which, without a *Miranda* warning, a person suspected of drunk driving was asked to give the year of his sixth birthday, which he was unable to do. As the high court stated, "Muniz's answer to the sixth birthday question was incriminating, not just because of his delivery, but also because of his answer's *content;* the trier of fact could infer from Muniz's answer (that he did not *know* the proper date) that his mental state was confused." (*Id.* at 592-593, italics in original.) The response was held to be testimonial, because it placed Muniz in the trilemma of truth, falsity, or silence. (*Id.* at 598-599.) The same is true here: appellant's responses in the discussion of the consent-to-search form were testimonial.

Appellant's appearance and non-verbal conduct during the interview are not testimonial evidence and, therefore, not subject to exclusion under *Miranda*. (*United States v. Hubbell* (2000) 530 U.S. 27, 35 ["even though

the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice" (fns. omitted)]; see *Schmerber v. California* (1966) 384 U.S. 757; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1112 [evidence acquired by observing petitioner's demeanor, gestures, posture, facial expressions, or voice quality would not be testimonial for, like a blood sample, its acquisition would not require petitioner to communicate, but only that a witness observe him visually or aurally].) But, without audio or a transcript or any other evidence of appellant's statements, the video would be inadmissible as irrelevant, because the naked video would not have "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see Evid. Code, § 350 ["No evidence is admissible except relevant evidence."].)

Therefore, the failure to provide a *Miranda* warning requires the exclusion of the entire interview. (*Miranda v. Arizona, supra,* 384 U.S. at 494; *People v. Sims, supra,* 5 Cal.4th at 440.)

H. Prejudice.

As discussed above, the entire interview should have been excluded on the grounds it was the product of an unlawful seizure and a *Miranda* violation.

Prejudice from admitting evidence obtained in violation of the Fourth Amendment or *Miranda* is assessed under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306; *Rose v. Clark* (1985) 478 U.S. 570, 576-577; *Chambers v. Maroney* (1970) 399 U.S. 42, 52-53;

People v. Johnson (1993) 6 Cal.4th 1, 32-33; *People v. Sims, supra,* 5 Cal.4th at 447; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

The prosecutor must have thought the interview was prejudicial to appellant, since he chose to play the entire one-hour tape as virtually the last piece of evidence in his case-in-chief. (13 RT 1775 [tape played], 1792 [prosecution rests].) Perhaps the prosecutor thought that appellant's appearance and demeanor in the video would harm him with the jury, because, although they are not evidence of any crime, they present a blank screen on which the prosecutor could project his theory that an innocent person would have behaved differently. The tape was the jury's only chance to see appellant other than in the courtroom.

Also, the interview included appellant's statements about the time he last saw Mary and Carley, which differed from his statement in the missing persons report he made in the afternoon. In the report, appellant said he last saw Mary and Carley when he left to take Ashley to school around 7:30 AM. (13 CT 3481-3482.) In the interview, he said he last saw them after he returned from taking Ashley to school. (13 CT 3640, 3660-3662.) The prosecutor argued that this discrepancy showed consciousness of guilt. (14 RT 1906-1907.) He argued that the reason appellant gave an inconsistent statement in the report was that Doug Burdick had pressured appellant into making the report before he had time to get his story straight. (14 RT 1907:17-19, 1949:9-12.) The prosecutor said, "You don't forget and make a mistake about when you last saw your wife and your daughter, unless you're lying." (14 RT 1907:26-28.) And, he said, "You can infer from the fact he's told different stories about what time they left that they never left." (14 RT 1940.) If the interview had been excluded from evidence, the prosecutor would not have had an evidentiary basis for this argument.

Also, the interview included appellant's statement that, before Mary and Carley left, he pulled the van to the rear of the house so he could check the oil. (13 CT 3661.) The prosecutor ridiculed this statement. He said it was a lie, because a receipt found in the bedroom showed the oil had been changed only 1,200 miles earlier. (14 RT 1942.) He said the real reason appellant pulled the van to the back of the house was to load the bodies into the van, but appellant did not know what the neighbors might have seen, so he gave checking the oil as a pretext. (14 RT 1942-1943.) This argument, too, could not have been made if the interview had been excluded from evidence.

There was further prejudice from allowing the jury to see the detectives cross-examining appellant about his scratches and shaking and disparaging his answers. For example, Detective Shumway asked appellant where he got the scratch on his face, and appellant said his mom told him he did it when he grabbed his face when he was told about Mary and Carley's deaths. Detective Shumway scornfully replied, "You don't have any fingernails, how the hell could you have done that?" (13 CT 3657.) At another point, Detective Shumway said he found it hard to believe that appellant was licensed to drive, because the way he was acting he couldn't operate a motor vehicle. (13 CT 3656.) At yet another point, appellant said he had been working in the dirt all day, and he had not taken a shower since he worked. Detective Shumway commented that his hands were pretty clean for having worked in the dirt. (13 CT 3651.) The jury could not have failed to notice that the detectives did not believe appellant.

The detectives could not have testified about their disbelief. Credibility questions are not a proper subject of testimony by either a lay witness or an expert. "Lay opinion about the veracity of particular statements by another is inadmissible on that issue." (*People v.*

Melton (1988) 44 Cal.3d 713, 744; accord, *People v. Smith* (2003) 30 Cal.4th 581, 628.) "[A]n expert may not give an opinion whether a witness is telling the truth .... (Citations.)" (*People v. Coffman* (2004) 34 Cal.4th 1, 81.) Thus, in *People v. Smith* (1989) 214 Cal.App.3d 904, the court held inadmissible the testimony of an officer that he believed the victim's dying declaration as to the perpetrator's identity. (*Id.* at 914-915.) In *People v. Sergil* (1982) 138 Cal.App.3d 34, the court reversed a conviction of sexual abuse of a child after a police officer testified that, in light of his experience as an officer investigating child abuse cases, he believed that the victim was credible. (*Id.* at 39-41.) In *United States v. Price* (5th Cir.1983) 722 F.2d 88, the court held that admission of a revenue agent's testimony that he relied on the statements of two people in his investigation because he "believed them" constituted reversible error. (*Id.* at 90; see *Osborne v. Wainwright* (11th Cir.1983) 720 F.2d 1237, 1238; *United States v. Weir* (8th Cir.1978) 575 F.2d 668, 671-72.) But, although the detectives could not have testified to their disbelief, the tape put their opinion as squarely before the jury as any testimony could have done.

On these facts, it cannot be said beyond a reasonable doubt that failure to exclude evidence of the interview was harmless.

I. Erroneous admission of the interview violated appellant's Eighth and Fourteenth Amendment rights to heightened reliability.

The Eighth and Fourteenth Amendments require a heightened standard of reliability at both guilt and penalty phases. (*Beck v. Alabama* (1980) 447 U.S. 625, 638; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *Johnson v. Mississippi* (1988) 486 U.S.

578, 587; *Green v. Georgia* (1979) 442 U.S. 95, 96-97.) The erroneous, prejudicial admission of the interview casts doubt on the reliability of the verdicts and is a denial of appellant's constitutional rights.

J. Reversal is required.

For the reasons stated above, the judgment should be reversed.

II. ADMITTING THE OUT-OF-COURT STATEMENTS OF LES BALLOU TO BOLSTER HIS PRELIMINARY HEARING TESTIMONY PLACING APPELLANT NEAR THE CRIME SCENE ON THE DAY OF THE HOMICIDES WAS PREJUDICIAL ERROR THAT DENIED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE DETERMINATION OF GUILT AND PENALTY.

A. Introduction.

One of the prosecution's most important pieces of evidence was the preliminary hearing testimony of Les Ballou. It placed appellant near the crime scene on the morning of the homicides. The gist of it was in two parts. The first part was Ballou's testimony that, on the morning of April 22, 1999, he saw an unfriendly man walk by his house, which was just around the corner from the crime scene. (6 RT 857-858.) The second part was his testimony that, when he saw a photograph of appellant in the newspaper on June 3, 1999, he recognized appellant as the unfriendly man. (6 RT 860.)

Ballou passed away before the trial. On the seventh trial day, his preliminary hearing testimony was read for the jury pursuant to the hearsay exception for former testimony of an unavailable witness. (6 RT 856-879.)

At the very end of the prosecution case-in-chief, on the 14th and 15th trial days, the prosecutor unfairly used inadmissible evidence to repeat and reinforce Ballou's former testimony. The prosecutor presented the testimony of Les Ballou's widow, Mae Ballou, that, just a few minutes after it happened, he told her about seeing the unfriendly man walk by (12 RT 1615), and, when he saw the photo in the newspaper, he told her the man in the photo was the unfriendly man (12 RT 1617). The prosecutor also

presented the testimony of Detective Shumway that Mae Ballou told him that her husband told her about the unfriendly man before he saw the newspaper photo (13 RT 1777) and later told her the man in the newspaper photo was the unfriendly man (13 RT 1791).

Admitting evidence of these statements of Les Ballou made prior to the preliminary hearing (the Prior Statements) was error, for several reasons. First, the court admitted the Prior Statements for the truth of the matter stated in reliance on Evidence Code section 1236, which provides a hearsay exception for certain prior consistent statements of a witness, but section 1236 does not apply to the prior consistent statements of a hearsay declarant who does not testify at the trial. Second, the court also admitted the Prior Statements to support Ballou's credibility in reliance on Evidence Code section 791, which provides for such use of prior consistent statements in certain circumstances, but, like section 1236, section 791 does not apply to the prior consistent statements of a hearsay declarant who does not testify at the trial. Finally, the Prior Statements were not even admissible to support Les Ballou's credibility as a hearsay declarant under Evidence Code section 1202, because the foundational requirements for such use were not met. The error in admitting the Prior Statements was compounded by a jury instruction that prior consistent statements could be considered for the truth of the matter stated. (CALJIC No. 2.13, 14 CT 3704.) These errors prejudiced appellant and deprived him of his state and federal constitutional rights to due process and a reliable verdict in a capital case. They require reversal of the convictions.

B. Relevant proceedings.

Les Ballou testified at the preliminary hearing on August 31, 1999, and he was cross-examined by defense counsel Jaffe. (1 CT 92-94; 2 CT

131-153.) Ballou passed away on July 20, 2000, before the trial began. (13 CT 3454.) At trial, the prosecutor moved to admit his preliminary hearing testimony under the former-testimony exception to the hearsay rule. (13 CT 3448-3449.)[8] Appellant did not oppose the motion, and it was granted. (13 CT 3452; 2 RT 305.) Ballou's preliminary hearing testimony was reenacted for the jury with Detective Shumway taking Ballou's part. (6 RT 856-880.)

Nearly two weeks later, on the next-to-the-last day of the prosecution case-in-chief, there was a conference outside the presence of the jury concerning the prosecutor's desire to present testimony of Ballou's wife, Mae Ballou, that, on the morning of April 22, 1999, her husband told her that a man had just walked by him while he was working in the front yard, and the man responded unpleasantly when Ballou said, "Hi." Jaffe objected that the prosecutor was not entitled to bring in a prior consistent statement, because there was no prior inconsistent statement, and the defense had not alleged recent fabrication or improper motive on Ballou's part. Jaffe also requested a ruling that the prior consistent statement would not become admissible if he brought out that, when Ballou was questioned by officers on April 23, 1999, he did not give an affirmative response to the question, "Did you see anyone unfamiliar to you?" (12 RT 1607-1611.)

The prosecutor argued that the prior consistent statement was

---

[8] Evidence Code section 1291, subdivision (a)(2) provides that evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

admissible under Evidence Code section 791, because it corroborated the fact that Mr. Ballou saw a person pass by on 4-22-99, as he testified, and it was probative of his ability to recollect that it was on that day he saw the man pass by. (12 RT 1608.)

The court ruled that the prior consistent statement could come in for a non-hearsay purpose. It said the credibility of any witness is in issue, and the defense cross-examined Mr. Ballou about whether he was mistaken. Therefore, "as to sheer credibility," Mr. Ballou's statement to his wife could come in "as not for the truth, but just the fact it did happen, and it happened on a particular day." (12 RT 1609.)

The court was uncertain at first whether the statement could come in for its truth. The court ruled that evidence that Ballou told officers he did not see anything unusual would not qualify as a prior inconsistent statement. But the prosecutor argued that Jaffe's cross-examination of Ballou was in effect a charge of fabrication motivated by seeing the newspaper photograph on June 3, 1999, and the prior consistent statement should be allowed to rebut the insinuation. (12 RT 1609-1611.) The court ruled the statement would be admitted both to support credibility and for the truth of the matter stated. The court said to the prosecutor, "I'm sure the only purpose you want her to testify to is the truth versus the nontruth," and the prosecutor agreed. (12 RT 1611.)

Mae Ballou testified, among other things, that, before noon on the same day the van was found with the mother and little girl in it, her husband came into the back yard and told her that, while he was working in the front yard, a man had passed by, and her husband said "hello" like he does to everyone, and the man just ignored him and walked away. (12 RT 1615.)

Mae Ballou further testified that, when her husband saw the

newspaper article with the photograph, he said, "You know, honey, that's the man that I saw when I told you about the man that passed by that didn't say, `Hello,' to me." (12 RT 1616-1617.) Detective Shumway testified that he tape-recorded an interview with Les and Mae Ballou at their house on June 26, 1999, and Mae told him that her husband had told her about seeing a man before he saw the picture in the paper (13 RT 1777) and that her husband told her about recognizing the man in the photo as the unfriendly man (13 RT 1791).

C. The Prior Statements are not admissible as substantive evidence under Evidence Code section 1236, because Les Ballou did not testify at the trial.

When the court ruled that the testimony of Mae Ballou concerning a prior statement of Les Ballou consistent with his testimony at the preliminary hearing would be admitted at trial for the truth of the matter stated, it must have relied on Evidence Code section 1236. (See 12 RT 1607-1611.) As appellant will discuss, section 1236 does not permit admitting the prior consistent statement of a hearsay declarant who does not testify at the trial as substantive evidence.

Appellant's claim is a question of statutory interpretation that is entitled to independent review. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699; *People v. Reed* (1996) 13 Cal.4th 217, 227-228.)

Evidence Code section 1236 provides an exception to the hearsay rule. It thus permits statements coming within its purview to be considered for the truth of the matter stated. It is as follows:

> "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." (Evid. Code, § 1236.)

Section 1236 establishes two conditions for admissibility of a statement. First, the statement must be consistent with the witness's testimony at the hearing. Second, the statement must be offered in compliance with section 791. As appellant will discuss, Les Ballou's Prior Statements do not meet the first test. It is therefore unnecessary to discuss section 791 in this section of argument, but section 791 is discussed in a subsequent section.

Section 1236 applies only to a witness's "statement ... consistent with his testimony at the hearing." The meaning of the phrase "testimony at the hearing" is determined by Evidence Code section 145, which is as follows:

> " 'The hearing' means the hearing at which a question under this code arises, and not some earlier or later hearing." (Evid. Code, § 145.)

The hearing at which the question of the admissibility of the Prior Statements arose was appellant's trial. (12 RT 1607.) Therefore, the threshold question in determining whether section 1236 applies to the Prior Statements is whether those statements are consistent with Les Ballou's testimony *at the trial*. But Les Ballou did not testify at the trial, because he was deceased. Therefore, the Prior Statements were not admissible under section 1236, and it was error to admit them as substantive evidence and instruct the jury they could be considered for their truth. (*People v. Williams* (1976) 16 Cal.3d 663, 669.)

This Court has considered a similar question concerning Evidence

Code section 1235, which also uses the phrase, "testimony at the hearing." (*People v. Blacksher* (2011) 52 Cal.4th 769, 806; *People v. Williams, supra,* 16 Cal.3d at 669.) 1235 is as follows:

> "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

In *People v. Williams, supra,* 16 Cal.3d 663, a witness, Morris, told a police officer that the defendant had committed a robbery. At the preliminary hearing, Morris denied making such a statement. The police officer then testified as to Morris's prior statement. At trial, Morris was declared unavailable, so his preliminary hearing testimony was read into the record. The district attorney again called the police officer to testify as to Morris's prior inconsistent statement, and the statement was admitted as substantive evidence under Evidence Code section 1235. (*Id.* at 665-666.)

This Court held that the trial court erred by admitting the police officer's testimony, because Morris had not testified at the trial. (*Id.* at 667.) The court explained, "[S]ection 1235 provides: 'Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony *at the hearing....*' ... Section 145 provides: ' "The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.' Morris not having testified at trial—the hearing at which the admissibility of his prior inconsistent statements arose—those statements were not inconsistent with his testimony 'at the hearing.' [Citation.] Therefore, Smith's testimony regarding Morris' prior inconsistent statements was not admissible under section 1235. (Citations.)" (*People v. Williams, supra,* 16 Cal.3d at 669, italics added by *Williams*.)

This Court reached a similar conclusion in *People v. Rojas* (1975) 15 Cal.3d 540. There, the chief prosecution witness, Navarrette, testified at the preliminary hearing and at a first trial. When he was called as a witness at the second trial, however, he refused to testify on the ground that he feared for his life and that of his family, and he maintained his refusal even after he was found in contempt of court and sent to juvenile hall for the duration of the trial. (*Id.* at 547.) His testimony at the preliminary hearing and first trial was read to the jury over defendants' objection. The trial court gave two grounds for ruling such testimony admissible: first, that it constituted a prior inconsistent statement under Evidence Code section 1235, because his refusal to testify at the second trial was an implied denial of his former testimony, and, second, that it was former testimony under section 1291, subdivision (a)(2), because his refusal to testify made him unavailable as a witness. This Court agreed with the second ground (*id.* at 552) but held that the first ground was erroneous. "We think it is clear that the testimony was not admissible under section 1235. The statute provides: 'Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony *at the hearing* and is offered in compliance with Section 770.' ... '"The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.' (§ 145.) Accordingly, whether Navarrette's refusal to testify at all is in effect a 'statement' inconsistent with earlier statements is irrelevant in view of the fact that Navarrette did not testify at the hearing at which the question of admissibility of the testimony arose." (*Id.* at 548, italics added by *Rojas*.)

This Court reached the same result in *People v. Blacksher, supra,* 52 Cal.4th 769. There, a witness, Eva, testified at the preliminary hearing, but she was deemed incompetent to testify at trial due to dementia. Her

preliminary hearing testimony was read into the record under Evidence Code section 1291. (*Id.* at 803.) Because portions of Eva's preliminary hearing testimony were inconsistent with statements she had made before that hearing, during the trial the court allowed the prosecution to present testimony of Eva's daughter, Ruth, concerning the prior statements to impeach Eva's preliminary hearing testimony. (*Id.* at 804.) This Court held that Ruth's testimony was not admissible under Evidence Code section 1235. "We first note that Eva's statements to Ruth ... were not admissible for their truth as prior inconsistent statements under Evidence Code sections 1235 and 770. Those sections permit admission of inconsistent statements made by a witness who actually testifies at the proceeding. (Citation.) Because Eva did not testify at trial, those sections do not apply here." (*Id.* at 806.)

In *People v. Hitchings* (1997) 59 Cal.App.4th 915, the Court of Appeal applied *Williams* to section 1236. *Hitchings* states, "Although *Williams* involved Evidence Code section 1235 and not section 1236, we find the Supreme Court's reasoning in that case persuasive. The language of Evidence Code section 1236 is virtually identical to section 1235. In fact, the provisions were enacted as part of the same legislative bill in 1965, and both became effective on January 1, 1967. Thus, under ordinary rules of statutory construction, Evidence Code section 1236 should be interpreted consistently with section 1235. (Citations.) [¶] Here, appellant did not testify at his second trial. Thus, he did not testify 'at the hearing' at which the question of whether his prior consistent statements were admissible arose. (See *People v. Williams, supra,* 16 Cal.3d at [669].) Accordingly, the statements made by appellant during his conversation with Pellegrini could not be consistent with his testimony at 'the hearing.' Those statements are therefore not admissible under Evidence Code sections 791

and 1236. (See *Williams, supra,* 16 Cal.3d at [669].)" (*People v. Hitchings, supra,* 59 Cal.App.4th at 922, fn. omitted.)

For the reasons stated in *Williams, Rojas*, *Blacksher,* and *Hitchings*, all *supra*, Evidence Code section 1236 does not permit the admission at trial as substantive evidence of prior consistent statements of a declarant who does not testify at the trial. Thus, it was error to admit Les Ballou's Prior Statements as substantive evidence.

Appellant's jury was instructed to consider the former testimony of Les Ballou that was read to it "as if it had been given before you in this trial." (CALJIC 2.12, 14 CT 3703.) The instruction does not affect the question under discussion. The instruction informs the jury how to consider such former testimony as it is allowed to hear; it does not convert the former testimony into trial testimony for purposes of applying the rules of evidence. In *Hitchings*, the defendant, the proponent of the prior consistent statement, argued that he should be treated as if he testified at the second trial, because his testimony from the first trial was read into the record, and the trial court instructed the jury to treat his prior testimony as if it had been given at the second trial. (*People v. Hitchings, supra,* 59 Cal.App.4th at 922, fn. 3.) *Hitchings* rejected this contention (*ibid.*), and properly so. In *Rojas*, the jury was instructed "that the testimony given by a witness at a prior proceeding is to be considered in the same light and in accordance with the same rules which relate to testimony given by witnesses in court." (*People v. Rojas, supra,* 15 Cal.3d at 548.) Nevertheless, *Rojas* concluded that the prior statements were not admissible under section 1235, "in view of the fact that Navarrette did not testify at the hearing at which the question of admissibility of the testimony arose." (*Id.* at 548.) The implication is clear that the instruction did not change the status of the prior statements from former testimony to trial testimony.

Rojas supports *Hitchings*'s rejection of the defendant's contention concerning the effect of the instruction.[9]

For all these reasons, it was error to admit Les Ballou's Prior Statements as substantive evidence and to instruct the jury they could be considered for their truth.

D. The Prior Statements are not admissible to support Les Ballou's credibility as a witness under Evidence Code section 791, because Les Ballou did not testify at the trial.

The prosecutor argued that the Prior Statements were admissible under Evidence Code section 791 to corroborate Les Ballou's testimony at the preliminary hearing. (12 RT 1608.) Section 791 deals with admission of prior consistent statements to support a trial witness's *credibility*, as opposed to for the truth of the matter stated. It is as follows:

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

---

[9] *Williams* does not state whether the jury was instructed as in CALJIC No. 2.12. It cannot be assumed such instruction was given, because, according to appellant's research, no case has held that the duty to give CALJIC No. 2.12 is sua sponte. (See *People v. Wharton* (1991) 53 Cal.3d 522, 598-599 [recognizing the question but not deciding it]; bench notes to CALCRIM No. 317.)

> "(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791.)

Evidence Code section 791 sets forth several conditions for admissibility of a statement, the first of which is that the statement is one "previously made by a witness that is consistent with his testimony at the hearing." In section 791, as in section 1236, the meaning of the phrase "testimony at the hearing" is governed by section 145. As discussed in the preceding section of argument, as applied to admission of statements in appellant's trial, the phrase means the witness's testimony at the trial. Since Les Ballou did not testify at the trial, the Prior Statements are not consistent with his testimony at the trial. Therefore, the Prior Statements were not admissible to support Ballou's credibility under section 791. (*People v. Blacksher, supra,* 52 Cal.4th at 806; *People v. Williams, supra,* 16 Cal.3d at 665-666; *People v. Rojas, supra,* 15 Cal.3d at 547-548; *People v. Hitchings, supra,* 59 Cal.App.4th at 922.)

E. The Prior Statements are not admissible to support Les Ballou's credibility as a hearsay declarant under Evidence Code sections 791 and 1202, because the foundational requirements of section 791 are not met.

1. Evidence Code section 1202.

As discussed above, the Prior Statements were not admissible either for their truth under Evidence Code section 1236 or to support Les Ballou's credibility under Evidence Code section 791, because those sections deal with trial witnesses, and Les Ballou was not a trial witness. He was a

hearsay declarant. The admissibility of a statement to support a hearsay declarant's credibility, but not as substantive evidence, is governed by Evidence Code section 1202. In pertinent part, section 1202 provides that evidence offered to attack or support the credibility of a hearsay declarant, other than evidence of a prior *in*consistent statement, "is admissible if it would have been admissible had the declarant been a witness at the hearing." (Evid. Code, § 1202.)[10] Thus, to apply section 1202 to the Prior Statements, it is necessary to assume that Ballou appeared as a witness at appellant's trial and testified as he did at the preliminary hearing and then consider whether the prior statements would have been admissible to support his credibility. "Section 1202 of the Evidence Code was drafted to ensure that the unavailability of a hearsay declarant would not prevent introduction of relevant evidence which would be admissible if the declarant was in court ...." (*People v. Marquez* (1979) 88 Cal.App.3d 993, 998.) This hypothetical analysis brings section 791, subdivisions (a) and

---

[10] Evidence Code section 1202 is as follows:

> "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant." (Evid. Code, § 1202.)

(b) into play.

2. Implicit rulings.

When court and counsel discussed Jaffe's objection to Mae Ballou's testimony, the court engaged in analysis consistent with the provisions of section 791. (12 RT 1609-1611.) Concerning subdivision (a), the court found that Les Ballou's statement to Officer May that he did not see anything unusual on April 22, 1999 was not inconsistent with his testimony that he saw the unfriendly man. (12 RT 1609.) Jaffe added that Officer May asked Ballou, "Did you see anyone familiar," and Ballou "did not give an affirmative response." (12 RT 1610.) The court did not make an express ruling on this question, because the prosecutor broke in to argue, concerning subdivision (b), that there was a charge of fabrication. (12 RT 1610-1611.) At the end of the prosecutor's argument on that point, the court asked Jaffe if there was anything else. Jaffe said, "No." The court stated, "Very well. I shall allow her to testify as to both purposes [i.e., to support credibility and as substantive evidence]." (12 RT 1611.) As discussed above, the court's ruling to admit the Prior Statements as substantive evidence is clearly erroneous. The grounds for the court's ruling that the statements were admissible to support Les Ballou's credibility are unclear. The court may have implicitly found either impeachment by a prior inconsistent statement or a charge of fabrication. Appellant discusses both possibilities below.

3. Standard of review.

"Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (Citations.)" (*People v. Waidla* (2000) 22 Cal.4th 690, 717; see

People v. Johnson (1992) 3 Cal.4th 1183, 1219-1220 [rejecting trial court's finding that statements were inconsistent because finding was not supported by substantial evidence].) As appellant will discuss, the court abused its discretion in making these implicit findings, because they are not supported by substantial evidence.

4. Evidence Code section 791, subdivision (a) does not apply, because Ballou was not impeached with a prior inconsistent statement.

Evidence Code section 791, subdivision (a) provides that evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is admissible to support his credibility if it is offered after "[e]vidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement ...." (Evid. Code, § 791, subd. (a).)

The threshold question concerning subdivision (a) is whether Ballou was impeached with a prior inconsistent statement. The only possible prior inconsistent statement is Ballou's statement to Officer May the day after the homicides. If that statement were determined to be inconsistent with Ballou's preliminary hearing testimony, evidence of Ballou's statement to his wife in the backyard just after he saw the unfriendly man might then be admissible, because that statement would have been "made *before* the alleged inconsistent statement ...." (Evid. Code, § 791, subd. (a), italics added.) The determination would not affect the admissibility of any other Prior Statement, however, because the other Prior Statements were all made *after* Ballou spoke to Officer May.

As appellant will discuss, there was no evidence of a statement by

Ballou that was inconsistent with his preliminary hearing testimony. At most, there was evidence of an opportunity for Ballou to make an inconsistent statement, but no evidence he actually did so.

At Jaffe's request, the court decided the question concerning Mae Ballou's testimony with reference to both Les Ballou's testimony on direct examination and cross-examination at the preliminary hearing and Jaffe's offer of proof concerning Les Ballou's responses to questioning by Officer May the day after the homicides. (12 RT 1607-1608, 1610.) So far as relevant here, Les Ballou's testimony on cross-examination was simply that he did not mention the man who walked by when police officers questioned him shortly after the homicides. (6 RT 864.)

The offer of proof was that Officer May asked Ballou, "Did you see anyone unfamiliar to you [on the day of the homicides]," and Ballou "did not give an affirmative response." (12 RT 1610.) The offer was borne out by subsequent testimony. When Detective Shumway testified on February 1, 2001, Jaffe took him as his own witness. (13 RT 1786.) Shumway testified that Officer May questioned Les and Mae Ballou as part of a neighborhood canvass on April 23, 1999. (13 RT 1789.) He asked them six questions: "Were you home on Thursday, 4-22-99?" "Was anyone home with you?" "Did you see anyone unfamiliar to you?" "Did you see the victim's vehicle in the neighborhood?" "Did you see any delivery service or utility type vehicle in the neighborhood?" "Did you notice anything out of the ordinary during the early morning hours up until the late afternoon?" (13 RT 1790.) The record does not disclose whether the questions were asked and answers received one at a time or as a group. The only evidence of a response to Officer May's questions was the testimony of Mae Ballou and Shumway that Les and Mae both said they had seen AT&T repairmen working on phone lines. (6 RT 1627-1628; 13 RT 1790.)

Les did not mention the unfriendly man walking by his house. Mae did not say her husband told her about the unfriendly man. Neither said they saw or heard anything unusual other than the AT&T repairmen. (6 RT 1627-1628; 13 RT 1790-1791.)

The testimony reviewed above is not evidence that Les Ballou made a statement inconsistent with his preliminary hearing testimony that he saw an unfriendly man walk by on April 22, 1999. There is evidence that Ballou was asked questions to which he might have responded that he saw a man walk by, but no evidence that he denied having seen a man walk by. So far as the evidence shows, he simply did not answer those questions.

Ballou's failure to answer is similar to the situation of a witness who testifies that he does not remember an event. If the claimed failure of memory is found to be untruthful and evasive, the claim may be taken as an inconsistent statement. Speaking with reference to section 1235, this Court stated, "'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement (citation), and the same principle governs the case of the forgetful witness.' (Citation.) When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. (Citation.)" (*People v. Johnson, supra,* 3 Cal.4th at 1219–1220.) Otherwise, however, failure of memory is not taken as an inconsistent statement. "Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. (Citation.)" (*Ibid.*)

Here, there is no reason to believe that Ballou's failure to answer Officer May's question was untruthful or evasive. Ballou had no personal stake in the matter and no relation to appellant or the victims. When Officer May questioned him, he had no reason to connect the unfriendly man to the homicides. His failure to answer was just that, an omission, not

an inconsistent statement. Therefore, if Ballou had appeared and testified at the trial as he did at the preliminary hearing, his Prior Statement would not have been admissible to support his credibility under section 791, subdivision (a). Therefore, his Prior Statement was not admissible to support his credibility as a hearsay declarant under Evidence Code section 1202.

5. Evidence Code section 791, subdivision (b) does not apply, because there was no charge that Ballou's preliminary hearing testimony was recently fabricated or influenced by improper motive.

Evidence Code section 791, subdivision (b) provides that evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is admissible to support his credibility if it is offered after "[a]n express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subd. (b).) When court and counsel discussed Mae Ballou's proposed testimony about a prior consistent statement by her husband, the prosecutor argued that the defense cross-examination of Les Ballou at the preliminary hearing was, "in a sense, a charge of a recent fabrication as of the date of the newspaper viewing on June 3rd, that he saw this picture in the paper and is fabricating the fact that he saw an individual walk by that morning, it was the defendant who did not say, 'Good morning.'" (12 RT 1610.) The prosecutor contended that evidence that Ballou "did make a comment to his wife consistent with his ... subsequent statement that a man did pass by and was rude ... rebuts the insinuation throughout cross-

examination that this was a fabrication that was motivated by the viewing of the arraignment photograph on June 3rd." (12 RT 1610-1611.) The court may have agreed with the prosecutor's argument, because it immediately ruled that it would allow the prior consistent statement to be considered in support of Ballou's credibility. (12 RT 1611.)

The court's ruling was error, because the cross-examination at the preliminary hearing was not an express or implied charge of "fabrication" within the meaning of section 791, subdivision (b). Even if it is assumed that Ballou's identification of appellant as the man who walked by on April 22 was motivated by the photograph published on June 3rd, that is not the sort of "improper motive" contemplated by section 791.

The argument in this section affects only the admissibility of the testimony of Mae Ballou and Detective Shumway that Les Ballou told Mae about seeing an unfriendly man walk by, because that statement was made before Les Ballou saw the photograph. Thus, that statement was "made *before* the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subd. (b), italics added.) The other Prior Statements were made *after* Ballou saw the photograph.

As used in section 791, subdivision (b), the term "fabrication" means an intentional falsehood. A legal dictionary defines "fabricate" as follows: "To invent; to devise falsely. Invent is sometimes used in a bad sense, but fabricate never in any other." (Black's Law Dictionary, 4th ed., p. 703.) "The word implies fraud or falsehood; a false or fraudulent concoction, knowing it to be wrong. (Citation.)" (*Ibid.*) Published decisions applying section 791, subdivision (b) uniformly use the term in that sense and identify the improper motive for the falsehood, generally the witness's self-interest. (E.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 614-615 [suggestion that witness's testimony on direct examination implicating

defendant was biased or fabricated because of threats of prosecution made by the police and the district attorney, because she was intoxicated, and because she was granted immunity]; *People v. Bolin* (1998)18 Cal.4th 297, 320-321 [cross-examination of prosecution witness elicited testimony he had given his account of events implicating defendant only after he himself had been charged with two counts of murder and had spoken with his attorney, after which he was released from custody and charges were dropped; implication was that his attorney had encouraged him to fabricate the accusations against defendant]; *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012 [charge that witness lied when she testified that appellant threatened her, because she had found out appellant had been seeing other women].)

An express or implied charge of fabrication may be found in the tenor of the questions asked on cross-examination. "The mere asking of questions may raise an implied charge of an improper motive...." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1209.) "[D]efense counsel's questioning of Sanders raised an implicit charge that the 'deal' provided Sanders with an additional motive to testify untruthfully." (*People v. Andrews* (1989) 49 Cal.3d 200, 210.) "In evaluating the admissibility of prior consistent statements, the focus is on `the specific agreement or other inducement suggested by cross-examination as supporting the witness's improper motive.' (Citation.)" (*People v. Crew* (2003) 31 Cal.4th 822, 843; see *People v. Noguera* (1992) 4 Cal.4th 599, 630.)

On the other hand, not all cross-examination that questions a witness's credibility implies fabrication or improper motive. "[W]e emphatically reject defendant's argument that any prior ... statements automatically became admissible merely because his ' "credibility in general" ' was attacked during cross-examination." (*People v. Ervine*

(2009) 47 Cal.4th 745, 779-780.) In *People v. Johnson, supra,* 3 Cal.4th 1183, this Court stated, concerning the preliminary hearing testimony of a trial witness, Angela, that "the testimony would not have been admissible under the theory it was a prior consistent statement, since defense counsel had made no express or implied charge that Angela's trial testimony was recently fabricated, or influenced by bias or other improper motive. The defense merely attempted to show that Angela's identification of defendant was mistaken." (*Id.* at 1219, fn. 3; see *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266, 272 ["Defendants' cross-examination, while attacking [the witness's] credibility, did not give rise to an inference of recent fabrication."].)

The situation in appellant's case is just like the situation in *People v. Johnson, supra,* 3 Cal.4th 1183: Jaffe made no express or implied charge that Ballou's preliminary hearing testimony was recently fabricated, or influenced by bias or other improper motive. Jaffe "merely attempted to show that [Ballou]'s identification of defendant was mistaken." (*Id.* at 1219, fn. 3.)

Review of Jaffe's cross-examination of Ballou shows there was no implication of fabrication or improper motive. Jaffe began by asking Ballou if he had been "documenting this case in the newspaper." Ballou said he had not. (6 RT 863.) Jaffe asked Ballou regarding his failure to mention the man who walked by to officers who questioned him on two occasions after April 22, 1999. Ballou admitted he did not tell any officer about the man walking by until he talked to Shumway on June 26, 1999. (6 RT 864-865, 868.) Jaffe asked Ballou whether a lot of people walk by his house. Ballou said they do, especially in the morning, and he knew most of them but did not know a few. Jaffe asked Ballou about the glasses he was wearing. Ballou said he wore them full-time, and he was wearing them

when he saw the man. (6 RT 865.) Jaffe asked Ballou why he would remember that the not-nice man walked by on April 22, 1999 instead of some other day. Ballou said the way the man answered him made him pay attention to the man, and the man was real close to the curb, and he noticed his shirt. (6 RT 866.) Jaffe asked again what it was that made Ballou believe he saw the man on April 22, 1999 instead of some other day. Ballou said he knew or recognized most people who walk by, but "this man was a stranger. Absolutely a stranger. I never seen him before in my life." (6 RT 866-867.) Jaffe asked Ballou if he made a note in his calendar about it. Ballou said he did not. Jaffe asked if Ballou told anyone about seeing the man. Ballou said he told his wife just a few minutes later. Jaffe asked why Ballou was sure he told his wife on the day the bodies were found, and Ballou said, "Right." (6 RT 867.) Ballou said he did not tell anyone other than his wife until Shumway came to his house. (6 RT 868.) He said he told Shumway that the man in the photo "sure looks like the fellow that I saw that day." Jaffe asked Ballou if he could say for certain it was the same man. Ballou said he was 99 percent sure it was, although he used the less precise term, "looked like." (6 RT 869-870.) Jaffe asked if Ballou noticed anything distinctive about the manner in which the man walked. Ballou said he noticed his shirt and that the man was "kind of dark, like he'd been sunburned." (6 RT 870.) He agreed with Jaffe that at the preliminary hearing appellant was not sunburned and his skin color was different than that of the man who walked by. He also agreed with Jaffe that he had not seen appellant in person since April 22, 1999, and he knew he was coming to court to make an identification and appellant would be seated at the counsel table. He agreed that the image that he saw in the newspaper was "pretty well seared in [his] memory." He said that appellant "sure does" look like the person he saw in the newspaper. (6 RT 871-872.) He agreed

he told his wife the man in the photo "resembles" the man who walked by. Jaffe asked if Ballou noticed any blood on the man's clothing. Ballou said any blood would not have been visible, because the man's shirt had a dark front with two white sleeves. (6 RT 873.) Jaffe asked about the man's hair. Ballous said it was a full head of hair, and it was thinning. He said the thinning was "not like it is now ... He probably might have had a haircut." He agreed he had not told the police the man's hair was thinning, only that it was dark. (6 RT 874.) He agreed that when he saw the man on April 22, 1999, he had no idea the man was involved in a homicide, and if he had known he would have paid more attention. Jaffe asked Ballou if he noticed any scratches or any bumps on the forehead or whether the man was bleeding. Ballou said he did not notice. (6 RT 875.) He agreed with Jaffe he probably saw the man for from 3 to 7 seconds. Jaffe pointed out that, in the photo, appellant has a mustache. Ballou said he did not notice a mustache on the man who walked by. (6 RT 876.) Jaffe asked Ballou's age. Ballou said he was 92. Jaffe asked Ballou if he was more certain that the person in the photo was appellant than he was that the man who walked by was appellant. Ballou said, "I'd say it's the same person." (6 RT 877.) Jaffe asked Ballou whom he first told that the person in the photo was the man who walked by. Ballou said it was his wife. He said he did not tell any other neighbor about it, but his wife told some people. He said he did not give the police a description of the man except that he looked like the man in the photo. (6 RT 878.)

Thus, the thrust of Jaffe's cross-examination of Ballou was that the unfriendly man Ballou saw was not appellant or that Ballou saw the man on some day other than April 22, 1999. The charge was that Ballou was mistaken, not that he had any improper motive. So far as the record shows, it was a matter of indifference to Ballou whether the man he saw was

appellant or not, because Ballou had no personal interest in the matter. Jaffe's cross-examination did not suggest otherwise.

Since there was no express or implied charge of fabrication, bias, or other improper motive, if Ballou had appeared and testified at the trial as he did at the preliminary hearing, his Prior Statement about seeing the unfriendly man would not have been admissible to support his credibility under section 791, subdivision (a). Therefore, his Prior Statement was not admissible to support his credibility as a hearsay declarant under Evidence Code section 1202.

F. Instructional error compounded the error of admitting the Prior Statements.

The error in admitting the Prior Statements was compounded by a jury instruction that prior consistent statements could be considered for the truth of the matter stated. (CALJIC No. 2.13, 14 CT 3704.)

G. Erroneous admission of the Prior Statements violated appellant's Eighth and Fourteenth Amendment rights to heightened reliability.

Admitting the Prior Statements denied appellant's state and federal constitutional rights to due process and a reliable verdict in a capital case. The Eighth and Fourteenth Amendments require a heightened standard of reliability at both guilt and penalty phases. (*Beck* v. *Alabama, supra,* 447 U.S. at 638; *Woodson v. North Carolina, supra,* 428 U.S. at 305; see *Gilmore v. Taylor, supra,* 508 U.S. at 342; *Penry v. Lynaugh, supra,* 492 U.S. at 328; *Johnson v. Mississippi, supra,* 486 U.S. at 587; *Green v. Georgia, supra,* 442 U.S. at 96-97.) The erroneous, prejudicial admission of the Prior Statements casts doubt on the reliability of the verdicts and is a denial of appellant's constitutional rights.

H. Prejudice.

Prejudice from error that denies appellant's rights under the Eighth and Fourteenth Amendments is assessed under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California, supra*, 386 U.S. at 24. (*Arizona v. Fulminante, supra,* 499 U.S. at 306; *Satterwhite v. Texas* (1988) 486 U.S. 249, 260; *Hopper v. Evans* (1982) 456 U.S. 605, 614.)

The error here was not harmless beyond a reasonable doubt. The prosecution case was entirely circumstantial and not particularly strong. There was no direct evidence that appellant committed the crimes. There was no direct evidence as to where the crimes were committed. There was no direct evidence of appellant's whereabouts during the time the crimes must have been committed, that is, between the time appellant dropped Ashley off at her school and the time he dropped off clothing at the cleaners around 12:00 PM. The prosecutor must have had doubts about the strength of his case, because, even as the trial was underway, he attempted to develop additional evidence against appellant. He sent an RPD officer to take the Kopatz van from storage, drive it to the Kopatz home, and attempt to collect evidence that a mark on the passenger-side side mirror was produced by scraping the mirror against the house or a post when the van was in a position in which bodies could have been loaded into it from the rear of the house, but the results were negative as to the house and inconclusive as to the post. (12 RT 1649-1662, 1698-1706.)

Introducing evidence of Les Ballou's Prior Statements was another effort by the prosecutor to bolster his case. As defense counsel acknowledged to the jury in closing argument, Les Ballou's testimony at the preliminary hearing was among the most important evidence against appellant. (14 RT 1994.) The inadmissible evidence the prosecutor put

before the jury through the testimony of Mae Ballou and Detective Shumway on the last two days of the prosecution case-in-chief repeated and reinforced Les Ballou's preliminary hearing testimony. Repetition inevitably conveyed the impression of accuracy. At the very least, it kept Ballou's statements in the forefront of the jury's mind.

Admitting Mae Ballou's testimony about her husband's statements was particularly prejudicial in that it tended to cure a serious weakness in his testimony. The weakness was that, although Les Ballou was clear that the unfriendly man he saw was appellant, he was unable to give any cogent reason why he remembered that he saw the unfriendly man *on the day of the homicides*. When Jaffe asked Ballou on cross-examination why he was sure he saw the man on April 22, 1999, instead of April 23 or April 24, Ballou was non-responsive. He said the way the man answered him made him pay attention to the man, and "everybody goes by and remarks how nice our place looks ...." (6 RT 866.) Jaffe repeated the question, and Ballou was still non-responsive. He said the man was real close to the curb, and he noticed his shirt. (6 RT 866.) Jaffe asked the question a third time, and the result was the same. Ballou said he knew or recognized most people who walk by, but the man was a stranger. (6 RT 866-867.) Ballou said he told his wife about the incident just a few minutes later. When Jaffe asked why Ballou was sure he told his wife on the day the bodies were found, Ballou said, "Right." (6 RT 867.) Thus, Ballou was unable to say how or why he knew he saw the man on the day of the homicides. This was a gaping hole in the prosecution evidence. But, when Mae testified, the prosecutor asked her, in leading fashion, "[W]hen he told you [about the unfriendly man], was it the same day that the van was found with the mother and the little girl in it?" She answered, "Yes, it was." (12 RT 1616.)

Further damage was done when Mae testified that, although Les Ballou was 90 years of age in April 1999, he was "very brilliant." "His mind was very, very good. He remembered everything." "He never had any problems." (12 RT 1617.) The court ruled that Mae's testimony about Les's memory would stay in, but the earlier part of her answers would be struck. The court admonished the jury "to treat the other as though you never heard it." (12 RT 1618.) However, this is surely one of those situations in which the attempt to "unring the bell" must be found to have been unsuccessful.

For these reasons, admitting the inadmissible evidence of Ballou's statements made prior to his preliminary hearing testimony was highly prejudicial. Without it, the result might well have been different. The convictions should be reversed.

I. Reversal of the convictions is required.

For the reasons stated above, the convictions should be reversed.

III. ADMITTING EVIDENCE OF THE OUT-OF-COURT STATEMENT OF JENNIFER FLEMING WAS *CRAWFORD* ERROR THAT DENIED APPELLANT'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT.

A. Introduction.

Appellant claimed that, as part of his search for Mary and Carley on the day of the homicides, he called the Sav-on pharmacy to see if Mary had gone there to pick up a prescription. The prosecutor contended that appellant did not call Sav-on, because he knew Mary was dead, and his statement that he did call was a deliberate falsehood that showed consciousness of guilt. To prove that appellant did not call Sav-on, the prosecutor called as a witness nearly every pharmacy employee who worked on that day, and they all testified that they did not receive any call from appellant that day. However, there was one pharmacy employee, Jennifer Fleming, who worked that day but whom the prosecutor did not call as a witness. Instead, the prosecutor presented the testimony of a police detective, Detective Shelton, who went to the pharmacy several days later to question the employees. His testimony was that he spoke to Fleming, and she told him she did not receive any call from appellant. As appellant will discuss, the detective's testimony about Fleming was a violation of appellant's federal constitutional right to confrontation, because Fleming's statement was testimonial, there was no showing she was unavailable as a witness, and appellant had no opportunity to cross-examine her.

B. Cognizable issue.

Appellant's argument relies on *Crawford v. Washington* (2004) 541

U.S. 36 (*Crawford*), which "announced a new standard for determining when the confrontation clause of the Sixth Amendment prohibits the use of hearsay evidence ... against a criminal defendant." (*People v. Cage* (2007) 40 Cal.4th 965, 969.) Although *Crawford* was decided after appellant's trial, a new rule announced by the high court applies to all criminal cases that, like appellant's case, are still pending on appeal. (*Id.* at 974, fn. 4; *Schriro v. Summerlin* (2004) 542 U.S. 348, 351.)

Defense counsel did not object to Detective Shelton's testimony about Fleming's statement, but failure to object is excused, because defense counsel could not have foreseen the holding in *Crawford*. "When the ground of objection rests on a change in the existing law so substantial that counsel cannot reasonably be expected to anticipate it, the failure to object is excused. (Citations.)" (*People v. Cage, supra,* 40 Cal.4th at 974, fn. 4; *People v. De Santiago* (1969) 71 Cal.2d 18, 22-23, 28; see *People v. Black* (2007) 41 Cal.4th 799, 810.) The rule change effected by *Crawford* meets this standard. (*Ibid.*) "The *Crawford* rule was not 'dictated' by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, [*Ohio v.*] *Roberts* [(1980) 448 U.S. 56], which *Crawford* overruled." (*Whorton v. Bockting* (2007) 549 U.S. 406, 417.) Accordingly, appellant did not forfeit a claim under the confrontation clause of the Sixth Amendment by failing to object on this ground in the trial court. (*People v. Jennings* (2010) 50 Cal.4th 616, 652; *People v. Cage, supra,* 40 Cal.4th at 974, fn. 4.)

C. Relevant proceedings.

Appellant's brother, Alan, testified that, on the afternoon of April 22, 1999, appellant told him he had called the Sav-on pharmacy located at 3530 Adams Street in Riverside to see if Mary had picked up a prescription.

(5 RT 686-687.) Appellant made a similar statement during the videotaped interview with Detectives DeVinna and Shumway during the early morning hours of April 23, 1999. (13 CT 3642).

The prosecutor sought to show that, in fact, appellant had not called the Sav-on pharmacy, so that his statements to the contrary were deliberate falsehoods that showed consciousness of guilt. Seven employees worked in the pharmacy during the day on April 22, 1999: Frank Lombardo, Sally Swor, Juana Longoria, Tina Shaw, Kevin Rawls, Mercedes Brand, and Jennifer Fleming. (6 RT 764-765; 12 RT 1679-1680.) Of these employees, all but Jennifer Fleming testified at the trial. The employees who testified all said they did not recall any telephone call from appellant that day. (6 RT 750 [Lombardo], 763 [Brand]; 9 RT 1147 [Rawls], 1156 [Longoria], 1162-1164, 1166 [Shaw], 1171-1172 [Swor].)

Jennifer Fleming did not testify at the trial. Evidence of her negative recollection was provided by Detective Shelton. He testified that he was assigned to contact the employees at the pharmacy and inquire whether or not appellant had called on April 22, 1999. (12 RT 1678.) The pertinent portion of the direct examination was as follows:

THE PROSECUTOR: Did you speak with ... Juana Longoria?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: Did you make any inquiry as to what her recollections were from April 22, 1999?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: When you spoke with her, did she have a recollection of working on April 22nd, 1999?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: And when you spoke with her, did you inquire as to whether or not she recalled speaking to a Kim Kopatz on

Thursday, April 22nd, 1999?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: What did she say?

WITNESS SHELTON: She had not.

THE PROSECUTOR: And when you spoke with Ms. Swor, was that on the date of ... May 3rd, 1999?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: Did you make the same inquiries of her as to her working on April 22nd, 1999?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: And did she recall receiving a phone call from Kim Kopatz on that date?

WITNESS SHELTON: She had not.

THE PROSECUTOR: Now, you also spoke to, did you not, Tina Shaw?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: Kevin Rawls?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: Mercedes Brand?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: Jennifer Fleming?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: And Frank Lombardo; correct?

WITNESS SHELTON: Yes, sir.

THE PROSECUTOR: Who was it you didn't speak to who was working that you didn't cover?

WITNESS SHELTON: Just two. On that particular day I didn't speak to Swor or Lombardo. I contacted Lombardo and Swor on 5/3.

THE PROSECUTOR: And you spoke to all the other ones on April 26th, 1999?

WITNESS SHELTON: Yes.

THE PROSECUTOR: I have no further questions. (12 RT 1679-1680.)

The prosecutor did not question Shelton concerning Shaw, Rawls, Brand, Fleming, and Lombardo in the same detail as he did concerning Longoria and Swor, but the pattern of questioning used for Longoria and Swor was implicit in the questioning concerning the others, including Fleming. The fair import of Shelton's answer concerning Fleming was that she told him she did not receive a call from appellant on April 22, 1999.

In his closing argument to the jury, the prosecutor made much of the conflict between appellant's claim to have called the pharmacy and the evidence from the pharmacy employees that he did not call. The prosecutor called the jury's attention to CALJIC No. 2.03 (14 CT 3700), which states that a willfully false statement may be considered as a circumstance tending to prove a consciousness of guilt. The prosecutor told the jury, "The statements by the defendant show consciousness of guilt. There's a number of them. .... But one that stands out, 'I called Sav-on's to check to see if Mary had picked up that prescription that she ran off to do in her errands.' [¶] Well, the police looked. They checked everyone that worked at Sav-on's. You heard the people here in court come in and testify. They knew the defendant. He was a regular customer. He probably knew them by name. He didn't call Sav-on's, because he knew she didn't pick up that prescription. Mary never left home that day alive." (14 RT 1906-1907.)

D. *Crawford v. Washington.*

The Confrontation Clause of the Sixth Amendment states: "In all

criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The Fourteenth Amendment renders the Clause binding on the States. (U.S. Const., 14th Amend.; *Michigan v. Bryant* (2011) ___ U.S. ___, 131 S.Ct. 1143, 1152; *Pointer v. Texas* (1965) 380 U.S. 400, 403.)

In *Crawford v. Washington, supra,* 541 U.S. 36, the United States Supreme Court held that the confrontation clause of the Sixth Amendment bars admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. (*Id.* at 53-54; see *People v. Cage, supra,* 40 Cal.4th at 970.)

E. Admitting evidence of Fleming's statement to Detective Shelton violated appellant's right of confrontation under *Crawford.*

1. Definition of "testimonial."

The touchstone of the *Crawford* rule is the requirement that the hearsay statement in question must be "testimonial." (*Crawford v. Washington, supra,* 541 U.S. at 59; *People v. Geier* (2007) 41 Cal.4th 555, 597.) In *Crawford*, the statement in question was one given by the defendant's wife, Sylvia, who was questioned twice by detectives. (*Crawford v. Washington, supra,* 541 U.S. at 38.) She was evidently in custody when she was questioned, because she was given *Miranda* warnings. (*Ibid.*) *Crawford* states that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." (*Id.* at 52.)

Crawford chose to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" (*Id.* at 68, fn. omitted.) It did,

however, provide situational examples of statements that are testimonial: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." (*Id.* at 68, italics added.)

Besides these discrete categories, *Crawford* also provided some suggestive, less-defined guidelines. It discussed the definitions of the term "testimonial" proffered in the *Crawford* briefing and in Justice Thomas's concurring opinion in *White v. Illinois* (1992) 502 U.S. 346, 365. It stated: "Various formulations of this core class of 'testimonial' statements exist: ' *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially' [citation]; 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." (*Crawford v. Washington, supra,* 541 U.S. at 51–52.) These guidelines look to the reasonable expectations of an objective witness. (See *People v. Rincon* (2005) 129 Cal.App.4th 738, 757.)

In *Davis v. Washington* (2006) 547 U.S. 813, the court considered a 911 call in which a victim reported that her former boyfriend was beating her with his fists. (Id. at 817-818.) *Davis* held as follows: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at 822.) Applying that standard to the facts before it, *Davis* held that the victim's statement to the 911 operator was not testimonial.

In *Hammon v. Indiana*, discussed and decided in the same opinion as *Davis*, police officers responded to a complaint of domestic violence at the Hammon home. When the officers arrived, the incident was over. One officer interviewed Amy Hammon, the victim, in the living room while another officer kept Amy's husband, Hershel Hammon, in the kitchen. (*Id.* at 819-820.) Applying the *Davis* standard, the court held that Amy's statements to the officer were testimonial, because "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." (*Id.* at 829.) There was "no emergency in progress." (*Ibid.*) The officer questioning Amy "was not seeking to determine ... 'what is happening,' but rather 'what happened.' " (*Id.* at 830.) Although the interview of Amy was not as formal as the custodial interview of Sylvia in *Crawford*, It was "formal enough" that the police interrogated Amy in a room separate from her husband where, "some time after the events described were over," she "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." (*Ibid.*) Because her statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation," the court held that they were testimonial. (*Id.* at 832.)

In *Michigan v. Bryant, supra,* 131 S.Ct. 1143, police officers responded to a 911 call concerning an assault with a firearm. When the

officers arrived, the victim was mortally wounded, and the suspect was still at large and presumably armed. (*Id.* at 1150, 1156.) Considering the statements the victim made to the officers before he was taken to the hospital, the court reasoned as follows: "At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." (*Id.* at 1164, fn. omitted.) The court held the statements were not testimonial. (*Id.* at 1167.)

The court stated, "the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial. (Citation.) Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." (*Michigan v. Bryant, supra,* 131 S.Ct. at 1155, fn. omitted.) The court explained that when, in *Davis*, it held that " 'interrogations by law enforcement officers fall squarely within [the] class' of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial." (*Id.* at 1153, citing *Davis v. Washington, supra,* 547 U.S. at 826.)

The court characterized this as the "primary purpose" test. "When, as in *Davis,* the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." (*Michigan v. Bryant, supra,* 131 S.Ct. at 1155.)

This Court has provided definitions of "testimonial" as pertinent to the confrontation clause. In *People v. Geier, supra,* 41 Cal.4th 555, the court considered an out-of-court statement by one forensic examiner, Paula Yates, to another, Dr. Cotton, concerning the results of a DNA test. (*Id.* at 596.) This Court made its own interpretation of *Crawford* and *Davis* and held that "a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*Id.* at 605.) Applying this test, the court found that the second element was critical. It held that Yates's actions "constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Id.* at 605-606.) On that basis, the court held that, when Yates made her observations, she was not acting as a witness and was not "testifying" against the defendant. (*Id.* at 606.) Therefore, her statement was not testimonial. (*Id.* at 607.)

In *People v. Romero* (2008) 44 Cal.4th 386, an officer responding to an emergency call encountered an agitated victim who said he had just been

attacked with a small ax. The victim described the ax attack and the perpetrator. Within five minutes, other officers detained the defendant and showed him to the victim, and the victim identified the defendant as the attacker. (*Id.* at 420-421.) This Court applied the "primary purpose" test of *Davis.* It observed that "a critical consideration is the primary purpose of the police in eliciting the statements. Statements are testimonial if the primary purpose was to produce evidence for possible use at a criminal trial; they are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator. (Citations.)" (*Id.* at 422, citing *People v. Cage, supra,* 40 Cal.4th at 984 and *Davis v. Washington, supra,* 547 U.S. at 832.) Applying these standards, the court found that "the statements [describing the attack] provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. The statements were not made primarily for the purpose of producing evidence for a later trial and thus were not testimonial. The same is true of the statements pertaining to identification. The primary purpose of the police in asking victim Schmidt to identify whether the detained individuals were the perpetrators, an identification made within five minutes of the arrival of the police, was to determine whether the perpetrators had been apprehended and the emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat." (*Ibid.*) Thus, the court held that the victim's statements were not testimonial. (*Ibid.*)

2. Fleming's statement to Detective Shelton in response to his questioning was "testimonial."

Under any of the definitions discussed above, Fleming's statement to Detective Shelton that she did not receive any call from appellant inquiring about his wife's picking up a prescription is "testimonial" for purposes of *Crawford*. The statement is the product of "police interrogation." Detective Shelton was assigned to go to Sav-on to inquire whether appellant had called about a prescription. (12 RT 1678.) At Sav-on, Shelton took the pharmacy employees, including Fleming, to the side one by one and questioned them. (12 RT 1681.) Shelton's questioning of Fleming and the other pharmacy employees pursuant to an assignment to inquire about a phone call by appellant is an instance of "structured police questioning," which, according to *Crawford*, qualifies as testimonial "under any conceivable definition." (*Crawford v. Washington, supra,* 541 U.S. at 52.) It is similar to the questioning in *Hammon*, where the police questioned Amy in a room in her home, but separate from her husband, and her statements were held to be testimonial. (*Hammon v. Indiana, supra,* 547 U.S. at 819-820.)

Shelton's questioning of Fleming was not custodial like the questioning in *Crawford*, but *Crawford* clarified that, when it said that a statement obtained through "police interrogation" was a clear example of a "testimonial" statement, it "use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense. (Citation.)" (*Crawford v. Washington, supra,* 541 U.S. at 38, fn. 4, citing *Rhode Island v. Innis, supra,* 446 U.S. at, 298.) *Hammon* reiterated this point, finding that the questioning of Amy in her living room was "formal enough." (*Hammon v. Indiana, supra,* 547 U.S. at 830.) From these decisions, it follows that

Shelton's questioning of Fleming when he took her to one side during a visit to the pharmacy for the sole purpose of questioning the employees was also "formal enough" to qualify as structured police questioning.

Consideration of the "primary purpose" of Shelton's questioning further demonstrates that the statements he obtained, including Fleming's, were testimonial. Shelton went to the pharmacy on April 26, 1999, four days after the homicides were committed. Clearly, there was no ongoing emergency, and "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington, supra,* 547 U.S. at 822.) As the court said in *Hammon*, "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." (*Hammon v. Indiana, supra,* 547 U.S. at 829.) The employees' statements were testimonial, because they "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." (*Id.* at 832.) Instead, Shelton's questioning was "interrogation[] solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial." (*Davis v. Washington, supra*, 547 U.S. at 826; accord, *Michigan v. Bryant, supra,* 131 S.Ct. at 1153.)

In *Michigan v. Bryant*, the court observed that, "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." (*Michigan v. Bryant, supra,* 131 S.Ct. at 1155.) In that context, it is significant that Fleming's statement is hearsay not subject to any hearsay exception. This, too, shows that Fleming's statement is testimonial.

Fleming's statement is testimonial under definitions provided by this court. It was made (1) to a law enforcement officer and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. It therefore qualifies as testimonial under the definition given in *People v. Geier, supra,* 41 Cal.4th at 605. Detective Shelton's "primary purpose" in eliciting the statement was to produce evidence for possible use at a criminal trial. The statement therefore qualifies as testimonial under the test given in *People v. Romero, supra,* 44 Cal.4th at 422.) Fleming's statement was "given as an analog of testimony by a witness—[it was] made in response to focused police questioning whose primary purpose, objectively considered, was not to deal with an ongoing emergency, but to investigate the circumstances of a crime ...." (*People v. Cage, supra,* 40 Cal.4th at 970.)

For all these reasons, Fleming's statement to Detective Shelton that she did not receive a phone call from appellant on the day of the homicides was "testimonial" within the meaning of *Crawford.*

3. There was no evidence that Fleming was unavailable.

Crawford holds that the confrontation clause of the Sixth Amendment bars admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. (*Crawford v. Washington, supra,* 541 U.S. at 53-54.)

A witness who is absent from a trial is not "unavailable" in the constitutional sense unless the prosecution has made a "good faith effort" to obtain the witness's presence at the trial. (*Barber v. Page* (1968) 390 U.S. 719, 724–725; *People v. Herrera* (2010) 49 Cal.4th 613, 621.) "The

ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, disapproved on another point in *Crawford v. Washington, supra,* 541 U.S. at 60–68.)

The Evidence Code includes a similar requirement for establishing a witness's unavailability. Evidence Code section 240, subdivision (a)(5) provides that a witness is unavailable when he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance by the court's process." (Italics added.) "Reasonable diligence ... connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.) In this regard, "California law and federal constitutional requirements are the same." (*People v. Valencia* (2008) 43 Cal.4th 268, 291–292.)

Here, there was no suggestion that Fleming was unavailable as a witness. There was no evidence of any effort by the prosecution to produce her as a witness. Her availability or lack thereof was simply not discussed. As a result, the situation here is like that in *Barber v. Page*: "So far as this record reveals, the sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek [her] presence. The right of confrontation may not be dispensed with so lightly." (*Barber v. Page, supra,* 390 U.S. at 725.)

4. Appellant had no opportunity to cross-examine Fleming.

Appellant had no opportunity to cross-examine Fleming. She did not testify at the preliminary hearing or the trial.

5. Admitting Fleming's statement violated *Crawford.*

For the reasons discussed above, Detective Shelton's testimony about Jennifer Fleming's statement was evidence of an out-of-court, testimonial statement by a witness who was not shown to be unavailable and whom appellant had no opportunity to cross-examine. The admission of such testimony violated appellant's federal constitutional right to confrontation of witnesses under *Crawford.*

F. Prejudice.

Prejudice from admitting evidence in violation of *Crawford* is assessed under *Chapman v. California, supra,* 386 U.S. 18. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Cage, supra,* 40 Cal.4th at 991-992; *People v. Geier, supra,* 41 Cal.4th at 608.) Such error requires reversal unless it is harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 18; *Chapman v. California, supra,* 386 U.S. at 24; *People v. Geier, supra,* 41 Cal.4th at 608.)

The prosecutor was attempting to prove a negative, namely, that appellant did not call Sav-on as he said he did. Proving a negative is a difficult task. (E.g., *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 373 (conc. opn. of Chin, J.).) In making such proof, it is logically necessary to demonstrate that, not merely *most* persons, but *all* persons who might have received the alleged call did not do so. A single omission destroys the force of the evidence, because there is no way to say that the omitted person did not receive the call.

Here, the prosecutor called as a witness every single employee who worked in the pharmacy on the day of the homicides except Jennifer Fleming. The failure to call her could not be explained by a stylistic

reluctance to put on basically boring evidence, because the testimony of the other employees was uninteresting, and the prosecutor spent a long time eliciting testimony about the contents of Mary Kopatz's wallet and other personal property found in the van that was so tedious even the judge commented on it. (9 RT 1248-1271.) Had the prosecutor done nothing to account for Fleming, his failure to do so must have suggested to the jury that there was some problem with Fleming or her testimony. The erroneous admission of Detective Shelton's testimony about Fleming's statement to him allowed the prosecutor to overcome this weakness and bolster his case against appellant.

The importance the prosecutor placed upon proving that appellant did not call Sav-on is demonstrated by his reference to it in closing argument to the jury. He ranked it second among the evidence he viewed as particularly incriminating. He told the jury that, if any one piece of evidence stood out in as evidence of appellant's guilt, it was the intentional concealment of evidence by placing blue glue over his scratches. (14 RT 1906.) Immediately after making that point, the prosecutor pointed to the instruction concerning willfully false statements showing consciousness of guilt. (14 RT 1906.) He said there were many such statements, "[b]ut one that stands out is 'I called Sav-on's to check to see if Mary had picked up that prescription ...." (14 RT 1907.) Thus, the prosecutor clearly considered proving that appellant's statement was false an important matter. Had his proof been weakened by lack of evidence about Fleming's recollection, it must have made it materially more difficult to obtain a conviction. Therefore, the *Crawford* violation prejudiced appellant.

G. The error implicates the 8th and 14th Amendment requirement of heightened reliability.

As discussed in Part I of Argument, the Eighth and Fourteenth Amendments require a heightened standard of reliability at both guilt and penalty phases. (*Beck* v. *Alabama, supra,* 447 U.S. at 638; *White v. Illinois, supra,* 502 U.S. at 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.) For the reasons discussed above under "Prejudice," the *Crawford* violation inherent in Detective Shelton's testimony about Fleming's statement deprives the verdict of the requisite reliability.

H. Reversal is required.

For the reasons stated above, the judgment should be reversed.

IV. VICTIM IMPACT EVIDENCE DENIED DUE PROCESS AND THE RIGHT TO A RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

In testimony that spans 52 pages of the reporter's transcript, six members of the victims' families testified to their devastation. As appellant will discuss, the penalty phase became a virtual memorial service for the victims. The victim impact evidence was so extensive and prejudicial it created a fundamentally unfair atmosphere for the penalty trial and resulted in an unreliable sentence of death.

B. Relevant proceedings.

At a pre-trial hearing on April 21, 2000, the prosecutor stated that he had not filed a statement in aggravation, but he represented that there would not be any evidence in aggravation other than the circumstances of the case and victim-impact evidence. (2 RT 48-49.)

On November 30, 2000, appellant filed a motion to exclude victim impact evidence on Fifth, Sixth, Eighth, and Fourteenth Amendment grounds. (2 CT 357-377.) Hearing on the motion was deferred. (2 RT 296.)

After verdicts were rendered in the guilt phase, the prosecutor filed points and authorities in support of victim impact evidence. (14 CT 3794-3799.) The points and authorities stated that the prosecutor intended to present "members of the victims' families" and "several friends of the victim." (14 CT 3798.)

The defense motion to exclude victim impact evidence was heard on the first day of the penalty trial, February 13, 2001. (14 CT 3812.)

Appellant argued that, due to the relationship between the victims and him, the jury was likely to give the victim impact evidence undue weight. (15 RT 2040-2042.) The prosecutor replied that his evidence was going to be "brief" and "limited," with "some photographs." He argued it was speculative to think the jury would go off on an emotional tangent, and the jury would be appropriately instructed and would follow its instructions. (15 RT 2042-2044.)

The court stated that the law allowed the prosecutor to introduce victim impact evidence. The court said that appellant's choice of victims "created the scenario that you're trying to prevent in the penalty phase." The court compared appellant to a person who kills his parents and asks the judge to have mercy because he is an orphan. It stated that it would not be fair to the prosecution "to exclude a huge portion of their case in deciding the penalty based upon this man's choosing these specific victims." The court denied the motion. (15 RT 2044-2045.)

The prosecutor's evidence in the penalty phase is discussed below.

C. Legal status of victim impact evidence.

When the Supreme Court first considered victim impact evidence in capital cases, it prohibited it. (*Booth v. Maryland* (1987) 482 U.S. 496, 502-503,509; *South Carolina v. Gathers* (1989) 490 U.S. 805, 810-812.) The prohibition arose out of recognition of the inherently emotional character of such evidence. Concerned that a death sentence could be imposed based on the ability of a victim's family to be "articulate and persuasive in expressing their grief and the extent of their loss," the court held the nature of the information contained in a victim impact statement "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." (*Booth v. Maryland, supra,* 482 U.S. at

505.) The risk was intolerable, because "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see *Zant v. Stephens* (1983) 462 U.S. 862, 885.)

In *Payne v. Tennessee* (1991) 501 U.S. 808, however, a divided Supreme Court held the Eighth Amendment did not pose a per se bar to victim impact evidence. The court stated that victim impact information could serve legitimate purposes in capital sentencing, where the defendant had up to that time been the sole focus of the proceeding. In the court's view, allowing the jury to receive some information about the victim would counterbalance the defense evidence in mitigation and prevent further depersonalization of the victim. In light of the wide array of mitigation evidence available to the defendant, the Supreme Court declared that the state should not be barred "from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' (citation) or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Id.* at 822.)

In *Payne*, the victim impact testimony was extremely limited, consisting of a witness's response to a single question. (*Id.* at 824.) Nothing in *Payne* suggests that the states may freely admit any and all quantity or variety of victim impact evidence. To the contrary, the court expressly advised that victim impact evidence was subject to limits under the Eighth Amendment. (*Ibid.*) The court also commented on the capital defendant's due process rights, stating: "If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." (*Ibid.*)

This Court has recognized that victim impact evidence may not be admitted without limit: "We have several times noted that victim impact evidence may be deemed inadmissible if it is so inflammatory that it would tend to divert the jury's attention from the task at hand. (Citation.)" (*People v. Roldan* (2005) 35 Cal.4th 646, 732; see *People v. Zapien* (1993) 4 Cal.4th 929, 992.) In *People v. Edwards* (1991) 54 Cal.3d 787, 835, this Court stated that allowing such evidence under Penal Code section 190.3, factor (a) "does not mean that there are no limits on emotional evidence and argument." (*Id.* at 836.) This Court quoted with approval its pre-*Payne* observations that, first, " 'the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason,' " and, second, although a court should " 'allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction,' " still, " 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.' " (*Ibid*,, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864; accord, *People v. Gonzales* (2011) 51 Cal.4th 894, 951-952.)

In *People v. Robinson* (2005) 37 Cal.4th 592, 651-652, this Court quoted with approval from *Salazar v. State* (Tex.Crim.App.2002) 90 S.W.3d 330, in which the Texas high court observed, among other things, that "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Id.* at 335–336.) The Texas court further stated, "[*W*]*e encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence.*" (*Id.* at 336, italics in

original.)

D. Victim impact evidence in appellant's case.

In assessing the propriety of the victim impact evidence in this case, it should be borne in mind that not much evidence was needed in the penalty phase to give the jury a "quick glimpse of the life" (*Payne v. Tennessee, supra,* 501 U.S. at 822) of Mary, because the jury had already received considerable information about her during the guilt phase. The jury knew that Mary was successful in her career. She was a manager at Jenny Craig, having started more recently than other employees in her office but becoming their boss. (5 RT 583, 585.) She was never late to work and rarely called in sick. (5 RT 586, 607, 669-672.) The jury knew that Mary was a devoted mother, never leaving home without her cell phone, so she could be reached if Ashley's diabetes needed treatment. (5 RT 607, 674, 677-678.) The jury saw numerous photos depicting the entire exterior and interior of Mary and appellant's home. (RT 1282-1291.) In the penalty phase, therefore, Mary was hardly a "faceless stranger" (*Payne v. Tennessee, supra,* 501 U.S. at 825).

Given this background, the victim impact evidence was excessive. Despite his assurance that the victim impact evidence would be "brief" (15 RT 2042), the prosecutor presented seven witnesses whose testimony lasted one hour and forty-five minutes and spans 52 pages in the reporter's transcript.[11] Thirty-one photos were presented. The quantity and quality of

---

[11] The first victim impact witness began testimony at 10:19 AM and (after one 20-minute recess and a 96-minute lunch recess) the last prosecution witness ended testimony at 2:00 PM, for a total of approximately 105 minutes. (14 CT 3817-3818; 15 RT 2076-2128.)

the evidence tended to turn the penalty phase into a memorial for the victims. (See *People v. Robinson, supra,* 37 Cal.4th at 644 [testimony from four witnesses covering 37 transcript pages is "extensive[]"].)

Much of the evidence that concerned Mary showed her as an infant, teenager, and young adult, even though she was 35 years old at the time of her death. Witnesses identified photographs of Mary at her first, fourth, sixth, seventh, and nineteenth birthdays. (15 RT 2084-2087.) The jury learned that Mary put doll clothes on the cat when she was six or seven, played piano in grade school, made a tree costume in fourth grade, drew a very good picture in junior high school, and kept score for the baseball team in high school. (15 RT 2084-2087.) Even as to Carley, who was three years old at the time of her death, the victim impact evidence included pictures of her at her baptism, at three and six months of age, and at her second birthday. (15 RT 2099-2100, 2103.) Such evidence could not have assisted the jury in fixing the penalty except by enraging the jury's emotions. Evidence that "emphasizes the childhood of an adult victim" may have an unduly emotional impact upon the jury. (*People v. Prince* (2007) 40 Cal.4th 1179, 1289; accord, *People v. Kelly* (2007) 42 Cal.4th 763, 795-796.)

The testimony of Mary's oldest sibling, Sandra Zalonis, that her marriage fell apart in Florida after the murders was moving but not relevant. It is evident that Sandra was miserable in Florida to begin with (15 RT 2081), so the causal connection between her divorce and the homicides is questionable. And, if there was a causal connection, it cannot be said to be part of the "circumstances of the crime." A Texas court commented on similar evidence as follows: "The … testimony, regarding how the decedent's sister's marriage broke up after the disappearance and missing the decedent's love and not being able to talk to her, seems to be …

tenuously tied to appellant's moral culpability. Such seem to be less foreseeable after-effects of such a murder and it is more questionable whether such fall within the parameters of admissible 'victim impact' evidence." (*McDuff v. State* (Tex.Crim.App., 1997) 939 S.W.2d 607, 620.)

The prejudicial effect of the victim impact evidence was compounded by the instruction concerning such evidence. It stated: "Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding what penalty the defendant should receive." (14 CT 3829.)

The admonition not to consider the evidence "to divert your attention from your proper role" is meaningless. It would not prevent a juror moved by the emotional impact of the evidence from relying on his or her emotional response to impose death. In contrast, the CALJIC instruction approved in 2010 cautions the jury, "You may consider this evidence as part of the circumstances of the crime in determining penalty. Your consideration must be limited to a rational inquiry, and must not be simply an emotional response to this evidence." (CALJIC No. 8.85.1.)

E. Reversal is required.

The standard of prejudice for state law error in the penalty phase is whether there is a reasonable possibility that the error affected the verdict. (*People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) The standard of prejudice for federal constitutional error in the penalty phase is whether it appears beyond a reasonable doubt that the assumed error did not contribute to the death verdict. (*Chapman v. California, supra*, 386 U.S. at 24; *People v. Carter,*

supra, 30 Cal.4th at 1221-1222.)

Under either standard, appellant was prejudiced. The victim impact evidence violated appellant's right to due process as well as his right to a reliable penalty verdict under the Eighth and Fourteenth Amendments to the federal constitution. Therefore, this Court should reverse the jury's verdict of death and grant appellant a new penalty trial.

V. INSTRUCTING THE JURY TO FIX A PENALTY "FOR MULTIPLE MURDERS" DENIED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Introduction.

In the penalty phase, the court instructed the jury that, having found appellant guilty of two counts of first degree murder, and having found true the special circumstance of murder for financial gain, the jury "must now return verdicts as to each count ...." (14 CT 3830; 15 RT 2230.) The court further instructed the jury that, having found appellant guilty of two counts of first degree murder, and having found true the special circumstance of multiple murders, the jury must now return a verdict fixing the penalty "for the multiple murders of Mary Kopatz and Carley Kopatz." (14 CT 3831; 15 RT 2231.) The jury then returned three verdict forms, one fixing the penalty under count I of the information as death for the murder of Mary Kopatz (14 CT 3861), one fixing the penalty under count II of the information as death for the murder of Carley Kopatz (14 CT 3860), and one fixing the penalty "under counts I and II of the information, as death, for the multiple murders of Mary Kopatz and Carley Kopatz" (14 CT 3859).

As appellant will explain, the instruction to fix a penalty "for multiple murders" was prejudicial error. "Multiple murders" is a special circumstance that renders a defendant eligible for the death penalty. (Pen. Code, § 190.2, subd. (a)(3).) It is a factor that may be taken into account in determining the penalty for each murder to which it refers. (Pen. Code, § 190.3, factor (a).) It is not, however, a crime for which the death penalty may be imposed. Nor is it an authorization for a blanket penalty for multiple counts of murder. By informing the jury it could impose a single

penalty on both counts, the instruction deprived appellant of an individual penalty determination for each count and provided an illegal theory of imposing the death penalty. It follows that the penalty verdicts and judgment of death should be reversed.

B. Multiple murder special circumstance.

Penal Code section 190.2, subdivision (a) provides in pertinent part as follows:

> "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:
>
> "[¶]
>
> "[¶]
>
> "(3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." (Pen. Code, § 190.2, subd. (a)(3).)

Although the multiple-murder special circumstance presumes the existence of two or more counts of murder, it is error to charge more than one multiple-murder circumstance in a single case or to require the jury to make more than one multiple-murder finding. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 430; *People v. Harris* (1984) 36 Cal.3d 36, 67 (plur. opn. of Broussard, J.),disapproved on other grounds in *People v. Bell* (1989) 49 Cal.3d 502, 526, fn. 12, abrogated on other grounds in *People v. Melton, supra,* 44 Cal.3d at 765-767.) The concern is that "alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty...." (*People v. Harris, supra,* 36

Cal.3d 36, 67 (plur. opn. of Broussard, J.).) Thus, the appropriate procedure is to "allege one 'multiple murder' special circumstance *separate from the individual murder counts.*" (*Ibid.,* italics added.)

The murders that comprise the "multiple murders" remain separate crimes, separately punishable. (*People v. Halvorsen, supra,* 42 Cal.4th at 430-431.) The single multiple-murder special circumstance applies to both murders. (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1563; see *People v. Anderson* (1987) 43 Cal.3d 1104, 1150; *People v. Harris, supra,* 36 Cal.3d at 67 (plur. opn. of Broussard, J.).) This Court has stated it would be incorrect to think "that *two* charged murders *together* constitute *one* capital murder for which only one death verdict may be had." (*People v. Halvorsen, supra,* 42 Cal.4th at 430, italics in original.) This Court has "approved the use of multiple penalty verdicts in cases involving only the multiple-murder special circumstance (citation)." (*Ibid.*, citing *People v. Sandoval* (1992) 4 Cal.4th 155, 197.) This Court has rejected a claim by a defendant convicted of two murders, with multiple murder the only special circumstance, that he was subject to only verdict: "Defendant's premise is faulty: His two murder convictions constituted *two* capital offenses, not one, regardless of the circumstance that only one multiple-murder special-circumstance finding may be had." (*People v. Halvorsen, supra,* 42 Cal.4th at 430, italics in original.) "[T]he two murders do not 'merge' into one capital crime, as defendant seems to argue." (*Id.* at 431; see *People v. Carter, supra,* 30 Cal.4th at 1222 [rejecting defendant's claim it was error to submit to jury separate verdict forms for each of two murder convictions].)

Since the murders that comprise the "multiple murders" are separate crimes, appellant is entitled to a separate penalty determination on each count. The rule prohibiting alleging more than one multiple–murder special circumstance is "not inconsistent with permitting separate penalty

verdicts for each of the murders." (*People v. Halvorsen, supra,* 42 Cal.4th at 431.) This Court rejected a multiple murderer's claim that "the trial court erred in requiring the jury to return a separate penalty verdict as to each murder victim." (*People v. Sandoval, supra,* 4 Cal.4th at 197.) To the contrary, said this Court, "A defendant who kills more than one person may be convicted and punished for each murder. (Citations.)" (*Ibid.*) The Court noted that separate penalty verdicts had been returned in other capital cases. The defendant in *People v. Bittaker* (1989) 48 Cal.3d 1046 was convicted of first degree murder of five victims and was given separate death verdicts as to each murder victim. (*Id.* at 1106, 1110, fn. 34.) Likewise, the defendant in *People v. Mattson* (1990) 50 Cal.3d 826, who was convicted of the first degree murder of two victims, was given a separate verdict of death as to each murder victim. (*Id.* at 838.) This Court was "not persuaded that there is any impropriety in requiring the jury to return a separate penalty verdict for each capital murder count." (*People v. Sandoval, supra,* 4 Cal.4th at 197.)

The necessity for separate penalty determinations follows from the jury's mandate in selecting the penalty. The jury is directed to consider, among other things, the circumstances of the crime for which the defendant is to be punished. (Pen. Code, § 190.3, factor (a); CALJIC No. 8.85.) Obviously the circumstances of different counts may differ. The jury must be allowed to take into account the relative weights of aggravating and mitigating factors in each count, otherwise the appellant is deprived of the separate penalty verdict on each count to which he is entitled. (*People v. Sandoval, supra,* 4 Cal.4th at 197.)

C. The instruction was prejudicial, because it required the jury to fix a single penalty for Counts 1 and 2 instead of separately fixing a penalty for each count.

The instruction prejudiced appellant, because it required the jury to fix a single penalty for Counts 1 and 2 instead of separately considering the penalty for each count. Although the death penalty may be carried out only once, it is still important, when the jury must fix the penalty on multiple death-eligible counts, that the jury consider each count individually. As discussed above, appellant is entitled to a separate penalty determination on each count. (*People v. Sandoval, supra,* 4 Cal.4th at 197.)

The Supreme Court requires that the capital-sentencing procedure be one that "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense ... before it can impose a sentence of death." (*Jurek v. Texas* (1976) 428 U.S. 262, 273–274; see *People v. Melton, supra,* 44 Cal.3d at 765-766.) The instruction here did not do that. It directed the jury to consider Count 1 and Count 2 together, not as individual offenses. It directed the jury to consider Counts 1 and 2 as "multiple murders" and impose a single penalty on Count 1 and Count 2. Such a procedure is contrary to *Sandoval*'s requirement of a separate penalty determination on each count. (*People v. Sandoval, supra,* 4 Cal.4th at 197.)

D. Reversal of the penalty is required.

The error gave the jury an unauthorized, illegal, and unconstitutional theory for imposing the death penalty, namely, that the jury could reach a verdict on both counts at once as "multiple murders." It could have prevented the jury from exercising its proper function of fixing a penalty for one of Counts 1 and 2 and then fixing a penalty for the other count.

Reasonable jurors could have considered the penalty verdict form for multiple murders first and decided to fix it as death. They could then have filled out the verdict forms for Count 1 and Count 2 as merely confirmatory of the verdict for multiple murders, without giving each single count the particularized attention to which appellant was constitutionally entitled. Of course, it is possible that the jurors considered the penalty verdict for Count 1 first, and fixed the penalty at death; then considered the penalty verdict for Count 2; and, finally, considered the penalty verdict for "multiple murders," fixing the penalty either by fresh consideration of the applicable factors or as the inevitable consequence of their previous determinations. There simply is no way to know.

"[W]hen a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. (Citations.) In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, 'it is equally likely that the verdict ... rested on an unconstitutional ground" (citation), and we have declined to choose between two such likely possibilities." (*Boyde v. California* (1990) 494 U.S. 370, 379-380; see *Stromberg v. California* (1931) 283 U.S. 359; *Leary v. United States* (1969) 395 U.S. 6, 31-32; *Bachellar v. Maryland* (1970) 397 U.S. 564, 571.)

There is a reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of an individual penalty for each count. (See *Boyde v. California, supra,* 494 U.S. at 379-380.) A defendant need not establish that the jury was "more likely than not" to have been impermissibly inhibited by the instruction. But the jury had to start its deliberations somewhere, and it is as reasonable as any other supposition

that the jury began with the multiple-murder verdict form.

For these reasons, the erroneous instruction and the superfluous multiple-murder penalty verdict form prejudiced appellant by possibly preventing the individual consideration needed to ensure a reliable penalty verdict on each of Counts 1 and 2 within the meaning of the Fifth, Sixth, Eighth, and Fourteenth Amendments. The penalty judgments should be reversed, and the multiple-murder penalty verdict in response to the erroneous instruction should be stricken as a nullity.

VI. INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

At the conclusion of the penalty phase, the court instructed the jury pursuant to CALJIC No. 8.85. (14 CT 3825-3826; 15 RT 2196-2197.) As discussed below, this instruction was constitutionally flawed, because it failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See 14 CT 3825-3826.) This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Farnham* (2002) 28 Cal.4th 107, 191-192), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 304 [re routine or generic claims].)

Of the factors listed in the instruction, those introduced by the phrase "whether or not"- factors (d), (e), (f), (g), (h), and (j) - are relevant as mitigators or not at all. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 ["factors (d), (e), (f), (g), (h), and (j) can only mitigate"]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton, supra,* 44 Cal.3d at 769-770; *People v. Davenport* (1995) 41 Cal.3d 247, 288-289.)

The absence of any of these factors is not an aggravating factor. "In *Davenport, supra*, 41 Cal.3d 247, 289-290, we held it improper for a prosecutor to argue that the absence of evidence of a statutory factor permitted or required that the factor be considered as one in aggravation. Thus the absence of evidence showing moral justification, extreme duress,

extreme emotional disturbance, or childhood deprivation cannot be factors in aggravation. As we noted in *Davenport*, the factors mentioned in section 190.3 are to be considered only if relevant, and a mitigating factor such as duress or moral justification is irrelevant and should be disregarded when there is no evidence of its existence." (*People v. Edelbacher, supra,* 47 Cal.3d 983, 1034-1035; see *People v. Melton, supra,* 44 Cal.3d at 769-770 [error to instruct that the absence of a statutory mitigating factor "does not *necessarily* constitute an aggravating factor" (italics added)].)

A contrary rule would have pernicious effects. "Several of the statutory mitigating factors are particularly unlikely to be present in a given case. (See, especially, § 190.3, subds. (e) [whether or not the victim was a participant in the homicidal conduct or consented to it]; and (f) [whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct].) To permit consideration of the absence of these factors as aggravating circumstances would make these aggravating circumstances automatically applicable to most murders." (*People v. Davenport, supra,* 41 Cal.3d at 289; see *People v. Rodriguez* (1986) 42 Cal.3d 730, 790 ["Because a belief in moral justification is usually lacking, we noted, its absence would otherwise become an automatic aggravating circumstance in most murders. (Citation.)"].)

The constitutional problem with the instruction is that it does not inform the jury that absence of any of the "whether or not" factors is not a factor in aggravation. This Court has suggested that reasonable jurors will infer from the instruction that, if one of the cited factors does not exist, it is not "relevant" and will pay no attention to it. (e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 776-777.) Appellant submits, however, that the phrase "whether or not" implies a logical toggle, that is, that the presence of the

cited factor is a mitigator and the absence of the cited factor is an aggravator. The risk of such an interpretation could be prevented by simply instructing the jury that the absence of a mitigating factor is not an aggravating factor, but no such instruction was given.

There was no evidence to support many of the factors. There was no evidence that the offenses were committed while the defendant was under the influence of extreme mental or emotional disturbance, as mentioned in factor (d), or that the victims participated in or consented to appellant's homicidal conduct, as mentioned in factor (e), or that the offenses were committed under circumstances which the appellant reasonably believed to a be a moral justification or extenuation of his conduct, as mentioned in factor (f), or that appellant acted under extreme duress or under the substantial domination of another person, as mentioned in factor (g), or that appellant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired by mental disease or defect or intoxication, as mentioned in factor (h), or that appellant was merely an accomplice to the offense and his participation was minor, as mentioned in factor (j).

Ordinarily it is error to give an instruction for which there is no evidence. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 ["It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case."]; *People v. Eggers* (1947) 30 Cal.2d 676, 687.) This Court has held, however, that this rule does not apply to factors in the instruction. "[W]e have consistently held that instructional reference to 'absent' mitigating factors is permissible. (Citations.)" (*People v. Melton, supra,* 44 Cal.3d at 769-770; see *People v. Miranda* (1987) 44 Cal.3d 57,104-105; *People v. Ghent, supra,* 43 Cal.3d at 776-777.) This Court has explained that "deletion of any potentially mitigating

factors from the statutory list could substantially prejudice the defendant. We believe that the jury is capable of deciding for itself which factors are 'applicable' in a particular case." (*People v. Ghent, supra,* 43 Cal.3d at 776-777.) The difficulty with this analysis is that nothing in the penalty phase instructions tells the jury that the absence of a mitigating factor cannot be used as an aggravating factor. A reasonable juror could infer from the "whether or not" language that each of the cited factors cuts both ways, as a mitigator if the relevant fact is present and as an aggravator if it is not.

This Court has also stated that, "So long as the absence of a particular factor is not considered a factor *in aggravation* ..., the jury is entitled to know that the crime lacks certain factors which, in the state's view, would make it a candidate for more lenient treatment than other offenses of the same general character. (Citation.)" (*People v. Melton, supra,* 44 Cal.3d at 769-770, italics in original; see *People v. Davenport, supra*, 41 Cal.3d at 289.) But, since the jury has only two choices, stating that "the crime lacks certain factors which ... would make it a candidate for more lenient treatment" comes perilously close to saying that the absence of a mitigating factor is an aggravating factor, which is clearly not the law. At the very least, this explanation suggests that the absence of factors that "in the state's view, would make it a candidate for more lenient treatment" is a reason to discount other factors, statutory or non-statutory, that, in the jury's view, are mitigating. It is unconstitutional, however, to prevent the jury from giving such weight as the jury finds appropriate to any potentially mitigating factor. (*Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399 [error to instruct jury not to consider evidence of nonstatutory mitigating circumstances]; *Lockett v. Ohio* (1978) 438 U.S. 586, 608.) Therefore, appellant believes the explanation in *Melton* is incorrect.

Instructing the jury on mitigating factors for which there is no evidence presents the jury with a factor that cannot possibly help the defendant, because there is no evidence from which it could be found to exist, and could harm the defendant in the most serious way possible, because the jury is not instructed that the absence of mitigating factor is not an aggravating factor, and, from the language of the instruction, the jury could think it was.

The trial court's failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of capital punishment. The jurors here were left free to conclude on their own with regard to each "whether or not" sentencing factor that any facts deemed relevant under that factor were actually aggravating. For this reason, appellant could not receive the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi, supra,* 486 U.S. at 584-85; *Zant v. Stephens, supra,* 462 U.S. at 879; *Woodson v. North Carolina, supra,* 428 U.S. at 280.)

By instructing the jury in this manner, the court facilitated the jury's choice of death upon the basis of facts which, as a matter of state law, are not aggravating factors. The substantial possibility that the jury may have considered these findings to be aggravating factors infringed appellant's rights under the Eighth Amendment, as well as state law, by making it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." *(Stringer v. Black* (1992) 503 U.S. 222, 235.) The impact on the sentencing calculus of the court's failure to instruct the jury not to consider the lack of a possible mitigating factor as aggravating will differ from case to case depending upon how a particular sentencing jury interprets the "law"

conveyed by CALJIC No. 8.85. In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is presented, the evidence must be construed as mitigating. In other cases, the jury may construe the "whether or not" language of CALJIC No. 8.85 as allowing jurors to treat as aggravating any evidence presented by appellant under that factor. The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different sets of aggravating circumstances because of differing constructions given to CALJIC No.8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" *(Tuilaepa* v. *California* (1994) 512 U.S. 967,973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (lead opn. of Stewart, Powell, and Stevens, J.s), and help ensure that the death penalty is evenhandedly applied. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Accordingly, by reciting the standard CALJIC No. 8.85, the court violated appellant's Eighth and Fourteenth Amendment rights.

VII. INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At the penalty phase jury charge, the trial judge instructed the jury pursuant to CALJIC 8.88 in pertinent part as follows:

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

> mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (14 CT 3832-3833; 15 RT 2231-2232.)

This instruction violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the state Constitution. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances. For all these reasons, reversal of appellant's death sentence is required.

Appellant recognizes that similar arguments have been rejected by this Court in the past. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 10991100; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered. (See *People v. Schmeck, supra,* 37 Cal.4th at 304 [re routine or generic claims].)

A. In failing to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to impose a sentence of life without possibility of parole, CALJIC No. 8.88 improperly reduced the prosecution's burden of proof below the level required by Penal Code section 190.3, and reversal is required.

Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code § 190.3.)[12] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra,* 494 U.S. at 377.)

This mandatory language, however, is not included in CALJIC No. 8.88. Instead, the instruction directly addresses only the imposition of the death penalty, and informing the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms permitted the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or

---

[12] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (*People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

"considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violates the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [emphasis in original].)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan, supra*, 53 Cal.3d at 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (E.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-29; *People v. Costello* (1943) 21 Cal.2d 760; see *People v. Kelley* (1980) 113 Cal.App.3d 1005,1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18,21; *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case,

and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[13]

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> "It is true that the ... instructions ... do not incorrectly state the law ... , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows.... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles." (*Id.* at 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*, the

---

[13] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335,344; *Izazaga v. Superior Court* (1991) 54 Ca1.3d 356, 372-377; cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at 474.) Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461,1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156,158.) The denial of this fundamental principle to appellant in the instant case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387,401; *Hicks v. Oklahoma, supra*, 447 U.S. at 346.) Moreover, the instruction is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and are as entitled as noncapital defendants – if not more -- to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd

and adopted, (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under the standard of *Chapman v. California, supra*, 386 U.S. at 24, reversal is required.

B. In failing to inform the jurors that they had discretion to impose life without possibility of parole even in the absence of mitigating evidence, CALJIC No. 8.88 improperly reduced the prosecution's burden of proof below the level required by Penal Code section 190.3, and reversal is required.

This Court has stated, "The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances. '" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244, quoting *People v. Johnson, supra,* 3 Cal.4th at 1250.) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan, supra*, 53 Cal.3d at 979; *People v. Brown, supra,* 40 Cal.3d at 538-541 [jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].) The jurors in this case were never informed of this fact. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that, if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was ipso facto the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation - and even if they found no mitigation whatever. As framed, then, CALJIC No. 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

Clearly, in appellant's case the overall impact of the penalty phase instructions, and in particular CALJIC No. 8.88, the concluding instruction, was to falsely give the jurors the impression (1) that the trial judge wanted the jurors to impose a sentence of death, and (2) that jurors did not "have the right to just as easily give Life without Parole." (*Ibid.*)

Since these defects in the instructions deprived appellant of an important procedural protection that California law affords noncapital defendants, it deprived appellant of due process of law (see *Hicks v. Oklahoma, supra*, 447 U.S. at 346; see also *Hewitt v. Helms* (1983) 459 U.S. 460,471-472) and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia* (1972) 408 U.S. 238).

C. The "so substantial" standard for comparing mitigating and aggravating circumstances is unconstitutionally vague and improperly reduced the prosecution's burden of proof below the level required by Penal Code section 190.3.

Under the standard CALJIC instructions, the question of whether to impose death hinges on the jurors' determination of whether they are

"persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole." (14 CT 3833; 15 RT 2231-2233.)

The words "so substantial" provide the jurors with no guidance as to what they have to find in order to impose the death penalty. The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites arbitrary application of the death penalty.

The word "substantial" caused constitutional vagueness problems when used as part of the aggravating circumstances in the Georgia death penalty scheme. In *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, the Georgia Supreme Court considered a void-for-vagueness attack on the following aggravating circumstance: "The offense of murder ... was committed by a person ... who has a substantial history of serious assaultive criminal convictions." The court held that this component of the Georgia death penalty statute did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." *(Id.* at 391; see *Zant v. Stephens, supra,* 462 U.S. at 867, fn. 5.) Regarding the word "substantial," the *Arnold* court concluded:

> "Black's Law Dictionary defines 'substantial' as 'of real worth and importance; valuable.' Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result. We therefore hold that the portion of [the statute] which allows for the death penalty where

> a 'murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions,' is unconstitutional and, thereby, unenforceable." *(Arnold v. State, supra,* 224 S.E.2d at 392, brackets in original, fn. omitted.)[14]

There is nothing in the words "so substantial ... that [the aggravating] evidence warrants death" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 429.) These words do not provide meaningful guidance to a sentencing jury attempting to choose between death and life without parole. The words are too amorphous to constitute a clear standard by which to judge whether the death penalty is appropriate, and their use in this case rendered the resulting death sentence constitutionally indefensible.

D. By failing to convey to the jury that the central decision at the penalty phase is the determination of the appropriate punishment, CALJIC No. 8.88 improperly reduced the prosecution's burden, and reversal is required.

As noted above, CALJIC No. 8.88 informed the jury that "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (14 CT 3833; 15 RT 2231-2233.) Eighth Amendment capital jurisprudence demands that the central determination in the penalty phase be whether death constitutes the appropriate, and not merely a warranted, punishment.

---

[14] The United States Supreme Court has praised the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia, supra*, 428 U.S. at 202.)

(See *Woodson v. North Carolina, supra,* 428 U.S. at 305.) CALJIC No. 8.88 does not adequately convey this standard; it thus violates the Eighth and Fourteenth Amendments.

To "warrant" death more accurately describes that state in the statutory ....sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for imposition of death.[15] Clearly, just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate.

The instructional deficiency is not cured by passing references in the instructions to a "justified and appropriate" penalty.[16] The instructions did not mention the concept of weighing or in any way inform the jury that aggravation must amount to something more than the mitigation before death became appropriate. Thus, the instructions did not inform the jurors of what circumstances render a death sentence "appropriate."

---

[15] "Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give (someone) authorization or sanction to do something; (b) to authorize (the doing of something)." *(Webster's Unabridged Dictionary* (2d ed. 1966) 2062.) In contrast, "appropriate" is defined as, "1. belonging peculiarly; special. 2. Set apart for a particular use or person. [Obs.] 3. Fit or proper; suitable; ...." *(Id.* at p.91.) "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet, fit, apt" *(ibid),* while the verb "warrant" is synonymous with broader terms such as "justify, ... authorize, ... support." *(Id.* at p. 2062.)

[16] CALJIC No. 8.88 states, "In weighing the various circumstances you determine under the relevant evidence *which penalty is justified and appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (14 CT 3832-3833, italics added].)

E. The instruction is unconstitutional because it fails to set out the appropriate burden of proof.

1. The California death penalty statute and instructions are constitutionally flawed because they fail to assign to the state the burden of proving beyond a reasonable doubt the existence of an aggravating factor or of proving beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3; *People v. Cudjo* (1993) 6 Cal.4th 585, 634). However, under the California scheme, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.

Appellant submits that the failure to assign a burden of proof renders the California death penalty scheme unconstitutional and appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments. Although this Court has rejected similar claims (see e.g. *People v. Stanley* (1995) 10 Cal.4th 764,842; *People v. Ghent, supra,* 43 Cal.3d at 773-774), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

Three opinions of the United States Supreme Court, *Jones v. United States* (1999) 526 U.S. 227 (*Jones*), *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), have dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in

California capital cases. As the United States Supreme Court has observed, "*in a capital sentencing proceeding*, as in a criminal trial, the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*People v. Monge* (1998) 524 U.S. 721, 732, citations and interior quotation marks omitted, italics added].)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above-quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the reasonable-doubt standard in the penalty phase of a capital case. If any doubt remained about this, the Supreme Court laid such doubts to rest by the series of cases that began with *Jones*.

In *Jones*, the Court held that, under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States, supra*, 526 U.S. at 243, fn. 6.) *Jones* involved a federal statute, but in *Apprendi*, the Court extended the holding of *Jones* to the states through the Fourteenth Amendment, concluding:

> "In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other 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. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: '[I]t is

> unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" (*Apprendi v. New Jersey, supra*, 530 U.S. at 490, quoting *Jones v. United States, supra*, 526 U.S. at 252-253.)

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra*, 530 U.S. at 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at 471-472.)

In *Ring*, the Supreme Court applied the principles of *Apprendi* in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona,*

supra, 536 U.S. at 607.) *Ring* considered Arizona's capital sentencing scheme, where the jury determines guilt but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court had previously upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*: "Capital defendants, no less than non-capital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona, supra*, 536 U.S. at 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings "necessary to ... put [a defendant] to death," regardless of whether those findings are labeled "sentencing factors" or "elements" and whether made at the guilt or the penalty phase of trial. (*Id.* at 609.) The Supreme Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

Despite the holding in *Apprendi*, this Court has stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (*People v. Ochoa* (2001) 26 Cal.4th 398, 454.) This Court reasoned that "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an "offense whose maximum penalty is death." (*Id.* at 454.) However, this holding is not tenable post-*Ring*.

Read together, the *Ring* trilogy renders the weighing of aggravating

circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey, supra*, 530 U.S. at 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect: does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Ibid.*) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, it is not enough that the jury has found the defendant guilty and one or more special circumstances true; specific findings that aggravation exists and that it outweighs mitigation must also be made.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first-degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona, supra*, 536 U.S. at 604, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at 541 (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the California jury must make additional findings at the penalty phase - that is, a finding of at least one aggravating factor plus a finding that the aggravating factor or factors outweigh any mitigating factors, and that death is "appropriate." These additional factual findings increase the punishment beyond that authorized by the jury's verdicts in the guilt phase and are "essential to the imposition of the level of punishment that the defendant receives." They thus trigger *Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

The Supreme Court in *Ring* and *Apprendi* made an effort to remove

the game of semantics from sentencing determinations. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination, or balancing test, the reasoning in *Apprendi* and *Ring* requires that this most critical "factual assessment" be made beyond a reasonable doubt.[17]

California law requires the same result. The reasonable doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, such as that the defendant was armed during the commission of an offense, must be proved beyond a reasonable doubt. (See CALJIC No. 17.15.) The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in the

---

[17] It cannot be disputed that the jury's decision of whether aggravating circumstances are present and whether the aggravating circumstances outweigh mitigating circumstances are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) This Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804,818 ["the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard"].)

defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417,421 ["A state should not be permitted to treat defendants differently .... unless it has 'some rational basis, announced with reasonable precision' for doing so."].)[18]

Accordingly, appellant submits that *Apprendi*, *Ring*, and consistent application of California precedent all require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

2. The Fifth, Sixth, Eighth and Fourteenth Amendments require that the state bear a clearly defined burden of persuasion at the penalty phase.

The penalty phase instructions given here not only failed to impose a reasonable doubt standard on the prosecution (see preceding argument), the instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" *(People v. Superior Court (Mitchell), supra,* 5 Cal.4th at 1236), it has also held that a burden of persuasion at the penalty phase is inappropriate given the "normative" nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant

---

[18] The practice in other states supports this conclusion. In at least six states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (See J. Acker and C. Lanier, Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes, 31 Crim. L. Bull. 19, 35-37, and fn. 71-76 (1995), and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

submits that this holding is constitutionally unacceptable under the Fifth, Sixth, Eighth, and Fourteenth Amendments and urges this Court to reconsider that ruling.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." *(Eddings v. Oklahoma, supra,* 455 U.S. at 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination will also vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, *some* burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments - "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) and the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) - that, where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state, while another assigns it to the accused or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant.

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and at least one special circumstance. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code §190.3) and may impose such a sentence even if no mitigating evidence was presented. (See *People* v. *Duncan, supra,* 53 Cal.3d at 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4(e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.[19]

A fact could not be established - a fact finder could not make a finding - without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most

---

[19] The Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v, Bohlen* (1994) 510 U.S. 383,393; *Strickland v, Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430,446.)

severe sentence possible. It does so, however, only in non-capital cases. (See Cal. Rules of Court, rule 420, subd. (b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to non-capital than to capital defendants violates the Due Process, Equal Protection and Cruel and Unusual Punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g. *Mills v. Maryland, supra,* 486 U.S. at 374; *Meyers v. Ylst, supra,* 897 F.2d at 421.)

3. Failure to instruct that there is no standard of proof and no requirement of unanimity as to mitigating circumstances resulted in an unfair, unreliable and constitutionally inadequate sentencing determination.

By failing to provide a sua sponte instruction on the standard of proof regarding mitigating circumstances (that is, that the defendant bears no particular burden to prove mitigating factors and that the jury was not required unanimously to agree on the existence of mitigation), the trial court impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland, supra,* 486 U.S. at 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra,* 428 U.S. at 304.) "There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." *(Boyde v. California, supra,* 494 U.S. at 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *(Ibid.)* That likelihood of

misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, *"Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armontrout* (8th Cir. 1992) 957 F.2d 1495, 1501, rev'd on other grounds (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal constitution. (See *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443.) Thus, had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question

that reversal would be warranted. *(Ibid.;* see also *Mills v. Maryland, supra,* 486 U.S. at 374.) Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital sentencing determination, in violation of the Eighth and Fourteenth Amendments as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

4. Even if it is constitutionally acceptable to have no burden of proof, the trial court erred in failing to so instruct the jury.

Appellant submits, in the alternative, that even if it were permissible not to have any burden of proof at all, the trial court still erred prejudicially by failing to articulate to the jury that there was no such burden. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan* v. *Louisiana, supra,* 508 U.S. at 280-282.) The reason is obvious: without an instruction on the burden of proof, jurors may not use the correct standard; and each may instead apply the standard he or she

believes appropriate in any given case. Such arbitrary and capricious decision-making in a capital case is contrary to the Eighth Amendment.

The same error occurs if there is no burden of proof but the jury is not so informed. Jurors who believe the burden should be on the defendant to prove mitigation in the penalty phase would continue in this erroneous belief with no other guidance. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof, rendering the failure to give any instruction at all a violation of the Eighth and Fourteenth Amendments.

5. Absence of a burden of proof is structural error requiring that the penalty phase verdict be reversed.

The burden of proof applicable to a particular case reflects society's estimation of the "consequences of an erroneous factual determination" *(In re Winship* (1970) 397 U.S. 358, 370-373 (conc. opn. of Harlan, J.)), and the consequences of an erroneous factual determination in a capital penalty phase can be the most severe of all. There can be no explanation why the most important and sensitive fact-finding process in all of the law - a penalty phase jury's choice between life and death - could or should be the only fact-finding process in all of the law completely exempted from a burden of proof. The absence of any burden of proof in the capital sentencing process is the antithesis of due process and of the Eighth Amendment principle that there is a heightened "need· for reliability in the determination that death is the appropriate punishment in a specific case." *(Woodson v. North Carolina, supra,* 427 U.S. at 305; see also *Caldwell v. Mississippi* (1985) 472 U.S. 320 at 341; *California v. Ramos* (1983) 463

U.S. 992, 998-999.)

The notion that a burden of proof is not required at all for proof of the facts at the penalty phase of a capital trial also violates the fundamental premise of appellate intervention in capital sentencing - the need for reliability (see *Ford v. Wainwright* (1986) 477 U.S. 399,414) and "genuinely narrowed" death eligibility *(Zant v. Stephens, supra,* 462 U.S. at 877), rather than unbridled discretion. (See *Furman v. Georgia, supra,* 408 U.S. at 247.)

Even in the administrative arena, "[d]ue process always requires, of course, that substantial evidence support sanctions imposed for alleged misconduct. ..." *(Braxton v. Municipal Court* (1973) 10 Ca1.3d 138, 154, fn. 16; see *Simms* v. *Pope* (1990) 218 Cal.App.3d 472, 477 [trial court may overturn property assessment board's decision only where no substantial evidence supports it, otherwise action is deemed arbitrary and denial of due process]; *In re Estate of Wilson* (1980) 111 Cal.App.3d 242, 247 [determination that decision is supported by substantial evidence is a "procedure reasonably demanded by developing concepts of due process"], citing *Jackson v. Virginia* (1979) 443 U.S. 307 and *Bixby v. Pierno* (1971) 4 Ca1.3d 130.)

Since any and all factual determinations by any and all entities acting on behalf of the public must be made under some burden of proof to be consistent with due process, even if that is nothing more than "rational basis," as with legislative decisions (see, e.g., *Webster v. Reproductive Health Services* (1989) 492 U.S. 490), it is self-evident that the reliability required of decision-making in capital sentencing also requires some burden of proof. To hold otherwise would ignore this well-established principle of Eighth Amendment jurisprudence.

The absence of the appropriate burden of proof prevented the jury

from rendering a reliable determination of penalty. The error was structural and interfered with the jury's function, thus "affecting the framework within which the trial proceeds," and rendered the trial fundamentally unfair. *(Arizona v. Fulminante, supra,* 499 U.S. at 310; see *Sullivan v. Louisiana, supra, 508* U.S. at 281-282.)

Even if the error did not amount to a structural defect, the constitutional harmless error standard should apply. It is reasonably possible that the error adversely affected the penalty determination of at least one juror. (See *Chapman v. California, supra,* 386 U.S. at 24; *People v. Brown, supra,* 46 Ca1.3d at 448-449.) It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra,* 472 U.S. at 341.) Accordingly, the penalty judgment must be reversed.

F. The instruction violated the Sixth, Eighth, and Fourteenth Amendments by failing to require juror unanimity on aggravating factors.

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted; regarding the reasons for the sentence - a single juror may have relied on evidence that only he or she believed existed in

imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1991) 1 Ca1.4th 103, 147; see also *People v. Taylor* (1990) 52 Ca1.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant submits that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, and slanted the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirement of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223,232-234; *Woodson v. North Carolina, supra*, 428 U.S. at 305.)[20]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo*, particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640, should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not

---

[20] The absence of historical authority to support such a practice further makes it violative of the Sixth, Eighth and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

require that the .specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at 640-641.) First of all, this is not the same as holding that unanimity is not required. Secondly, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable and undercuts the constitutional validity of this Court's ruling in *Bacigalupo.*

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina, supra,* 494 U.S. at 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 721, 732; accord, *Johnson v. Mississippi, supra,* 486 U.S. at 584; *Gardner v. Florida, supra,* 430 U.S. at 359 (plur. opn. of White, J.); *Woodson v. North Carolina, supra,* 428 U.S. at 305), the Fifth, Sixth, and Eighth Amendments similarly are not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the California Constitution assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating

factors true also stands in stark contrast to rules applicable in California to noncapital cases. For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (Pen. Code §§ 1158, 1158(a), 1163.) Since capital defendants are entitled, if anything, to more rigorous protections than those afforded noncapital defendants (see *Monge v. California, supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst, supra*, 897 F.2d at 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) would, by its inequity, violate the Equal Protection Clause and, by its irrationality, violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions.[21]

---

[21] It should also be noted that the federal death penalty statute provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. §848(k).) In addition, 14 of the 22 states that, like California, vest in the jury the responsibility for death penalty sentencing require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 3120A- 3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv)

G. The instruction violated the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base any death sentence on written findings regarding aggravating factors.

The version of CALJIC No. 8.88 given at appellant's trial was also constitutionally flawed because it failed to require explicit written findings by the jury identifying which aggravating factors it relied upon in reaching its death verdict. The jury should have been required to state the findings on which it relied in its sentencing determination. (See *Harmelin v, Michigan, supra,* 501 U.S. at 994.) The failure to require the jury to give a statement of reasons for imposing death violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 24 of the California Constitution.

In all noncapital felony proceedings, the sentencer is required by California law to state on the record the reasons for the sentence choice in order to provide meaningful appellate review. (See *People v. Martin* (1986) 42 Cal.3d 437, 449; *People v. Lock* (1981) 30 Cal.3d 454, 459; Pen. Code § 1170.) It is only when the accused's life is at stake that this Court excuses the sentencer from providing written findings. Such disparate treatment of similarly situated individuals denies appellant his right to equal protection of the laws. (See *Reynolds v. Sims* (1964) 377 U.S. 533, 565; U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) Because capital defendants are entitled under the Fifth, Eighth, and Fourteenth Amendments to more rigorous protections than those afforded non-capital defendants (see *Harmelin v. Michigan, supra,* 501 U.S. at 994), and since providing more protection to a noncapital defendant than a capital

---

(1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst, supra,* 897 F.2d at 421), it follows that the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating and mitigating circumstances found and rejected.

In addition, the sentencing process in capital cases is highly subjective, and an erroneous sentence determination will result in the defendant's death (see *Turner v. Murray* (1986) 476 U.S. 28, 33-34). Given all that is at stake, the enormous benefit it would bring, and the minimal burden it would create, a requirement of explicit findings is essential to ensure the "high [degree] of reliability" in death-sentencing that is demanded by both the Due Process Clause and the Eighth Amendment. *(Mills v, Maryland, supra,* 486 U.S. at 383-384.)

Finally, a provision for meaningful appellate review of the sentencing process is an indispensable ingredient of a death penalty scheme under the Eighth Amendment. The United States Supreme Court has recognized as much in a number of cases where, in the course of explaining why the state death statutes at issue were constitutional, it pointed to the fact that the statutory schemes required on-the-record findings by the sentencer, thus enabling meaningful appellant review. (See *Gregg v. Georgia, supra,* 428 U.S. at 198 (plur. opn.) [appellate review is an "important additional safeguard against arbitrariness and caprice"]; *id.* at 211-212, 222-223 (conc. opn. of White, J.) [provision for detailed appellate review is an important aspect of constitutional death penalty statute]; *Proffitt v. Florida, supra,* 428 U.S. at 250-253, 259-260 ("[s]ince ... the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible"); see, e.g., *California v. Brown* (1987) 479 U.S. 538, 543 [judicial review is

"another safeguard that improves the reliability of the sentencing process"].[22] Indeed, most state statutory schemes require such findings.[23]

This Court has also recognized the importance of explicit findings. (See, e.g., *People v. Martin, supra,* 42 Cal.3d at 449.) Indeed, this Court

---

[22] Appellant notes that in *Clemons v. Mississippi* (1990) 494 U.S. 738, 750, the United States Supreme Court was not impressed with the claim that without written jury findings concerning mitigating circumstances, appellate courts could not perform their proper role. Nevertheless, in a weighing state, such as California or Florida, an Eighth Amendment violation occurs when the sentencer considers and weighs an invalid aggravating circumstance in reaching its penalty verdict. (See *Sochor v. Florida* (1992) 504 U.S. 527, 532.) Written findings would allow for meaningful appellate review of such an error; a review that cannot take place under California's current procedures.

[23] See Code of Ala., sec. 13A-5-47(d) (1994); Ariz. Rev. Stat., sec. l3-703(D) (1995); Conn. Gen. Stat., sec. 53a-46a(e) (1994); **11** Del. Code, sec. 4209(d) (3) (1994); Fla. Stat., sec. 921.141(3) (1994); Ga. Code Ann. §17-10-30(c) (Harrison 1990); Idaho Code, sec. 19-2515(e) (1994); Ind. Code Ann., sec. 35-38-1-3(3) (Burns 1995) (per *Schiro* v. *State* (Ind. 1983) 451 N.E.2d 1047,1052-53); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Code Ann., art. 27, secs. 413(i) and U) (1995); Miss. Code Ann., sec. 99-19-101(3) (1994); Rev. Stat. Mo., sec. 565.030 (4) (1994); Mont. Code Ann., sec. 4618-306(1994); Neb. Rev. Stat., sec. 29-2522 (1994); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); N.J. Stat., sec. 2C:11-3© (3) (1994); N.C. Gen. Stat., sec. 15A-2000© (1994); 21 Okla. Stat., sec. 701.11 (1994); 42 Pa. Stat., sec. 9711(F) (1) (1992); S.C. Code Ann. § 16-3-20(c) (Law.Coop. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann., sec. 39-13- 204(g) (2)(A)(1) (1995); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat., sec. 6-2-l02(d) (ii) (1995). See also 21 U.S.C., sec. 848(k) (West Supp. 1993).

has described written findings as "essential" for meaningful appellate review: "In *In re Podesto* (1976) 15 Cal.3d 921, we emphasized that a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision making is careful, reasoned and equitable." *(People v. Martin, supra,* 42 Cal.3d at 449-450.)

In California, the primary sentencer in a capital case is the jury. California juries have absolute discretion and are provided virtually no guidance on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra,* 512 U.S. at 978-979.) Moreover, unlike the judge, jurors cannot be presumed to know the law or to apply it correctly. (See *Walton v. Arizona, supra,* 497 U.S. at 653; *Pulley v. Harris* (1984) 465 U.S. 37, 46.) Without a statement of findings and reasons for the jury's sentencing choice, this Court cannot fulfill its constitutionally required reviewing function. Any given juror in appellant's case could have made his or her decision to impose death by using one of the improper considerations described elsewhere in this brief. Further, the individual factors listed were not identified as either mitigating or aggravating. As a result, it is quite possible that a juror improperly considered a mitigating factor in aggravation.

The sentencing process in which the jurors must engage is fraught with ambiguities and unreviewable discretion, concealed beneath a stark verdict imposing a penalty of death. Such a verdict does not allow for meaningful appellate review of the sentencing process, a constitutionally

indispensable ingredient of a death penalty scheme under the Eighth and Fourteenth Amendments.

In *People v. Frierson* (1979) 25 Cal.3d 142, 177, a plurality of this Court concluded that written findings were not required under the 1977 law because the scheme provided "adequate alternative safeguards for assuring careful appellate review," including (1) the requirement that a special circumstance be found beyond a reasonable doubt before a death sentence could even be considered, and (2) the provision that the trial court in ruling on the automatic modification motion "must review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to the weight of the evidence supporting the jury's ... verdict, and state on the record the reasons for its findings." (*Id.* at 179.)

In *People v. Jackson* (1980) 28 Cal.3d 264, 317, this Court carried the analysis a step further, concluding: "Surely, if Florida's scheme is valid (wherein an advisory jury makes recommendations, without findings, to the trial judge), California's system, which imposes the *additional* safeguard of a jury independently determining the penalty, must likewise be valid." *(Ibid;* emphasis in original.) This logic is flawed, because it conflates the reviewing role of the California trial court at the automatic sentence modification hearing with the sentencing function of the jury responsible for fixing the penalty of death. The findings referred to approvingly in *Gregg* and *Proffitt* are statements of the reasons for the sentence by the sentencer.[24] A trial court's statement of reasons for upholding the jury's

---

[24] In Florida, prior to *Ring,* the jurors' function was merely to advise the judge, who was responsible for the final pronouncement of sentencing and specifying in writing the underlying reasons for such a sentence. (See *Proffitt v. Florida, supra,* 428 U.S. at 251-252 ["[s]ince ... the trial judge

sentence is no substitute for a statement of reasons by the entity that actually made the critical decision. Although a judge's findings might provide insight as to his or her considerations in upholding the jury's findings, that explanation sheds no light on the appropriateness, consistency, propriety, or strength of the sentencing body's actual reasons. The fact that the court, while independently reviewing the evidence, is able to articulate a rational basis for the sentencing decision affords no assurance that the jury did so. (Cf. *Sullivan v. Louisiana, supra,* 508 U.S. at 279 [court reviewing for harmless error must look "to the basis on which 'the jury *actually rested* its verdict'" (emphasis in original)].) Thus, rather than "substantially comport[ing] with the requirements of both *Gregg* and *Proffitt* with respect to disclosure of the reasons supporting a sentence of death" *(People v. Frierson, supra,* 25 Cal.3d at 180), that feature of California's sentencing scheme further insulates the jury's sentencing decision from meaningful appellate review. (See *People v. Lock, supra,* 30 Ca1.3d at 459 [meaningful appellate review obviously impossible where sentencer states no reasons for its sentence choice].)

---

must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible"].) There are other critical distinctions between the California and the former Florida statutes. For example, Florida's sentencing considerations were separated into discrete categories as either aggravating or mitigating. California factors are not so designated. In addition, Florida's aggravating factors for death selection correspond to California's special circumstances that serve to narrow the class of individuals eligible for death.

H. Failure to instruct the jury on the presumption of life violated the Fifth, Eighth, and Fourteenth Amendments.

In noncapital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is a basic component of a fair trial. (See *Estelle v. Williams, supra,* 425 U.S. at 503.) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. (Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo* v. *Lashley* (1993) 507 U.S. 272.) Appellant submits that the court's failure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

In *People v. Arias* (1996) 13 Ca1.4th 92, this Court held that such a presumption of life is not necessary when a person's life is at stake, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" so long as the state's law properly limits death eligibility. *(Id.* at 190.) However, California's capital-sentencing statute fails to narrow adequately the class of murders that are death eligible. (See Shatz & Rivkind, "*The California Death Penalty Scheme: Requiem for Furman*?" (1997) 72 N.Y.U. L.Rev. 1283.) Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to require written findings regarding aggravating factors, and fails to require intercase

proportionality review. Accordingly, appellant submits that a presumption of life instruction is constitutionally required at the penalty phase, and reversal of the penalty judgment is required.

For all the above reasons, the trial court violated appellant's federal constitutional rights by instructing the jury in accordance with CALJIC No. 8.88, and appellant's death sentence must therefore be reversed.

VIII. CUMULATIVE GUILT-PHASE AND PENALTY-PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION.

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (*Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc), cert. den. (1979) 440 U.S. 974 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra,* 416 U.S. at 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *(United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.).

Appellant has argued that a serious constitutional error occurred during the guilt phase of trial and that this error alone was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. The death judgment rendered in this case also must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes, supra,* 52 Cal.3d at 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial:

> "Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were

> committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error."

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown, supra,* 46 Ca1.3d at 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of review. *(Yates v. Evatt* (1991) 500 U.S. 391,402-405; *Chapman v. California, supra,* 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, all errors should be reviewed under a *Chapman* standard. *(People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, appellant has shown that errors occurred in the guilt and penalty phases. Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase

proceedings so that reversal is required. There can be no doubt that appellant was denied the fair trial and due process of law to which he is entitled before the State can claim the right to take his life. Reversal is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. *(Skipper v. South Carolina* (1986) 476 U.S. 1, 8*; Caldwell v. Mississippi, supra,* 472 U.S. at 341; *Hitchcock v. Dugger, supra,* 481 U.S. at 399.)

IX. CALIFORNIA'S CAPITAL-SENTENCING STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

A. Introduction.

This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Clark* (2011) 52 Cal.4th 856), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein. (See *People v. Schmeck, supra,* 37 Cal.4th at 304 [re routine or generic claims].)

B. California's use of the death penalty as a regular form of punishment constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth amendments.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . .. The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa as one of the few nations which has executed a large number of persons .... Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 846 (conc. and dis. opn. of Harrison, J.).)[25]

---

[25] South Africa abandoned the death penalty in 1995, five years after the article was written.

The unavailability of the death penalty, or its limitation to exceptional crimes such as treason - as opposed to its use as regular punishment - is uniform within the nations of Western Europe. (See *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Indeed, all nations of Western Europe, plus Canada, Australia, and the Czech and Slovak Republics, have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)

The abandonment of the death penalty in Western Europe is especially important since our Founding Fathers looked to the nations of Western Europe for the "law of nations," for models on which the laws of civilized nations were founded, and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.); *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.) Thus, for example, Congress's power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; what civilized nations of Europe forbade, such as poison weapons or the selling into slavery of wartime prisoners,

was constitutionally forbidden here. (See *Miller v. United States* (1870) 78 U.S. 268, 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment," as defined in the Constitution, is not limited to punishments that violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency, as perceived by the civilized nations of Europe to which our Framers looked as models, have themselves evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma, supra*, 487 U.S. at 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."].)

Thus, assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes - as opposed to extraordinary punishment for extraordinary crimes - is contrary to those norms. Nations in the Western world no longer accept it, and the Eighth Amendment does not permit states in this nation to lag so far behind. (See *Hilton v. Guyot, supra,* 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855)

59 U.S. [18 How.] 110, 112.) Thus, the very broad death scheme in California, and the regular use of death as a punishment, violates the Eighth and Fourteenth Amendments. Consequently, appellant's death sentence should be set aside.[26]

C. Failing to Provide Intercase Proportionality Review Violates Appellant's Eighth and Fourteenth Amendment Rights.

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra,* 428 U.S. at 198; *Proffitt v. Florida, supra*, 428 U.S. at 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme. Despite the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a

---

[26] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad - mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1,30.)

requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris, supra,* 465 U.S. 37, the Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at 51.) Based upon that, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam, supra*, 28 Cal.4th at 193; *People v. Fierro* (1991) 1 Cal. 4th 173, 253.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* was based in part on an understanding that the application of the relevant factors "provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty," thus "guarantee[ing] that the jury's discretion will be guided and its consideration deliberate. As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the court will be well advised to reevaluate its decision in *Pulley v. Harris*." (*Tuilaepa v. California, supra*, 512 U.S. at 995 (dis. opn. of Blackmun, J.), quoting *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1194, interior quotation marks omitted.)

The time has come for *Pulley v. Harris* to be reevaluated, because the special circumstances of the California statutory scheme fail to perform the type of narrowing required to sustain the constitutionality of a death penalty scheme in the absence of intercase proportionality review. Comparative case review is the most rational, if not the only, effective means by which to demonstrate that the scheme as a whole is not producing arbitrary results. That is why the vast majority (31 out of 34) of the states that sanction capital punishment require comparative, or intercase,

proportionality review.[27]

Many states have judicially instituted similar review. (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

The capital sentencing scheme in effect in this state is the type of scheme that the *Pulley* court had in mind when it said "that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris, supra*, 465 U.S. at 51.) One reason for this is that the scope of the special circumstances that render a first-degree murderer eligible for the death penalty is now unduly broad. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman*?,

---

[27] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 192827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-325(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A27A-12(3) (1988); Tenn. Code Ann. § 13·-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

supra, 72 N.Y.U. L. Rev. at 1324-1326.) Even assuming that California's capital-sentencing statute's narrowing scheme is not so overly broad that it is actually unconstitutional on its face, the narrowing function embodied by the statute barely complies with constitutional standards. Furthermore, the open-ended nature of the aggravating and mitigating factors, especially the circumstances-of- the-offense factor delineated in Penal Code section 190.3, grants the jury tremendous discretion in making the death-sentencing decision. (See *Tuilaepa v. California, supra*, 512 U.S. at 986-988 [dis. opn. of Blackmun, J.].) The minimal narrowing provided by the numerous special circumstances and the open-ended nature of the aggravating factors work synergistically to infuse California's capital-sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few first-degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital-sentencing scheme lacks other safeguards, such as a beyond-the-reasonable-doubt standard and jury unanimity requirement for aggravating factors, the use of an instruction informing the jury which factors are aggravating and which are mitigating, or the required use of an instruction informing the jury that it is prohibited from finding non-statutory aggravating factors. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital-sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

Penal Code section 190.3 does not forbid intercase proportionality review; the prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries is strictly the product of this Court. *Furman v. Georgia, supra*, raised the question of whether,

within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 [conc. opn. of White, J.].)

California's capital-sentencing scheme does not operate in a manner that enables it to ensure consistency in penalty-phase verdicts; nor does it operate in a manner that assures that it will prevent arbitrariness in capital sentencing. Because of that, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution, and therefore requires the reversal of appellant's sentence of death.

X. BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, BINDING ON THIS COURT, THE DEATH SENTENCE HERE MUST BE VACATED

This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Carrington* (2009) 47 Cal.4th 145, 199), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein. (See *People v. Schmeck, supra,* 37 Cal.4th at 304 [re routine or generic claims].)

The California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the death penalty imposed here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia, supra*, 536 U.S. at 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at 389-390 [dis. opn. of Brennan, J.].)

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound

thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[28]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR. In *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, the Eleventh Circuit held that, when the United States Senate ratified the ICCPR, "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land." (Id. at 1284, fn. omitted; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

---

[28] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harvard Hum. Rts. J. 59.

Appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Ghent, supra*, 43 Cal.3d at 778-779; see *id.* at 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied in the United States. (See *United States v. Duarte-Acero, supra*, 208 F.3d at 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).)

Appellant requests that this Court reconsider and, in this context, find appellant's death sentence violates international law. (See also *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be re-raised to preserve the issue for federal habeas corpus review].) For this reason, the death sentence here should be vacated.

CONCLUSION

For the reasons stated above, this Court should reverse the convictions of murder and the judgment of death.

Respectfully submitted,

DAVID P. LAMPKIN
Attorney at Law
P.O. Box 2541
Camarillo, CA 93011-2541
Telephone: (805) 389-4388

Attorney for Appellant
Kim Raymond Kopatz

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.360 of California Rules of Court, counsel on appeal certifies that, according to the word count function of the word processing software with which this brief was produced, this brief contains 63,875 words.

_____

DAVID P. LAMPKIN

PROOF OF SERVICE

I am a resident of or employed in the County of Ventura, State of California, and am over the age of 18 years. I am not a party to the within action. My business address is P.O. Box 2541, Camarillo, CA 93011-2541.

On December 16, 2011, I served the APPELLANT'S OPENING BRIEF by placing a true copy thereof in each of several envelopes, one for and addressed to each addressee hereafter named:

[PLEASE SEE ATTACHED SERVICE LIST]

[X](BY MAIL) I caused each of such envelopes to be sealed and deposited in the United States mail, with postage thereon fully prepaid, at Camarillo, California.

[ ](BY PERSONAL SERVICE) I caused such envelope to be sealed and delivered by hand to the offices of the addressee.

Executed on December 16, 2011, at Camarillo, California.

[X](State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

DAVID P. LAMPKIN

SERVICE LIST

ATTORNEY GENERAL, representing the People:

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

DISTRICT ATTORNEY:

Office of the District Attorney
3960 Orange Street #100
Riverside, California 92501

TRIAL JUDGE:

Clerk of the Superior Court
For Delivery To: Hon. W. Charles Morgan
4100 Main Street
Riverside, CA 92501

APPELLANT:

Kim Raymond Kopatz
San Quentin State Prison
P.O. Box T-11498 – NSS 32
San Quentin, California 94974

CALIFORNIA APPELLATE PROJECT – SAN FRANCISCO:

California Appellate Project
Attn: Scott Kauffman, Esq.
101 Second Street
Sixth Floor
San Francisco, California 94105