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 REPLY 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

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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 appellant was released from the hospital emergency room in the early morning hours of Friday, April 23, 1999, two police officers took him to the detective bureau, where two detectives interviewed him for over an hour without any *Miranda* warning (*Miranda v. Arizona* (1966) 384 U.S. 436). Appellant contends that he was unlawfully seized and subjected to custodial interrogation without *Miranda* advice. (AOB 66-102.) Respondent contends that there was merely a consensual encounter between appellant and the police. (RB 42-54.)

B. Legal standards.

Appellant and respondent agree on the applicable standards. "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 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; see AOB 74-75; RB 44.)

"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; see AOB 76; RB 44.)

The test for *Miranda* custody 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; *Thompson v. Keohane* (1995) 516 U.S. 99, 112; see AOB 91; RB 48.)

C. Seizure.

Respondent contends there was no seizure between the hospital and the detective bureau. Respondent points to the absence of a number of things, including display of weapons and application of hands or restraints by the officers and objection or complaint by appellant. Respondent notes that, when the officers told appellant they were taking him to the detective bureau, he said, "Fine." As respondent sees it, appellant "understood that it was his choice whether or not he went to the detective's bureau to assist police," and his transportation to the detective bureau by the officers and interview by the detectives was "a consensual encounter which resulted in no restraint of his liberty." (RB 45-46.)

Respondent's discussion omits much detail that, given the applicable legal standard, is highly relevant to the issue of seizure. This court's independent review should take into account the *entire record.* (E.g., *J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2402 ["we have required ... courts to 'examine all of the circumstances surrounding the interrogation,' (citation)"].)

Respondent does not discuss the circumstances under which the

officers told appellant they were taking him to the detective bureau (8 RT 1021), but they are indicative of seizure. Appellant had just spent several hours in the emergency room, accompanied all the while by Officer McCarthy. He had no means of transportation, having been taken to the hospital by ambulance. He was dressed in only a T-shirt and shorts, and it was after midnight. (8 RT 1016, 1018, 1021.) He could see that McCarthy had been joined by his partner, Officer Goodner, who had brought the patrol car. 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.) They did not tell him he was free to go. In these circumstances, no reasonable person would think he had any choice but to comply. (*Kaupp v. Texas* (2003) 538 U.S. 626, 631 [finding seizure where police officers roused adolescent out of bed in the middle of the night, and observing that being told "we need to go [to the police station] and talk" presents "no option but to go" (interior quotation marks omitted)].)

Respondent relies on appellant's single word, "Fine," and his failure to object or resist. (RB 46.) But these reflect only acquiescence to the officers' show of authority that they were taking him to the detective bureau. Passive acquiescence is not consent to seizure. "[T]he burden of proving that the necessary consent was obtained and that it was freely and voluntarily given ... is not satisfied by showing a mere submission to a claim of lawful authority. (Citations.)" (*Florida v. Royer* (1983) 460 U.S. 491, 497.) Appellant was not required to resist. (*Kaupp v. Texas, supra,* 538 U.S. at 632.) Appellant's response, "Fine," expressed no more than acquiescence. In *Kaupp*, 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.) The same is true of appellant's "Fine."

Appellant was transported to the detective bureau in the locked cage of the officers' patrol car. (8 RT 1021:5-8, 1027:10-12; 13 RT 1722:5-7, 1731:23-25, 1744.) Respondent does not discuss it, but transportation to a police station is a hallmark of a seizure. (*Hayes v. Florida* (1985) 470 U.S. 811, 815.)

Thus, appellant was seized when he was told by two officers that they were taking him to the detective bureau and he was transported to the bureau in a patrol car.

D. *Miranda* custody.

Respondent similarly argues that there was no seizure or *Miranda* custody at the detective bureau. Respondent asserts that appellant went into the interview room unrestrained, and the interview began promptly. (RB 46, 50.) Respondent does not discuss that the evidence of these matters is in substantial conflict. McCarthy testified that he and Goodner had to wait with appellant until the detectives were ready to interview him. (8 RT 1027-1028.) McCarthy said that, while they waited, appellant complained of pain, had spasms in his arms and legs, and sometimes had to lie on the floor. (8 RT 1028-1029.) McCarthy spoke of "trying to get him ... into a room with the detectives." (8 RT 1027.) McCarthy said Goodner was with him when these things happened. (8 RT 1028.) But Goodner did not recall any of this. (13 RT 1732-1733.)

Respondent cites the detectives' comments to appellant as evidence that appellant must have understood he was free to go at any time (RB 46, 50), but a reasonable person would have understood the comments as

indicative of temporary restraint. The detectives' manner towards appellant communicated that they were in control. Almost the first thing DeVinna said to appellant was, "I'm going to ask you some questions ...." (13 CT 3636.) They told him, "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.

Respondent argues that some of the detectives' controlling behavior has an innocent explanation, because Shumway testified they were having difficulty understanding appellant. (RB 51.) Shumway's thought process is irrelevant, however. (*J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2402 ["the 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant"].) It is the effect of his behavior and words on a reasonable person that is important. Placed alone in a small barren room with two detectives, no reasonable person hearing the detectives' words to him would think that he was free to go. (13 RT 1744; see Exhibit 81B [video tape].)

Respondent fails to mention that, when the detectives left appellant alone for a while, he said to no one, but out loud, "Oooh. Don't leave me in here for 30 f---g minutes. I gotta go. I gotta go." (13 CT 3669.) These words clearly express a desire to be out of the interview. They are not the words of a person who believes he is free to go. A reasonable person in

appellant's position would not have believed he was free to go. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1401.)

Respondent points out that the detectives allowed appellant to use the restroom and then had the officers drive appellant to his brother's house. (RB 46, 50-51.) These events took place *after* appellant was transported to the detective bureau and interviewed by the detectives. They could not have had any effect on a reasonable person's belief, *during* the transportation and interview, as to whether he was free to go.

E. The cases respondent cites are not apposite.

The cases respondent cites (RB 51-53) are not apposite. In *Oregon v. Mathiason* (1977) 429 U.S. 492, the defendant agreed to be interviewed, and a convenient time was agreed upon. He drove himself to the police station, where he was told he was not under arrest. The high court held this not to be *Miranda* custody. (*Id.* at 495.) Here, appellant did not in any meaningful way agree to be interviewed. He was told the time of the interview would be then, not some time convenient for him. He was taken to the detective bureau in the cage of a squad car. He was not told he was free to go. The facts of this case could not be more different from those of *Mathiason*. Furthermore, *Mathiason* is a 1977 decision that applies the test of whether "the questioning took place in a context where respondent's freedom to depart was restricted in any way." (*Id.* at 495.) A more recent decision discusses how the statement of the relevant test has evolved and cites *Mathiason* as an example of an outmoded standard. (*Yarborough v. Alvarado, supra,* 541 U.S. at 661-663; see AOB 90-92.) *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.) Since *Mathiason* does not speak to that

question, it provides no guidance here.

Respondent cites *People v. Holloway* (2004) 33 Cal.4th 96 and *People v. Leonard, supra,* 40 Cal.4th 1370 (RB 52-53), but they are not like appellant's case. In *Holloway*, police officers contacted the defendant at his parole agent's office. They asked him to come to the station. They gave him the choice of riding with them or getting a ride from a friend. At the beginning of the interview the detectives told the defendant he was not under arrest, and he agreed he was there voluntarily. (*People v. Holloway, supra,* 33 Cal.4th at 119-120.) In *Leonard*, when the officers asked the defendant to accompany them to the station, he told them he was too busy, but he arranged a time for the next day. The next day, officers drove the defendant to the station, because he was unable to drive. At the station, he was told he not under arrest and he was free to leave. (*People v. Leonard, supra,* 40 Cal.4th at 1398-1399.)

Here, in contrast to *Holloway* and *Leonard*, the officers contacted appellant and told him they were taking him to the detective bureau. They did not suggest any alternative to immediate transportation in the patrol car. At the bureau, no one told appellant he was free to go and not under arrest. Instead, when appellant indicated he was tired, the detectives told him he could go when they were done. A reasonable person would think he could not leave until the detectives chose to end the interview. There was custody during the interview, even if appellant was allowed to go at the end of it.

Based on *Holloway* and *Leonard*, respondent seems to suggest that any situation in which the police "gave defendants a ride to the station," the defendants are "not handcuffed," and the defendant is placed in "an unlocked interview room" does not involve *Miranda* custody. (RB 53.) But all of these factors together are not determinative, because all of these factors may exist and yet, due to other factors, a reasonable person would

feel not free to leave. Here, the officers drove appellant to the bureau, but the decision to go to the bureau was imposed on appellant. He was not handcuffed, but a reasonable person would not consider himself free to go, because he had been told "they wanted to talk to him." The door was unlocked, but it was closed. A reasonable person would not have felt free to open the door. A defendant is not required to resist or complain to establish that he is in custody. The detectives' presence in the small bare room was imposing, and their conduct with appellant was directive and controlling.

F. Admitting the interview prejudiced appellant.

Admitting the interview harmed appellant specifically by providing evidence of a statement that was inconsistent with the statement he gave in the missing persons report about the time he last saw Mary and Carley. (RB 56.) In the missing persons report he made in the afternoon, he 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 with the detectives, he said he last saw them after he returned from taking Ashley to school. (13 CT 3640, 3660-3662.) Arguing to the jury, the prosecutor pointed to the difference between the statements in the missing persons report and the interview and 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.) The prosecutor could not have made this argument without the foundation provided by the erroneously admitted interview.

Respondent argues that the prosecutor could have made the same argument without the interview, based on a statement appellant made to Mary Burdick. (RB 59.) She testified that, when appellant spoke to her between 1:30 PM and 1:40 PM, he said Mary and Carley had left the

residence between 8:30 and 9:00 AM. (5 RT 598, 601.) From the prosecutorial perspective, however, this statement was not the equal of the one in the interview. For one thing, the statement in the interview was in appellant's own words, but the evidence of the statement to Mary Burdick was only her account of what he said. For another, the statement in the interview included the fact that appellant saw the victims after he returned from taking Ashley to school. The statement to Mary Burdick was ambiguous on that point. Appellant did not tell her he saw them leave. He could have been only telling her the time he thought they would have left.

Admitting the interview also harmed appellant by showing the jury his bearing and demeanor at the time of the interview, which, as explained in the opening brief (AOB 98-101), did him no credit. In the interview, appellant showed the effects of stress, hospitalization, and medication, and the prosecutor pointed to his demeanor as evidence of guilt. The interview included an episode in which the detectives cross-examined appellant about his scratches and tremors and then disparaged his answers. The effect was as if the detectives had been allowed to testify that they thought appellant was lying. And credit should be given to the prosecutor's judgment: he must have thought the interview was prejudicial to appellant, because he chose to play the entire one-hour tape as virtually the last piece of evidence in his case-in-chief. (13 RT 1775.)

Respondent argues that, without the interview, the evidence of guilt would still be overwhelming (RB 54), but there are weaknesses in the evidence. For example, respondent says it was suspicious that respondent could not be reached during the late morning and early afternoon of the day of the murders. (RB 55.) The evidence showed, however, that appellant was at Ashley's school at 8:00 AM. (4 RT 508.) He was at the cleaners before 12:00 noon. (6 RT 888, 890.) He was seen digging in his front yard

in the early afternoon. (7 RT 926, 929-930, 932, 938; 9 RT 1190-1191.) He was on the phone at 1:15 PM talking to Jean Black. (5 RT 673.) There is nothing suspicious about any of this.

Respondent argues that appellant should have been concerned that Mary did not bring Carley home before going to work at 11:00 AM. (RB 55.) That argument assumes, however, that appellant's statements to various people that he thought that Mary took Carley to work as part of take-your-daughter-to-work day were false. (RB 55-56.) There is evidence they were not false. Mary's office had observed the day in prior years. (5 RT 601.) That year, Mary had told her office it would not be appropriate to bring children to the office. (RT 601-602.) There is no evidence, however, that she told appellant about her announcement. Appellant could have honestly believed that Carley was with Mary.

Respondent points to Doug Burdick's seeing a woman's rings in the hallway bathroom as strong evidence of guilt (RB 55), but Burdick and his wife's conduct regarding the rings is so curious that a reasonable jury could have given little weight to his statements. Burdick testified that he told his wife about the rings when he returned home that afternoon. (5 RT 653.) 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 that he did not see the article the day it came out. (13 RT 1796.) His wife, Mary, evidently saw it and saved it, because, he said, she showed it to him after he testified in the prosecution case-in-chief on January 17, 2001. (13 RT 1796.) To credit Burdick's testimony, one must assume that Mary Burdick knew Doug had seen rings at the Kopatz house the day the bodies were found, because he told her; she found the newspaper article about the rings significant, because she saved it; but she did not show it to Doug; and neither she nor Doug contacted the

police about the rings Doug purportedly saw until Doug spoke to Detective Shumway just before he testified. (5 RT 653-654, 664-665; 13 RT 1794-1797.) The record suggests that the jury could have found the Burdicks to be somewhat biased against appellant, because, for example, Doug referred negatively to his past experience with appellant. (5 RT 623.) For them to sit silent with their knowledge of the rings therefore seems incongruous. Because of that, the reliability of Doug's testimony about the rings is reduced.

Respondent asserts that appellant made several misleading statements that show consciousness of guilt. (RB 55-56.) The first statement respondent points to is appellant's statement that he thought that Mary took Carley to work as part of take-your-daughter-to-work day. As discussed above, there is substantial evidence that appellant did think that. The other two statements respondent points to require reference to inadmissible, erroneously admitted evidence. Respondent asserts that appellant's statement that he called Sav-on to see if Mary had picked up prescriptions was a falsehood, but the only way the jury could have rationally found beyond a reasonable doubt that it was a falsehood was to credit the statement from Jennifer Fleming implied in violation of *Crawford*, as discussed in Part III of Argument. Respondent also asserts that appellant's statements about when he last saw the victims were inconsistent, but the best evidence of the inconsistency is in the erroneously admitted interview, as discussed above.

Respondent argues that the blue glue found on appellant's hands and arms was an attempt to conceal scratches allegedly inflicted in a struggle between appellant and Mary (RB 57), but examination of the evidence reveals that this is an unreasonable claim. The best evidence of the scratches and blue glue was the photographic evidence taken the evening of

April 22, 1999. The photos show scratches and gouges on appellant's hand and arms, and they show blue glue, but the glue does not obscure the scratches. In Exhibit 9F, there is glue on the back of the left hand, and a possible scratch is visible underneath. Many more scratches were left uncovered than were covered. In Exhibits 9E, 9G, and 9H, a scratch on right middle finger is clearly visible and not covered with glue, and there is glue where there is no scratch. In Exhibit 9A, there is a red mark on the left eye, but no glue. In Exhibit 9D, there are scratches above the right wrist, but no glue. The prosecutor argued to the jury, "If any one piece of evidence stands out in this case as evidence of [appellant's] guilt, this is one." (14 RT 1903-1906.) But the exhibits show it is just not so.

As further evidence of guilt, respondent cites Doug Burdick's remark that appellant did not look as if he had been digging. (RB 57.) But, whether or not he looked like it, there is ample evidence that appellant had been digging. Appellant's neighbor Montoya saw him digging. (7 RT 926, 929-930, 932, 938.) So did David Laird, the travelling bill collector. (9 RT 1190-1191.) Laird testified that appellant was wearing a white T-shirt and blue shorts, which describes the clothes appellant was wearing when a technician photographed him on a hospital gurney that evening. (9 RT 1192, 1195-1196; Exhibit 9B.) Appellant's brother Alan found tools and pipe scattered over the driveway. (5 RT 694-695.) He saw three holes in the front yard, inside which were white pipe joined with blue glue, and alongside which was freshly dug earth. (5 RT 696-698; 6 RT 729.) Shumway also saw the holes. (13 RT 1775-1777.)

Respondent points to Shumway's opinion that the crime scene in the van had been "staged," that is, the perpetrator had attempted to make the crime appear to have been something other than what it was and divert attention from the "natural" suspect. (RB 57.) But anyone aware of the

theory could stage a crime scene to throw attention on the "natural" suspect, thereby lessening the likelihood of attention being paid to the actual perpetrator.

Respondent also points out that appellant's fingerprints were found on the van in which the victims were found, and the van driver's seat was in its rearmost position. (RB 57.) But the fingerprints are hardly evidence of guilt, because the van belongs to appellant. The position of the driver's seat may show that Mary was not the last driver, but it does not show that appellant killed the victims.

The prosecutor's strongest evidence was Ballou's testimony that he saw appellant near the crime scene on the morning of April 22, 1999, the analysts' testimony that the material found under Mary's fingernail contained DNA that could have been contributed by appellant, and the insurance policies. But even all of this evidence does not compel a conclusion of guilt. Ballou was 90 years old in April 1999. When he saw the unfriendly man, he mentioned it to his wife. But, when Officer May questioned him on April 23, 1999, he did not mention the unfriendly man. Apparently, his recollection of the man had passed from his mind by that time, to be renewed only by the photo seen 42 days later, with what degree of accuracy cannot be said. He admitted he did not remember seeing a mustache. Reasonable jurors could have doubted whether he saw the unfriendly man on the same day the van was found and whether the man he saw was actually appellant. They might have done so here if the testimony of Mae Ballou concerning his prior consistent statements had not been admitted in error, as discussed in Part II of Argument. The DNA, if it was appellant's, could have come to be under Mary's nail in many ways not involving murder, because appellant and Mary were husband and wife sharing the same bed and bathroom. There was a lot of insurance, but it

was not recently acquired. Except for the rings, which he reported lost or stolen on the last day of the policy term (Exhibit 76, part 6), appellant did not make any claim under the insurance policies. (11 RT 1483, 1490-1494, 1535, 1550-1551, 1568-1569, 1599-1606; 12 RT 1607-1612, 1664-1677.)

Respondent's argument that the evidence is overwhelming even without the interview is further weakened by the prosecutor's use of the interview. The prosecutor chose to give the interview prominence by playing it in its entirety near the end of his case-in-chief. (13 RT 1775.) During his argument to the jury, he replayed the part in which appellant talks about when he last saw the victims (13 CT 3658-3662), telling the jury, "It's better in his own words" (14 RT 1941).[1] The prosecutor evidently saw the interview as valuable evidence. Therefore, its erroneous admission was prejudicial.

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[1] The excerpt the prosecutor played for the jury is identified by the prosecutor's remarks. Just before he played the excerpt, he referred to the detectives' preemptive question about the neighbors' hearing noise, which is in the interview transcript at 13 CT 3658. Then he said, "Let me play this for you," and he played the excerpt. When the playback was complete, he said, "So now it's ninish," an obvious quote of appellant's statement to the detectives that Mary left the house "about nine-ish," which is at 13 CT 3661. (14 RT 1941.)

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.

The court admitted the testimony of Les Ballou's widow, Mae Ballou, that he told her he had just seen an 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 defense objected, but this evidence was admitted on the grounds it was evidence of prior consistent statements admissible both for their truth and to rehabilitate Ballou's credibility. (12 RT 1609-1611; see Evid. Code, §§ 791, 1236.) The court instructed the jury that prior consistent statements could be considered for the truth of the matter stated. (CALJIC No. 2.13, 14 CT 3704.)

Appellant argues, and respondent agrees, that it was error to admit Ballou's prior consistent statements for their truth under Evidence Code section 1236. (AOB 107-113; RB 67-70.) At appellant's trial, Ballou was a hearsay declarant, not a live witness. His preliminary hearing testimony was read for the jury pursuant to the hearsay exception for former testimony of an unavailable witness, because he passed away before the trial. (6 RT 856-879.) Evidence Code section 1236 provides a hearsay exception for certain prior consistent statements of a witness, but it does not apply to the prior consistent statements of a hearsay declarant who does not testify at the trial. (*People v. Williams* (1976) 16 Cal.3d 663, 669.)

Appellant also argues, and respondent agrees, that it was error to admit Ballou's prior consistent statements to support Ballou's credibility as a witness under Evidence Code section 791. (AOB 113-114; RB 67-70.) Evidence Code section 791 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. (*People v. Williams, supra,* 16 Cal.3d at 669.)

Appellant and respondent disagree whether the prior consistent statements were admissible to support the credibility of a hearsay declarant under Evidence Code section 1202. (AOB 114, 117-126; RB 70-74.) Appellant and respondent agree that, 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. (AOB 115; RB 70.)

Respondent argues the prior consistent statements are admissible, because Ballou was impeached with a prior inconsistent statement, and the prior consistent statement is admissible to rehabilitate his credibility. (RB 70.) To support the claim of impeachment with a prior inconsistent statement, respondent points to Ballou's statement on direct examination that he saw an unfriendly man walk by. (6 RT 858.) Respondent then points to Ballou's statement on cross-examination that, when officers questioned him shortly after the homicides, he did not mention the unfriendly man. (6 RT 864.) Respondent also points to Jaffe's offer of proof, which was part of the record of the ruling. (12 RT 1607-1610.) The offer was that, when Officer May questioned Ballou the next day and asked him if he saw anyone unfamiliar or anything out of the ordinary the day before, Ballou did not give an affirmative response. (12 RT 1610.)

Respondent contends that Ballou's statements on cross-examination and in the offer of proof are inconsistent with his testimony that he saw an unfriendly man. Respondent does not offer any explanation of this contention. (RB 72.) The testimony and statements are not inconsistent, however. The trial court found that they were not inconsistent. (12 RT 1609-1610.) The applicable test is [i]nconsistency in effect, rather than contradiction in express terms ...." (*People v. Cowan* (2010) 50 Cal.4th 401, 462, internal quotation marks omitted.) For example, when a witness was examined regarding to whom the defendant purportedly spoke about killing an elderly couple, the witness's prior statement that the defendant spoke to her was inconsistent with her trial testimony that she overheard the defendant tell her daughter. (*Ibid.*) As a practical matter, both statements could not be true. Ballou's statement, "I saw an unfriendly man," is not inconsistent with his statement, "When the officers questioned me, I did not mention the unfriendly man." Both statements could be true, as if, for example, Ballou saw the unfriendly man but did not remember it when the officer spoke to him.

Since Ballou's testimony and his prior statements to officers are not inconsistent, if Ballou had appeared and testified at the trial as he did at the preliminary hearing, his prior statements to his wife would not have been admissible to support his credibility under Evidence Code section 791, subdivision (a). Therefore, his prior statements were not admissible to support his credibility as a hearsay declarant under Evidence Code section 1202.

Respondent also claims that the statements would have been admissible under Evidence Code section 791(b) to refute an implied charge that Les Balou's testimony was recently fabricated. To support this claim, respondent quotes a portion of the cross-examination of Ballou. (RB 72-

73.) In the quotation, appellant's counsel elicited Ballou's admissions that he had not seen appellant since the one time on April 22, 1999, but he knew he was coming to court to identify appellant and he knew the person in the newspaper photo would be seated at counsel table. (6 RT 871-872.)

Respondent contends defense counsel's questioning was a "broad, implicit, charge of fabrication" (RB 73), but it was not. As discussed in the opening brief, as used in section 791(b), the term "fabrication" means an intentional falsehood. (AOB 121-122.) 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.)

Cross-examination that questions a witness's credibility but does not imply fabrication or improper motive does not open the door to prior consistent statements. "[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; 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."].)

Jaffe's cross-examination of Ballou is discussed in the opening brief. (AOB 123-126.) There was no implication of fabrication or improper motive. The thrust of the cross-examination 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 implicit charge was that Ballou was mistaken, not that he had any improper motive. (See 6 RT 863-878.) The cross-examination of Ballou was like that in *People v. Johnson* (1992) 3 Cal.4th 1183, in which "defense counsel ... 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.)

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 consistent statements would not have been admissible to support his credibility under section 791, subdivision (b). Therefore, his prior consistent statements were not admissible to support his credibility as a hearsay declarant under Evidence Code section 1202.

Respondent contends that, even if Ballou's prior consistent statements were inadmissible under section 1202 -- and therefore wholly inadmissible, since respondent concedes they were not admissible under section 791 or section 1236 -- there was no prejudice, because the prior consistent statements were "entirely duplicative" of Ballou's testimony. They were more than duplicative, however. For one thing, Ballou was in his 90's, and his identification of appellant was crucial to the prosecution case. His prior consistent statements tended to corroborate his testimony at the preliminary hearing, and corroboration of such a witness on such a point is obviously beneficial to the prosecution case. For another, Mae's testimony tended to cure a serious weakness in Ballou's testimony, which was that, although Ballou was clear that the unfriendly man he saw was appellant, he was unable to give any cogent reason why he remembered that the day on which he saw the unfriendly man was the day of the homicides. As discussed in the opening brief, on cross-examination, Jaffe asked Ballou a series of questions about the reason he was sure he saw the man on April 22, 1999, instead of April 23 or April 24, and Ballou's replies were all non-

responsive. (AOB 128.) Ballou was unable to say how or why he knew he saw the man on the day of the homicides. This was a gap 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.)

Respondent makes a brief prejudice argument that relies on the discussion in Part I of respondent's argument. Appellant disagrees and likewise relies on his discussion in Part I of this brief.

For these reasons, admitting the inadmissible evidence of Ballou's prior consistent statements was highly prejudicial. Without it and the other errors discussed in appellant's briefs, the result might well have been different. 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 told his brother Alan and the detectives that, as part of his search for Mary and Carley, he called the Sav-on pharmacy to see if Mary had gone there to pick up a prescription. To prove that appellant did not call Sav-on, the prosecutor called as a witness nearly every pharmacy employee who worked on that day. 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. The prosecutor asked Shelton if he interviewed one of the employees, Juana Longoria. Shelton said he did. The prosecutor asked if Shelton had questioned Longoria about receiving a call from appellant. Shelton said he did. The prosecutor asked how Longoria responded. Shelton said she did not remember any telephone call from appellant. The prosecutor asked Shelton if he interviewed another of the employees, Sally Swor. The prosecutor asked if Shelton had questioned Swor about receiving a call from appellant. Shelton said he did. The prosecutor asked how Swor responded. Shelton said she did not remember any telephone call from appellant. Then the prosecutor changed his pattern of questioning. He asked Shelton if he "also spoke" to the remaining employees, naming them one by one, including Jennifer Fleming. Shelton said he did. The prosecutor did not inquire about what those employees

told Shelton. (12 RT 1679-1680; see AOB 132-134.)

Appellant contends that the prosecutor intentionally invited the jury to infer that Fleming told Shelton she did not recall any telephone call from appellant, and that so to do violated appellant's federal constitutional right of confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

B. The issue is not waived.

Respondent argues that this issue is waived by failure to object. (RB 77-78.) The failure to object is excused, however, because *Crawford* "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 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.)

C. The prosecutor could not have introduced direct evidence that Fleming told Shelton she did not speak to appellant; the prosecutor may not introduce circumstantial evidence of such a statement.

Respondent argues that there is no error, because the prosecutor did not actually elicit testimony from Shelton about what Fleming told him. (RB 78, 80.) But, if the prosecutor had elicited testimony from Shelton that, when he spoke to Fleming, she told him she did not recall any telephone call from appellant, the statement would have been inadmissible under *Crawford*. Respondent does not dispute that the statement would be testimonial, there was no showing that Fleming was unavailable as a witness, and appellant had no opportunity to cross-examine her. (See AOB 135-144.)

Although the prosecutor did not elicit testimony that Fleming told Shelton she did not remember a call from appellant, the pattern of the prosecutor's examination and Shelton's testimony implied it. The implication was that *every* employee to whom Shelton spoke told him that he or she did not remember a telephone call from appellant. The implication was necessary to the prosecutor's case, because the only way to prove that appellant did not call the pharmacy was to prove that no one who might have received the call remembered doing so. The implication was intentional: the prosecutor told the jury, "The statements by the defendant show consciousness of guilt. .... [O]ne 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 ...." (14 RT 1906-

1907, italics added.) The prosecutor cannot prove circumstantially a statement he could not prove directly.

Respondent cites a decision that states that an inference is not evidence. (RB 80, citing *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138.) Respondent apparently means that an inference that Fleming told Shelton she did not remember is not evidence that can offend the confrontation clause. But, in the cited case, the question was whether there was sufficient evidence that a certain person was distributing an allegedly defamatory flyer to defeat a SLAPP motion. The only relevant evidence was a videotape that did not actually show the person handing a flyer to anyone but did show him doing other things from which a jury might infer he distributed the flyer. (*Id.* at 1149.) The court observed that "an inference is not evidence but rather the result of reasoning from evidence." (*Ibid.*) The court concluded, "Having reviewed the tape, we agree that at least for the showing of 'minimal merit' required to defeat a SLAPP motion, the videotape is sufficient evidence of distribution." (*Ibid.*, fn. omitted.) The court held, therefore, that the inference had sufficient substance to bar dismissal for insufficient evidence. The result supports appellant more than respondent, because it supports appellant's claim that the inference that the prosecutor invited the jury to make -- that Fleming told Shelton she did not remember a call from appellant -- is indeed substantial enough to offend *Crawford*.

D. Prejudice.

Respondent contends that any constitutional error was harmless beyond a reasonable doubt, because six of the seven employees on duty the day of the murders testified that they did not recall any telephone call from appellant. (RB 81.) This would be strong evidence if the prosecutor had

been trying to prove an affirmative statement, but the prosecutor was trying to prove a negative: he wanted to show that appellant did not call the pharmacy. If any one of the seven employees testified that he or she received a call from appellant that day, the testimony of the others that they did not receive a call would become unimportant. Therefore, it was important for the prosecutor to prove that Fleming told Shelton she did not take a call from appellant.

Respondent's further prejudice argument on this point (RB 81-85) is substantially identical to the prejudice argument in Part I of respondent's argument (RB 54-59). Appellant's reply to that argument is at pages 10-15, *ante.*

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

Appellant contends that 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. (AOB 148-155.) Respondent argues that the evidence was well within the bounds of discretion. (RB 85-89.)

The prosecutor told the court that his penalty phase evidence was going to be "brief" and "limited," with "some photographs." (15 RT 2042-2044.) Respondent claims that the evidence admitted was consistent with that representation. (RB 88.) But, as respondent acknowledges (RB 88, fn. 31), the victim impact testimony spans 52 pages of the reporter's transcript, included 31 photographs, and lasted approximately one hour and forty-five minutes, which is neither "brief" nor "limited." The victim impact evidence was excessive.

Respondent argues that the evidence concerned permissible subjects, such as how the witnesses learned of the crimes and the impact of the crimes upon their lives. (RB 88-89.) But much of the evidence concerned other subjects. Much of the evidence concerning 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.) Carley was three years old at the time of her death, but 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.) The testimony of Mary's oldest sibling, Sandra Zalonis, that her marriage fell apart in

Florida after the murders (15 RT 2081-2082) cannot reasonably be said to describe the "circumstances of the crime." Such evidence could not have assisted the jury in fixing the penalty except by enraging the jury's emotions.

The prejudicial effect of the victim impact evidence was compounded by an instruction telling the jury not to consider the evidence "to divert your attention from your proper role of deciding what penalty the defendant should receive." (14 CT 3829.) This instruction would not prevent a juror moved by the emotional impact of the evidence from relying on his or her emotional response to impose death.

The victim impact evidence was overlong and, in substantial part, not to the point. It was also highly emotional, as respondent recognizes. (RB 89.) The penalty phase became a virtual memorial service for the victims. 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.

The court instructed the jury to return three penalty verdicts, one for the murder of Mary Kopatz in Count 1 (14 CT 3861), one for the murder of Carley Kopatz in Count 2 (14 CT 3860), and one for "multiple murders" (14 CT 3859). In the opening brief, appellant contended that, 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. (AOB 156-162.) Further research has located two decisions indicating that a single penalty verdict covering two murders is not improper, although it is unclear whether those decisions are still viable, as discussed below. But, regardless of whether there could or should be one penalty verdict or two as to Counts 1 and 2, there should not be *both* separate penalty verdicts on Counts 1 and 2 *and* a penalty verdict for multiple murders.

B. The issue is not waived.

Respondent claims that this argument is waived by failure to object and by defense counsel Belter's approval of the verdict forms. (RB 92-93.) There was no objection, but the trial court has a sua sponte duty to give correct instructions. (*People v. Avila* (2009) 38 Cal.4th 491, 568.) And Belter's comment about the verdict forms was not such as to invoke waiver or invited error. The verdict forms were prepared by someone other than Belter. The separate penalty verdict for multiple murders and the related instruction were not discussed. (15 RT 2046-2060, 2183-2186.) When

the court asked Belter if he had looked at the verdict forms, he replied, "I just got them, and I'm looking at them right now. [¶][¶] Those are fine, Your Honor." (15 RT 2184.) This was mere acquiescence, and it does not show any tactical purpose. It does not invoke the doctrine of invited error. "The invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction. (Citation.)" (*People v. Moon* (2005) 37 Cal.4th 1, 28; accord, *People v. McKinnon* (2011) 52 Cal.4th 610, 677, fn. 41.)

In any event, the instructions can be reviewed under Penal Code section 1259. (*People v. Prieto* (2003) 30 Cal.4th 226, 268 [applying § 1259 to penalty phase instructions].)

The cases respondent cites concerning waiver (RB 93) do not involve the form of death penalty verdicts. One concerns whether a verdict form in the guilt phase of a capital case was fatally ambiguous because it was unclear whether the jury was finding defendant guilty of first degree murder on a rape-felony-murder theory or whether it was finding true the rape-felony-murder special circumstance. The court held that the defendant waived this issue by failing to object to the form of the verdict. It further held that the jury's intent to find the rape-felony-murder special circumstance true was unmistakably clear. (*People v. Jones* (2003) 29 Cal.4th 1229, 1259-1260.)

The other case respondent cites is a non-capital case. The defendant argued that, in a bifurcated trial on a prior conviction, the verdict form was defective because it misstated the section under which he had been convicted. The court held that the defendant waived this issue by failing to object to the form of the verdict. It further held that the misstatement was "technical at worst" and harmless, since the statute was correctly cited in the evidence submitted to the jury. (*People v. Bolin* (1998) 18 Cal.4th 297,

330-331.)

Neither case can reasonably be read as holding that error of directing the jury to render an unnecessary, unauthorized penalty verdict for "multiple murders" is waived by failure to object. Such error is not merely technical, as in *Bolin*. It concerns, not the form of the verdict, as in *Jones*, but the very existence of an instruction and verdict form for an unnecessary determination.

C. It was error to seek both separate penalty verdicts for the two murders and a third penalty verdict for "multiple murders."

Respondent asserts that appellant is not entitled to a separate penalty verdict on each count of murder. (RB 94.) This point is moot, since appellant received a separate verdict on each count. But there are decisions that support respondent, although respondent does not cite them. In *People v. Crittenden* (1994) 9 Cal.4th 83, this Court held, "Although it is proper to employ separate verdict forms when there is more than one murder victim (citations), no authority compels the rendering of separate penalty verdicts as to each victim." (*Id.* at 159.) This Court stated, "[T]he use of a single verdict form encompassing the penalty for the murder of more than one victim conceivably may promote a comprehensive determination as to whether the death penalty is appropriate in a particular case, without placing undue emphasis upon the characteristics and status of the individual victims or their number." (*Ibid.*) And, in *People v. Hines* (1997) 15 Cal.4th 997, this Court stated, "after a defendant has been convicted of multiple counts of capital murder, the trial court may employ separate verdict forms for separate counts but is not required to do so," and it approved the use of a single penalty verdict form for two capital murders.

(*Id.* at 1070-1071.)

Crittendon rejected an argument that a single penalty verdict is error, because it cannot be determined whether the jury unanimously voted the punishment of death on any single count, stating, "[T]he jury need not unanimously agree as to which of the murders committed warrants the death penalty, so long as the jury unanimously agrees that death is the appropriate penalty." (*People v. Crittenden, supra,* 9 Cal.4th at 159.)

It is unclear whether *Crittendon* and *Hines* are still valid on the matter of penalty verdicts. *Hines* cites *Crittendon* but, according to appellant's research, no other decision cites either case on this point. *Halvorsen*, a much more recent decision, discusses and rejects a claim that it was error to seek separate penalty verdicts for two murders without mentioning *Crittendon* or *Hines*. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 430.)

But, regardless of whether there should be one penalty verdict or two as to Counts 1 and 2, there should not be *both* separate penalty verdicts on Counts 1 and 2 *and* a penalty verdict for multiple murders. Respondent agrees the instruction to fix a penalty for "multiple murders" in addition to fixing the penalties for Counts 1 and 2 was error and "not consistent with the penalty scheme that envisions a penalty verdict as to each murder." (RB 93-94.)

D. Prejudice.

Respondent argues the conceded error was not prejudicial, but appellant disagrees. Respondent's discussion of this subject misstates the relationship of the special circumstances to the penalty verdicts. Respondent speaks as if the prosecution were entitled to a separate penalty verdict for each special circumstance. Respondent states that "the trial

court properly instructed the jury in the penalty phase to return one penalty verdict for the financial gain special-circumstance murder of Mary Kopatz in count 1 and one penalty verdict for the financial gain special-circumstance murder of Carley Kopatz in count 2." (RB 93.) Respondent states the jury "consider[ed] separately whether death was appropriate for the murder of Mary for financial gain, and for the murder of Carley for financial gain, from whether death was appropriate for having committed multiple murder." (RB 94.)

In fact, however, the penalty is imposed on a crime, not a special circumstance. Respondent correctly states that the special circumstances merely made appellant death-eligible. (RB 95.) Respondent fails to note, however, that a constitutionally imposed death verdict takes into account *all relevant information* about the crime and the defendant. This information includes "the circumstances of the crime and the existence of any special circumstances found to be true." (Pen. Code, § 190.3, subd. (a).) The jury was instructed, "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." (CALJIC No. 8.88, 14 CT 3832-3833, italics added.) In accordance with these principles, the penalty verdict on Count 1 should be presumed to reflect full consideration of all relevant facts and circumstances shown by the evidence, including the financial gain special circumstance and also the multiple-murder special circumstance. So should the verdict on Count 2.

Respondent argues that the error was harmless, because the jury voted for death on Counts 1 and 2 on the basis of the financial gain special circumstance alone. (RB 94-95.) Respondent would be correct if the jury's penalty determination was a wholly logical decision, but it is not. Penalty

determination is a "normative process" in which the jury is vested with "vast discretion different from that possessed by any guilt phase jury. (Citation.)" (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [role of a capital penalty jury is "not merely to find facts, but also—and most important—to render an individualized, *normative* determination about the penalty appropriate for the particular defendant—i.e., whether he should live or die."].)

Given the gravity of the decision, the tolerance for error is very low. Penalty phase error is subjected to a more exacting standard of prejudice than guilt phase error. (*People v. Jones* (2012) 54 Cal.4th 1, 75; *People v. Brown, supra,* 46 Cal.3d at 447 ["we have recognized a fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination"].) The applicable test is whether there is a reasonable *possibility*, not a reasonable *probability*, that the error affected the outcome. (*People v. Brown, supra,* 46 Cal.3d at 447.) "When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the [reasonable probability] standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case.' [Citations.]" (*Id.* at 448.)

There is a reasonable possibility that submitting the unnecessary verdict for multiple murders to the jury infected the entire penalty decision process. Respondent describes the penalty verdict for multiple murders as merely "superfluous" (RB 94), but it is worse than that.

First, it must have confused the jury to be asked for three penalty verdicts when only two murders had been committed. The jury must have wondered whether the three verdicts should be based on different factors, because, if they were not, there would be no reason to ask for the third

penalty verdict. If the jury thought the verdict for multiple murders should be based on different factors than the verdicts for the two murder counts, it could have allocated factors among verdicts. In the process, mitigating factors could have been misallocated or diluted.

Second, requesting the third penalty verdict gave particular prominence to the multiple murders special circumstance. It suggested that the circumstance of multiple murders was an independent reason for imposing death. It was similar to requesting a jury to make too many multiple murder special circumstance findings (*People v. Halvorsen, supra,* 42 Cal.4th at 430), but the error is more prejudicial because it is in the penalty phase.

Third, requesting three penalty verdicts instead of two increases the chances the jury will return a death verdict. Like alleging two special circumstances for a double murder, seeking a third penalty verdict "improperly inflates the risk that the jury will arbitrarily impose the death penalty...." (*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* (1988) 44 Cal.3d 713, 765-767.) Requesting the third penalty verdict is not a "benefit," as respondent suggests (RB 94); it increases the opportunity for a death verdict. It weights the process towards death.

E. The penalty verdicts should be reversed.

The instruction and verdict forms requiring separate penalty verdicts on Counts 1 and 2 and a third penalty verdict for "multiple murders" prejudiced appellant by possibly confusing the jury, calling undue attention to the multiple-murder special circumstance, and requiring more penalty decisions than were needed. The instruction and verdict forms interfered

with a reliable penalty verdict within the meaning of the Fifth, Sixth, Eighth, and Fourteenth Amendments. The penalty judgments should be reversed.

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

This claim is fairly presented in the Appellant's Opening Brief. (See AOB 163-168; *People v. Schmeck* (2005) 37 Cal.4th 240, 304.) Respondent does not state any contention concerning it that is not already reflected in case law. (RB 95-96.) Appellant stands on the argument in the Appellant's Opening Brief.

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

This claim is fairly presented in the Appellant's Opening Brief. (See AOB 169-205; *People v. Schmeck, supra,* 37 Cal.4th at 304.) Respondent does not state any contention concerning it that is not already reflected in case law. (RB 96-101.) Appellant stands on the argument in the Appellant's Opening Brief.

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

Respondent argues that "there are no errors to cumulate." (RB 102.) Elsewhere, however, respondent concedes that it was error to admit Ballou's prior consistent statements for their truth under Evidence Code section 1236 and to support Ballou's credibility as a witness under Evidence Code section 791. (RB 67-70.) Appellant's briefs discuss additional errors, including admitting the recording of his interview by the detectives, admitting the prior consistent statements of Les Ballou, admitting the testimonial hearsay of Jennifer Fleming, admitting excessive victim impact evidence, and requiring the jury to make unnecessary penalty determinations. Even if this Court were to determine that no single error was prejudicial by itself, the cumulative effect of these errors sufficiently undermines confidence in the integrity of the guilt and penalty phase proceedings that reversal is required. *(Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

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

This claim is fairly presented in the Appellant's Opening Brief. (See AOB 209-216; *People v. Schmeck, supra,* 37 Cal.4th at 304.) Respondent does not state any contention concerning it that is not already reflected in case law. (RB 102-103.) Appellant stands on the argument in the Appellant's Opening Brief.

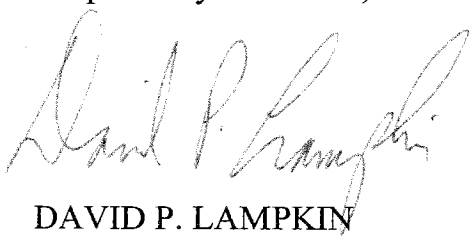
X. BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, BINDING ON THIS COURT, THE DEATH SENTENCE HERE MUST BE VACATED.

This claim is fairly presented in the Appellant's Opening Brief. (See AOB 217-220; *People v. Schmeck, supra,* 37 Cal.4th at 304.) Respondent does not state any contention concerning it that is not already reflected in case law. (RB 103-104.) Appellant stands on the argument in the Appellant's Opening Brief.

CONCLUSION

For the reasons stated above, this Court should reverse the convictions of murder and the judgment of death.

Respectfully submitted,

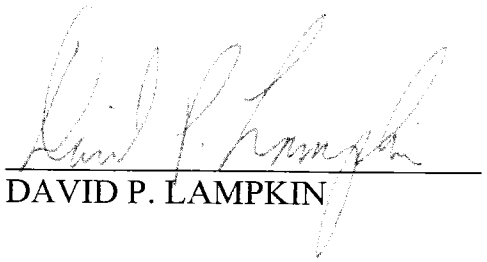


DAVID P. LAMPKIN
Attorney at Law
P.O. Box 2541
Camarillo, CA 93011-2541
Telephone: (805) 389-4388

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 10,993 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 January 10, 2013, I served the APPELLANT'S REPLY BRIEF by placing a true copy thereof in each of several envelopes, one for and addressed to each addressee hereafter named:

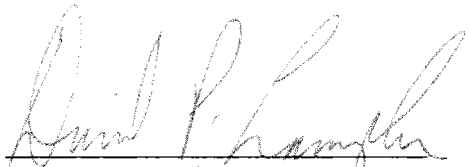
[PLEASE SEE ATTACHED SERVICE LIST]

[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 January 10, 2013 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:

Andrew Mestman, Esq.
Deputy 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 #T-11498
CSP-SQ
NSS-24
San Quentin, CA 94974

CALIFORNIA APPELLATE PROJECT – SAN FRANCISCO:

California Appellate Project
Attn: Scott Kauffman, Esq.
101 Second Street
Sixth Floor
San Francisco, California 94105