IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	Supreme Court
Plaintiff and Respondent,	)	Crim. S078404
	)	
v.	)	Los Angeles County
	)	Superior Court No.
ROGER HOAN BRADY,	)	YA020910
	)	
Defendant and Appellant.	)	

APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

APPELLANT'S OPENING BRIEF

On Automatic Appeal From a Judgment Of Death

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Roger Hoan Brady

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death (Penal Code §1239) entered by the Los Angeles Superior Court on March 16, 1999. (33 CT 9550.)

STATEMENT OF THE CASE

On September 1, 1994, a felony complaint for arrest warrant was filed charging appellant, Roger Hoan Brady, in count 1 with the murder of Martin Lane Ganz. (Pen. Code §187(a).) (1 CT 1.)

The Information also alleged two special circumstances in connection with the murder count. Appellant was charged with intentionally and knowingly killing a police officer engaged in the performance of his duties. (Pen. Code §190.2(a)(7); 1 CT 2.) It was also charged that appellant committed the murder for the purpose of avoiding

and preventing a lawful arrest. (Pen. Code §190.2(a)(5).) The complaint further alleged that appellant personally used a firearm in the commission of all of the offenses (Pen. Code §§1203.06(a)(1); 12022.5), causing the offense to become a serious felony. (Pen. Code §1192.7(c)(8).) (1 CT 2.)

Appellant was held to answer for the charges following a preliminary hearing held on April 17, 1997. (1 CT 154.) The same charges were filed in an information on April 29, 1997. (2 CT 330.) The Information further alleged as an additional special circumstance that appellant had been previously convicted of first degree murder in the State of Oregon on November 2, 1995. (2 CT 331.)

On October 14, 1998, a jury trial began before the Honorable Stephen E. O'Neil. (10 CT 2791.) Jury selection concluded on October 23, 1998. (CT Supp. II 3.)

On October 26, 1998, the prosecution began presenting evidence in the guilt phase of trial. (34 CT 9023.) The presentation of evidence and the arguments of counsel concluded on November 10, 1998, and the jury began deliberations. (34 CT 9059-9060.) On November 12, 1998, the jury announced that they had agreed upon the verdicts. (34 CT 9076.) The jury found appellant, Roger Hoan Brady, guilty of first degree murder as charged in the information. (34 CT 9077.) The jury further that appellant had personally used a firearm in commission of the offenses, and found true the special circumstances alleged under Penal Code sections 190.2(a)(5) and (7). (*Id.*)

On November 13, 1998, the jury heard evidence concerning the special circumstance alleged in the Information under Penal Code section 190.2(a)(2), based on appellant's previous murder conviction in Oregon. (34 CT 9169.) The jury found this special circumstance to be true. (34 CT 9170.)

The penalty phase began on November 16, 1998. (34 CT 9205.) The presentation of evidence and the arguments of counsel concluded on December 14, 1998. (35 CT 9407.) The jury retired to begin deliberations at 3:58 p.m. on December 14, 1998, and adjourned for the evening at 4:23 p.m. (*Id.*) On December 15, 1998, the jury resumed its deliberations at 10:00 a.m. (33 CT 9424A.) The jury deliberated from 10:00 a.m. to 11:48 a.m., before breaking for lunch. The jurors returned at 1:30 p.m., and at 2:45 p.m. announced that they had reached a verdict. (*Id.*) The jury requested to have the verdict read the following day because one juror needed to leave for a medical appointment. (*Ibid.*) The court ordered the verdict sealed and retained in the custody of the clerk. (33 CT 9477.) The jury, all counsel and appellant were ordered to return the following day. (33 CT 9424B.)

On December 16, 1998, the jury returned to the courtroom and the verdict of death was announced. (33 CT 9481.)

On March 16, 1999, the trial court denied appellant's motion to modify the verdict of death pursuant to Penal Code section 190.4(e). (33 CT 9544.) The trial court imposed the death penalty for the first degree murder charged in Count I of the Information, and for the three special

circumstances found to be true: the murder of a peace officer engaged in the performance of his duties (Pen. Code §190.2(a)(7)); the previous first degree murder conviction from Oregon (Pen. Code §190.2(a)(2)); and the murder being committed for the purpose of avoiding a lawful arrest (Pen. Code §190.2(a)(5)). (33 CT 9550.)

The notice of automatic appeal was timely filed on March 16, 1999. (33 CT 9554.)

STATEMENT OF THE FACTS

I. THE PROSECUTION'S CASE IN THE GUILT PHASE.

A. The Traffic Stop and the Shooting of Officer Martin Ganz.

Officer Martin Ganz of the Manhattan Beach Police Department ("MBPD") was on patrol duty, working the evening shift, on December 27, 1993. (6 RT 1456.) Ganz's twelve-year-old nephew, Don, was accompanying him on a Department sanctioned "ride along." (*Id.*) At around 11:00 p.m., they were stopped at a traffic signal when Officer Ganz noticed a small grey or silver car on the other side of the street. The driver had stopped past the limit line, and was partially blocking the intersection. (6 RT 1377; 1460.) Officer Ganz told his nephew, "we are going to pull him over and find out what is going on." (6 RT 1464.)

Ganz followed the car for a few moments and then activated the flashing lights atop the patrol car to signal the driver to pull over. (6 RT 1464.) The driver turned onto Carlotta Way, a small street running through the Manhattan Village Mall, and pulled over alongside the Bank of America just before reaching a stop sign. (6 RT 1465.) Officer Ganz stopped the patrol car three or four feet behind the suspect's car. (6 RT 1472.) He told Don to wait in the car, and he would be right back. (*Id.*)

Eighteen-year-old Jennifer La Fond drove by the traffic stop, passing alongside the patrol car as Officer Ganz was opening the door. As La Fond drove past the suspect's car she turned to look at the driver. He looked directly at her; the windows of both of their cars were open. La Fond estimated that she had a three or four second look at the suspect. (7 RT

1808.)[1]

Don saw Officer Ganz standing at the driver's side door of the suspect car. He and the suspect appeared to be talking. The driver was leaning over toward the passenger's side of his car, as if he were reaching for something in his glove box. (6 RT 1474-1475.) Then Don heard a loud "pop" sound. Martin Ganz was still at the driver's side door, but his lower body leaned back as though something had hit him. (6 RT 1476.) Don heard another "pop" sound; he ducked down onto the floor and curled up under the dashboard. (6 RT 1477-1478.) Don heard heavy footsteps (like the boots his uncle was wearing) near the driver's side of the patrol car. (6 RT 1479.) He did not look up. Don peeked up a moment later and saw a man standing at the back of the suspect's car. (6 RT 1480.) The man was holding a gun with both hands. His arms were straight out in front of him and he seemed to be pointing downward toward the ground alongside the patrol car. (6 RT 1480.) Don saw fire coming from the gun's barrel. He ducked down again. (6 RT 1481-1482.) When he looked up the next time the suspect was still there. (6 RT 1488.) The suspect turned to look at the patrol car, pointing the gun in that direction. (6 RT 1489.) Don was afraid that he had been seen, and quickly ducked down onto the patrol car's floorboards. (6 RT 1490.) He had a "split second" look at the suspect's face. (6 RT 1491.) When he heard the car drive away, Don tried to use the police radio to call for help. (6 RT 1491-1492.) The prosecutor played a tape recording of Don screaming for help over the police radio. (*Id.*, People's

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La Fond had taken some methamphetamine earlier that morning. She testified, however, that the effects had worn off by the evening. (7 RT 1820-1821.) She characterized her drug use as "experimental." (7 RT 1822.)

Exh. No. 7.)

Witnesses in other areas of the mall noticed what they believed to be a routine traffic stop. (See, e.g., 6 RT 1533; 7 RT 1613.) A few moments later, they heard one or two loud "pop" sounds and turned to look in the direction of the noise. (6 RT 1537; 6 RT 1583; 7 RT 1661.) The officer was moving quickly, in a sort of crouched position, from the suspect's car toward the patrol car. (6 RT 1539; 1584; 7 RT 1617; 1664-1666.) The suspect was following, between six to twelve feet behind. (6 RT 1540-1541; 1584; 7 RT 1617.) The suspect fired again as he drew alongside the patrol car's rear tire. (6 RT 1540; 1587.) The officer disappeared from view, either falling or diving behind the patrol car. (6 RT 1585.) Several witnesses testified that the suspect held the gun in both hands with his arms extended, and fired again at a downward angle over the trunk of the patrol car. (6 RT 1542; 1587; 1590; 7 RT 1667; 1690.) The suspect appeared to move back along the driver's side of the patrol car. He lowered his body and dropped out of sight for a few moments. Then the suspect stood up, returned to his own car and drove away. (6 RT 1548-1549; 7 RT 1701; 1752.)

Several people came to help the officer. Robert Doyle/Ferrer arrived within a few moments, and Jamie Timmons appeared soon thereafter. (6 RT 1593; 7 RT 1754.) Don Ganz had emerged from the patrol car, and was running around screaming for someone to save his uncle. (6 RT 1593; 7 RT 1754; 1790.) Don was hysterical, and seemed confused and disoriented. (7 RT 1793.) Timmons tried to use the police radio to call for help, but was not certain that her call had been received. (7 RT 1755-1756; People's Exh. 7(b).) A passerby, retired LASD Deputy David Thomas, knew how to use the patrol car's microphone and he called the police dispatcher. (7 RT 1687; People's Exh. 7(c).)

Officer Ganz was lying face down behind the patrol car. His right arm appeared to be pinned down underneath his body. (6 RT 1593.) Ganz was making gurgling noises and struggling to breathe and to move. (6 RT 1597; 7 RT 1685.) Fluids and what appeared to be bodily tissue were collecting in and around his mouth. (7 RT 1686.) Jamie Timmons put the officer's head in her lap to get him out of the puddle of blood which seemed to be choking him. She spoke to Ganz, telling him to relax, that help was coming and that his nephew was safe. (7 RT 1756.) He appeared to be conscious, and seemed to relax and grow less agitated in response to what she said. (7 RT 1757.)

B. Officer Ganz's Injuries and the Cause of Death.

Paramedics transported Officer Ganz to a nearby hospital where he died shortly after arrival. (See 19 RT 4234-4235.) Autopsy revealed the presence of two gunshot entry wounds. (8 RT 2041.) One bullet had passed through the chest wall without entering the chest cavity. It then traveled through the upper portion of the right arm, breaking the bone, and leaving an exit wound on the rear of the right arm. (8 RT 2043.) Abrasions on Ganz's back indicated that he had been shot in the back while wearing a bullet proof vest. (8 RT 2046.) The cause of death was a gunshot wound to the left side of the face, near the cheekbone and under the left eye. (8 RT 2048; 2053.) The bullet traveled through toward the base of the skull grazing the front portion of the brain's left side. It then crossed over, hitting the middle portion of the brain and lodging in the right side of the cerebrum under the scalp behind the right ear. (8 RT 2048.) There was no exit wound. The coroner removed the bullet and turned it over to investigators for analysis. (8 RT 2059.)

The coroner could not determine the positions of the shooter and the officer based on the medical evidence. (8 RT 2049-2050.) He was also unable to determine which shot had been fired first. (8 RT 2042.) The coroner stated, however, that there were no indications of close range "contact" wounds. (8 RT 2064.) With regard to the head wound, the coroner testified that this injury causes immediate hemorrhaging to the brain and is "more or less uniformly fatal." (8 RT 2053.) Someone sustaining this type of gunshot wound would be incapacitated fairly quickly. (8 RT 2053.) In the coroner's opinion, Officer Ganz was probably unconscious and unaware of his surroundings within a matter of seconds following this shot. (8 RT 2072.)

C. The Investigation.

A team of three investigators (LASD Detectives Delores Perales and Clemente Bonilla, and MBPD Sergeant Randy Lee) interviewed the crime scene witnesses immediately after the shooting. (9 RT 2172-2173.) Twenty-three witnesses were interviewed between 3:00 a.m. and approximately 10:45 a.m. on December 28, 1993. (9 RT 2175-2176.) Most of the witnesses did not get a close look at the suspect. The car was described as a small, compact two-door hatchback (6 RT 1525-1526; 7 RT 1622-1623;1664; 1831) with California license plates. (6 RT 1525-1526; 7 RT 1758.) Some witnesses stated that the car was silver, gray or blue-gray in color. (6 RT 1525-1526; 1597; 7 RT 1758.) Another witness told police that the car was brown. (7 RT 1664.)

Jennifer La Fond thought that the suspect might have been of Asian descent. (7 RT 1796-1797.) His hair was dark, and appeared neither noticeably short nor long. He had dark eyes and a rounder face. (*Id.*) Don Ganz's description was similar. (6 RT 1495.) La Fond told police that the

suspect had been wearing a gray jacket (similar in style to those made by the "Members Only" clothing line) with a shirt underneath. (7 RT 1795-1796. See also 6 RT 1495.)

Los Angeles County Sheriff's Department ("LASD") investigators recovered three shell casings from the crime scene. (8 RT 1883. See People's Exhs. 31, 32, 33, 35 and 39.) Two casings were found around eight feet in front of the patrol car, approximately four feet apart from each other. (8 RT 1931; People's Exh. 39.) A third casing was found by the patrol car, lying about one foot behind the wheel well near the car's front panel. (*Id.*) Investigators later determined that Officer Ganz's weapon had not been fired. (9 RT 2127.)

Investigators obtained surveillance videotapes from the Bank of America adjacent to the crime scene, and also a nearby First Interstate Bank. (8 RT 1903, 1904-1905.) The surveillance systems produced a series of still images which were recorded on videotape at 14 second intervals. Several images from these tapes were compiled on one videotape which was shown to the jury. (8 RT 1904-1905; People's Exh. 46.) The video images show Officer Ganz's patrol car. (8 RT 1909-1912.) The rear bumper of the suspect's car is visible in one frame. (8 RT 1918.) In a subsequent frame a figure identified as the officer is seen "stepping backwards." (8 RT 1916.) In the next frame, the officer is seen falling to the ground. The suspect's vehicle is still present. (*Id.*) In the frame which follows fourteen seconds later the officer is down on the ground. A shadow is alongside his body. (8 RT 1918.) Subsequent frames show that the suspect car has left. A pool of blood is forming on the pavement around the officer's head. (8 RT 1920.)

LASD Detectives consulted with a private firm, Aerospace Corporation, to analyze the images recorded on the surveillance videotapes.

(8 RT 1936-1939.) Aerospace advised investigators that the suspect's car was a Diahatsu Charade in a color other than red, white or black. (8 RT 1958-1959.) They also recommended that police look for a car with only the passenger side rear view mirror, or a vehicle with a dark or possibly black-colored right hand passenger's side mirror. (8 RT 1959.) Aerospace representatives also advised detectives that the suspect car might have damage to its right front bumper. (8 RT 1960-1961.)

The Ganz homicide was featured "almost nightly" on local television for a period of two or three weeks (8 RT 1999-2000), and the case was also heavily covered in the newspapers. (*Id.*) The Los Angeles County Sheriff's Department immediately formed a "Clue Task Force," and established a system for recording any information the public provided. (9 RT 2079-2080; 2088.) Over 2,000 clues were generated in the case largely due to the considerable publicity it received. (8 RT 1979.) Each clue was given a number as it was received and then assigned to an investigator for follow up. (8 RT 1979-1980.)

On January 20, 1994, the Task force received a clue (designated Clue No. 1270) identifying Roger Brady as the suspect. (8 RT 1980.) Clue No. 1270 was assigned to LASD Deputy Timothy Miley for investigation. (8 RT 1978.) Miley ran a criminal "rap sheet" on Roger Brady, and determined that he was on federal parole. (8 RT 1980; 1985.) Miley contacted Brady's probation officer, Mr. Bouchard (8 RT 1985-1986), who gave investigators a Polaroid photograph of Brady, and his work and home addresses. Miley and his partner, Detective Steve Weireter, drove to the Malibu condominium complex where Brady lived with his parents. They watched the complex for 6 or 7 hours, but did not contact Roger Brady or take any photographs that day. (8 RT 1988, 2003.) They did, however, order a surveillance team to

begin watching the Brady residence. (8 RT 1988, 1990.) Miley and Weireter prepared a search warrant and prepared to have a SWAT team serve it on the Brady residence on Sunday, January 23, 1994. (8 RT 1991.) The surveillance was called off because a company hired to analyze the bank surveillance video advised that the suspect car had specific features which did not match Brady's Diahatsu. (8 RT 1991.)

On January 25, 1994, Miley, Weireter, and two Malibu patrol deputies went to the Brady's home. (8 RT 1992-1993.) Roger Brady consented to a search of his car, his bedroom and the common areas of the condo. (8 RT 1993-1994.) Miley and Weireter each took turns interviewing Roger Brady while the other searched. (*Id.*) They were specifically searching for anything that might match information they had received about the crime, including a weapon, some items of clothing, and ammunition. (8 RT 2008) Police searched for two hours and found no contraband and no evidence connected to the Ganz homicide. (8 RT 1993-1994; 2008.)

In the weeks and months following the shooting, investigators showed Jennifer La Fond and Don Ganz photo-spreads of possible suspects; Roger Brady's picture among them. (9 RT 2204-2206; 2218-2219.) Neither Don Ganz nor La Fond was able to identify a suspect. (6 RT 1498-1500,1526-1527; 7 RT 1795-1797,1815-1816.)

In the spring of 1994, Roger Brady and his parents, Phillip and Diep, moved to the Vancouver, Washington, area. (19 RT 4340.) On August 4, 1994, Roger and his parents were living in an apartment in Washington County, Oregon. Oregon state and local law enforcement agents went to the Brady's apartment complex to serve a warrant for Roger's arrest in

connection with another case. (8 RT 2013-2014.)[2] A search of the apartment revealed a small safe containing two pairs of gloves, a .380 Davis handgun, two extra magazines, some ammunition and a knit ski mask. (8 RT 2031.) Tests performed on the Davis handgun indicated that it was the weapon used in the Ganz homicide. (9 RT 2115.) The bullet recovered from Ganz's body during the autopsy(People's Exh. 44) was matched to this Davis .380. (9 RT 2115.) The bullet embedded in Officer Ganz's bullet proof vest also was matched to the gun. (*Id.*)

On August 13, 1994, investigators brought Jennifer La Fond and Don Ganz to Oregon to view a live line-up of six potential suspects. (6 RT 1498; 7 RT 1801; People's Exh. 9.) La Fond identified Roger Brady as the suspect. (7 RT 1801-1802.) Don Ganz did not identify Roger Brady. (6 RT 1499.) He initially selected another person from the line-up. (*Id.*) By that time, Perales and the other investigators had focused on Roger Brady as the prime suspect. (9 RT 2223-2224.) After speaking with Detective Perales, Don Ganz changed his mind and said that number five (Roger Brady) also

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Roger Brady was arrested on charges of murder, attempted murder and armed robbery. He was subsequently tried and convicted (hereafter referred to as the "Correa" homicide or the "Oregon case"), and received a sentence of life without possibility of parole when the Oregon jury could not reach a verdict in the penalty phase. The jurors in this case were not told about the underlying facts or the charges in Oregon. In the guilt phase of this case, the jury made findings on the murder charge, weapons use allegation and two special circumstances: murder of a police officer engaged in the performance of his duties, and murder to avoid or prevent a lawful arrest. (Pen. Code §§190.2(a)(5) and 190.2(2)(7).) The jury determined the third special circumstance pertaining to the Correa homicide (Pen. Code §190.2(a)(2)) separately, after returning the guilt phase verdicts and before the start of the penalty phase. (See 11 RT 2555-2580; 2592-2593; 32 CT 9169-9170.)

looked like the suspect. (See 6 RT 1529.)

A little more than a year later, in November of 1995, Don went to Oregon to testify in a trial there. (6 RT 1529.) He was sitting in the courtroom accompanied by his mother and the prosecutor in this case, Deputy District Attorney Barbara Turner. (6 RT 1530.) Roger Brady was brought into court by uniformed officers, and was clearly in custody. (6 RT 1529-1530.) Don testified that he and Roger Brady made eye contact, and that was when he was sure Brady was the shooter. (*Id.*)

II. THE DEFENSE CASE IN THE GUILT PHASE

The prosecutor argued that the shooting was preceded by premeditation and deliberation. According to the prosecution's theory of the case, the first shot struck Officer Ganz in the arm. Brady then pursued the injured officer, in order to "finish him off" as Ganz tried to take cover behind the patrol car. (11 RT 2522-2523.) The gunshot to Ganz's face which proved fatal was the final shot Brady fired under the prosecution's version of the events. (See *id.*)

Defense counsel vigorously contested Don Ganz's and Jennifer La Fond's identifications of Roger Brady as the shooter. (See, e.g., 6 RT 1513-1530 [defense cross-examintaion of Don Ganz]; 7 RT 1803-1821 [defense cross-examination of Jennifer La Fond].) The defense also asserted that the evidence about the way in which the crime occurred was insufficient to support the prosecution's scenario. Counsel argued that the state, therefore, had not provided enough evidence from which to infer the elements of premeditation and deliberation necessary for a first degree murder conviction. (See 11 RT 2494-2510.)

Defense counsel called John Gruen, M.D., Director of Neurotrauma at USC Medical Center, to testify as an expert in gunshot wounds to the

head. (9 RT 2232-2235.) Dr. Gruen reviewed all of Officer Ganz's medical records, and the coroner's report. (9 RT 2237.) He agreed with the coroner that it was not possible to determine which wound was inflicted first based on the medical evidence. He also concurred in the coroner's opinion that Ganz would have been unconscious within a matter of a few minutes after sustaining the gunshot wound to the face. (9 RT 2242.) However, Dr. Gruen opined that Officer Ganz could have moved quickly to the rear of the patrol car after being shot in the face. The onset of bleeding would have been rapid, but the blood would not necessarily have flowed from Ganz's mouth before he fell behind the police car. (9 RT 2243.) It was possible that no blood would have dropped along the path from the suspect vehicle to the rear of the police car. (9 RT 2246.)

The defense also called LASD Detective Delores Perales to testify about a number of discrepancies between the witnesses' statements immediately after the crime and their trial testimony. (9 RT 2249.) Witness David Brumley never told Perales that he had seen the suspect get out of the car. (9 RT 2254.) He never described seeing the suspect drop out of sight near the patrol car's door. (*Id.*) Witness Robert Doyle/Ferrer was interviewed at 7:00 a.m. on December 28th. Although Perales specifically asked him if he had seen the shots fired, Doyle/Ferrer stated that he had not seen the actual shooting. (9 RT 2255-2256; 2258.) He never stated that he had seen the officer get out of the police car and walk towards the suspect vehicle. (9 RT 2256.) Doyle/Ferrer did not tell Perales that he had seen the officer running back to the patrol car. (9 RT 2257.) Witness La Croix never told Perales that she had seen the shooter standing in the so-called "combat stance," firing two or three more shots. (9 RT 2259-2260.) She did not mention having seen the officer running toward the patrol car. (9 RT 2259.)

Witness David Sattler never mentioned seeing the suspect in a "combat stance." (9 RT 2261.) In contrast to his testimony at trial, Sattler did not tell police that he had seen the suspect in silhouette reaching inside the patrol car. (9 RT 2261-2262.) In his police interview, Sattler told Perales that the patrol car's door had been closed. (9 RT 2261.) In her December 28th interview with Detective Perales, Timmons expressly stated that she had not seen the suspect travel from his car to the patrol car. (9 RT 2263.) Timmons did not tell the police that she had seen the suspect and the officer facing each other. (*Id.*)

La Fond told Perales that she had gotten out of her car and hidden behind it. (9 RT 2203.) At trial, La Fond described how she stayed inside her car, and "ducked down" behind the steering wheel. (7 RT 1787.) In the Oregon trial, La Fond testified that she did not see the officer outside of his patrol car other than the time when he was sweeping the flashlight across the back of the suspect car. (7 RT 1819-1820.) La Fond also testified in Oregon that she heard no more gunshots after parking her car. (7 RT 1820.)[3]

III. THE PROSECUTION'S CASE IN THE PENALTY PHASE.

A. Overview.

The penalty phase was largely taken up by the prosecution's case in aggravation. Sixty-four prosecution witnesses testified in the penalty phase. (9 CT 9205-9209; 9221; 9264-9268; 9286-9310.) In addition to the 95 guilt

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La Fond's testimony in this trial differed in other respects as well. On direct examination, she testified that she drove alongside the officer and saw Ganz getting out of his patrol car. (7 RT 1771.) She described seeing Officer Ganz "dashing" behind the patrol car, running forward with a "crouched" down or "almost diving motion." (7 RT 1784-1785.) La Fond claimed to have heard the initial shot, and then two more shots during and after the time she parked her car. (7 RT 1786-1787.)

phase exhibits, the prosecutor offered a total of 102 new exhibits in the penalty phase. (33 CT 9486-9494.) The jury heard evidence and testimony concerning 24 incidents of criminal conduct unrelated to the Ganz homicide. (See 9 CT 2488-2491.) A total of 55 witnesses testified concerning these incidents. In some instances, two or three witnesses testified about the same occurrence. Most of the alleged incidents in aggravation fell within four categories: a series of seven bank robberies in 1989; a series of five unadjudicated robberies of Los Angeles area supermarkets in late 1993; a series of seven robberies (one pharmacy and six supermarkets) near the border between Washington and Oregon in 1994; and the August 3, 1994, robbery/homicide underlying Roger Brady's Oregon convictions. (9 CT 2488-2491.) The prosecution also presented evidence from three additional incidents of uncharged conduct. (*Id.*)

The final two days of the state's case in aggravation were largely occupied with victim impact testimony and evidence pertaining to the Ganz homicide. Eight witnesses (in addition to the treating emergency room physician) testified for the prosecution, providing emotional and detailed descriptions of their loss and heartbreak. This testimony (140 transcript pages) was accompanied by exhibits which included family photographs, certificates, awards, an assortment of memorabilia and two highly prejudicial videotapes. The sheer quantity of the victim impact material was sufficient to overwhelm the jury. In addition, the content of this victim impact evidence was so inflammatory that Roger Brady could not hope to have a fair determination of the sentence. [4]

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[4] The victim impact evidence pertaining to Officer Ganz is set forth in connection with the series of legal challenges to the admission of this

B. Evidence of Other Crimes Admitted Pursuant to Penal Code section 190.3(b).

1. The 1989 Bank Robbery Convictions.

In 1989, Roger Brady was arrested and charged with six counts of bank robbery. (9 CT 2488-2491.) Brady accepted responsibility from the time of his arrest, and was at all times cooperative with federal authorities. (13 RT 2949-2950.) He subsequently entered a guilty plea on two of the six counts charged in the indictment, and served approximately two and one-half years at the Federal Correctional Institution in Lompoc, California. (13 RT 2945-2947; 2951.) The defense did not dispute the essential facts concerning the 1989 bank robberies. The prosecution nonetheless spent three full court days presenting the testimony of 17 witnesses to these events.

Federal Probation Officer Mikal Klumpp testified about the events leading up to Roger's arrest immediately after a bank robbery in Agoura on October 12, 1989. (13 RT 2948.) Roger was heavily addicted to crack cocaine when he committed the bank robberies. (13 RT 2953.) Although he had used cocaine prior to 1989, Roger's drug habit increased in May of 1989 and rapidly escalated to the point that he spent up to $1,000 a week to support his addiction. (13 RT 2951, 2953.) Around August 1, 1989, Roger moved out of his parents' home due to family problems. (13 RT 2960.) Within two weeks, on August 14, 1989, he committed the first in a series of six bank robberies to get the money he needed to live and to supply his addiction. (13 RT 2951.) When he was arrested on October 12, 1989, Roger was emaciated, weighing only 120 pounds at 5' 10" tall. (13 RT 2934.) He told federal authorities that he had carried a pellet gun in his waistband, but

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evidence and testimony. (See Argument VI, *infra*.)

never intended to use it because he did not want to hurt anyone. (13 RT 2950.) Roger stated that he knew he had made a mistake but at the time his only thought had been getting money for drugs. (13 RT 2952.)

The 14 witnesses who had been bank employees in 1989 described bank robberies committed in an almost identical pattern. Roger typically wore the same outfit: a red and white baseball cap, dark sunglasses, dark pants or jeans and a gray sport coat. (See, RT 2686; 2699; 2740; 2751; 2770; 2792; 2865.) His manner was consistent in each instance. He waited in line to approach the teller and then demanded money, speaking in a low, calm voice. He sometimes pulled back the jacket to let the teller see the gun tucked into his waistband. (See, RT 2686; 2707; 2726; 2757; 2774; 2780; 2877.)

The two final robberies were the only incidents in which Roger pointed the gun at a person. On October 5, 1989, Roger went to Hawthorne Savings in Calabassas. Witnesses described him as "agitated." Roger allegedly pushed a customer aside rather than wait in line. (12 RT 2793.) He drew the gun from his waistband and, pointing it at the teller, demanded money. (12 RT 2804-2805.) When the teller opened the drawer Roger reached across the counter and grabbed the cash. (12 RT 2794.) Roger spoke in a terse tone of voice. He was impatient and repeated his demands several times. Seven days later, on October 12, 1989, Roger Brady robbed a Home Federal Savings in Agoura. He approached the teller with his gun drawn and demanded $2,000 in $100 bills. (12 RT 2876.) When the teller complied, Roger left the bank. (12 RT 2862-2863.)

Over defense objections, several witnesses were allowed to testify not only about the immediate impact but also the permanent traumatic effects of having witnessed a bank robbery. One woman stated that she has been afraid

to work in banks ever since. (12 RT 2673-2674.) Another remains apprehensive anytime she is inside a bank. (12 RT 2704.) The teller in the August 14th robbery stated that it was "extremely difficult" for him to testify at the Ganz trial some 9 years later. (12 RT 2691.) Two women who worked for Home Federal Savings on October 12, 1989, were allowed to give detailed testimony about the ongoing, "life altering" effects of the robbery. (13 RT 2867; 2880.)

2. The Ralph's Supermarket Robberies In Late 1993.

The prosecution claimed that Roger Brady was responsible for five armed robberies of Ralph's supermarkets during October, November and December of 1993. (9 CT 2488-2491.) Although Brady was never charged in these cases, the prosecutor presented a substantial amount of evidence in the penalty phase for the purpose of implicating Roger in these crimes. Seven Ralph's employees testified over the course of four court days. (See, 13 RT 2973-2974; 2983 [testimony of Robert Beauchamp]; 13 RT 3003-3025 [testimony of Delsa Hernandez Thompson]; 13 RT 3099-3127 [testimony of Ricardo Gutierrez]; 14 RT 3128-3161 [testimony of Lana Lee]; 14 RT 3198-3209 [testimony of Patty Foster]; 14 RT 3255-3282 [testimony of Suzanne Mc Garvey]; 15 RT 3402-3423 [testimony of William Johnson].)

The Ralph's robberies all occurred in the early morning hours when market employees were transferring cash from the registers to the manager's office. (See, e.g., 13 RT 3005-3006; 14 RT 3199-3200.) The suspect wore an obviously false moustache and a wig. (See 13 RT 3012; 14 RT 3272.) He approached the employees as they were transferring the cash boxes, drew a gun from his waistband and demanded the money. (See, e.g., 14 RT 3199-3200.) When reporting the crimes in 1993, the witnesses gave police a very different physical description of the suspect. The witnesses' suspect

descriptions were substantially similar to one another but did not match Roger Brady. Five witnesses told police that the robber was Hispanic. (See 13 RT 2994; 3018; 14 RT 3115; 3208; 3277.) Three people told police that the suspect was stocky, weighing as much as 200 pounds. (See 13 RT 2994; 14 RT 3115-3116; 3209.)

Roger Brady did not become a suspect in the Ralph's robberies until after his arrest in Oregon. (15 RT 3429.) On October 17, 1994, police contacted witnesses and had them to come to the police station to view slides of a line up. (13 RT 2988; 3015; 14 RT 3112; 3146; 3204; 3269-3270; 15 RT 3411.) Several of the witnesses identified Roger Brady. In August of 1995, police flew the witnesses to Oregon where they viewed a live line up. (15 RT 3440-3444.) Four witnesses who positively identified Roger Brady testified in the penalty phase of the Oregon trial. (13 RT 2991; 3024; 14 RT 3280-3281; 15 RT 3421.)

3. The 1994 Safeway Robberies and the Pharmacy Robbery.

The prosecution's case included evidence from another series of uncharged robberies that occurred between April and July of 1994 near the border of Washington and Oregon. (9 CT 2488-2491.) Twelve witnesses testified concerning one robbery of a pharmacy and six robberies of Safeway markets. The supermarket robberies followed a common pattern. The suspect wore a long, heavy coat and a dark blue or black ski mask. The ski mask covered all but the suspect's eyes and the center portion of his face. (See, e.g., 15 RT 3489-3490.) The robber would enter the store and walk to the end of an open check stand. When the checker noticed him, the suspect demanded money in a calm and quiet voice. (15 RT 3485; 3514; 3532; 3546; 16 RT 3637.) The suspect occasionally displayed a gun in his waistband or in his pocket. (See 15 RT 3536; 16 RT 3639.) He held the gun

on people during a robbery on several occasions. (14 RT 3214; 15 RT 3462; 3485-3486; 3500-3501.)

Several witnesses involved in the market robberies positively identified Roger Brady. However, by the time they made the identification these witnesses had already seen him on television or on the front page of the newspaper, in custody, and described as the suspect in the Correa murder and Safeway robbery of August 3, 1994. (See 14 RT 3175; 3182; 3221-3222; 15 RT 3470-3471; 3478; 3492-3493; 3518; 3538-3539; 3550-3551; 3567; 3585-3588.) The only witness who had not seen the news coverage was unable to identify him. (15 RT 3503.) Several of these witnesses testified in the Oregon case in 1995, and had seen Roger Brady in court for that trial. By the time of their testimony in the California case, the witnesses all stated that they could identify Roger Brady by looking at his eyes. (See 14 RT 3174-3175; 15 RT 3470-3471; 16 RT 3644.) The witnesses to the Safeway market robberies also testified about the emotional impact of having been present during those crimes. (See 14 RT 3178; 15 RT 3521; 3501-3502; 3540.)

The prosecution also alleged another unadjudicated crime - the May 26, 1994, robbery of the Medicine Shoppe Pharmacy in Vancouver, Washington. (9 CT 2488-2491.) Three witnesses, Pharmacist Richard Kim, Pharmacy Technician Kay Heinzman and F.B.I. Special Agent David Moriguchi, testified in the penalty phase. Unlike the market robberies, all of which occurred at night, the pharmacy robbery took place in the afternoon. (14 RT 3283.) The suspect pulled out a gun and announced "This is a robbery." (14 RT 3284-3285.) He demanded a number of specific drugs (primarily narcotics) and cash. (14 RT 3288; 3294-3295.) When he was ready to leave, the suspect told Kim and Heinzman that they should go into

the restroom in the back of the store. He warned them that they would be shot if they tried to come after him. (14 RT 3290.)

The pharmacist, Richard Kim, was unable to identify Roger Brady. (14 RT 3292.) He believed that the suspect was Caucasian. (14 RT 3293.) The pharmacy technician, Kay Heinzman, told police that the suspect was Caucasian, blue-eyed and had gray streaks in his hair. (14 RT 3321-3322; 3347.) She identified Roger Brady only after seeing him on television, in custody following the Correa robbery/homicide. (14 RT 3315-3317.) F.B.I. analyses of some unused cartridges found on the pharmacy's floor could not be conclusively matched to Brady's gun. (14 RT 3350-3351.) Fingerprints taken inside the pharmacy were not matched to Brady. (*Id.*) Both Kim and Heinzman described the lasting effects of the traumatic experience. (14 RT 3287; 3322-3323.) Ms. Heinzman was visibly upset and tearful. She expressed her reluctance to testify, and her fear of Roger Brady. (14 RT 3304-3305; 3322.) Heinzman stated that she lost a year of her life and was unable to work following the robbery. (14 RT 3322-3323.)

4. The August 3, 1994, Correa Homicide.

Over repeated defense objections, the trial court allowed the prosecution to present an array of evidence from the Oregon homicide case in the Los Angeles penalty phase.

At approximately 10:25 p.m. on August 3, 1994, Roger Brady allegedly entered the Safeway store at Cedar Mills wearing a full length coat and a black ski mask covering most of his face and head. (16 RT 3672.) Customer Stephen O'Neil had just finished paying the checker and was walking toward the exit alongside the female customer (later identified as Ms. Catalina Correa) who had been in front of him in line. (16 RT 3671-3672.) When the man in the coat and mask walked past them, Ms. Correa

remarked to O'Neil, "I think he's got something in his pocket and I don't want to stick around to find out what it is." (16 RT 3673.) Ms. Correa continued walking and left the store. O'Neil stopped and watched as the suspect approached the checker. (*Id.*)

The suspect approached checker Arden Schoenborn and demanded that he open the till. (17 RT 3755.) When Schoenborn did not react quickly enough, the suspect repeated his demand more forcefully and pulled a .380 semi-automatic pistol from his pocket. (17 RT 3759-3760.) The suspect took the money from the register while holding the gun 6 or 8 inches from Schoenborn's head. (17 RT 3762.) When he had finished, the suspect turned and walked back the toward the door he had used to come in. (17 RT 3770-3771.) When he was around 12 feet away from O'Neil, the suspect ordered O'Neil to get down on the floor. (16 RT 3680-3681.) The suspect walked out of the market, passing a row of vending machines on his way toward the side parking lot. (16 RT 3770-3771.) When the suspect left the store Schoenborn went to the manager's area to call 911. (16 RT 3770-3771.) Within 15 to 20 seconds, witnesses inside the market heard three or four gunshots. (16 RT 3683.)

Witnesses Andrew Dickson and Brett Ferguson testified about the shooting in the Safeway parking lot.[5] The suspect walked alongside the Safeway building, heading east toward the small side parking lot. (18 RT 4015.) As the suspect rounded the corner a woman turned to face him. (*Id.*)

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Ferguson testified in the Oregon case, but the prosecution was unable to locate him by the time this case went to trial in 1998. The trial court determined that Ferguson was an unavailable witness. Over defense objections, a portion of his testimony was read to the jury and admitted into evidence. (18 RT 4012-4035.)

She was holding a bag of groceries, standing eight to ten feet away from the suspect's car. (18 RT 4018.) The suspect raised his arm and fired three shots directly at her from a distance of between three and five feet. (16 RT 3706; 18 RT 4015.) The woman rocked back on her heels and fell to the ground. (16 RT 3706.) The suspect then got into his car and drove away. (16 RT 3708; 18 RT 4021-4022.)

Andrew Dickson followed the suspect as he left the market parking lot and turned down a residential street. (16 RT 3715-3717.) He memorized the suspect's license plate. (16 RT 3715-3716.) Within a minute of leaving the parking lot, the suspect stopped and got out of his car. Dickson saw the suspect face him and raise his arms up. The next thing Dickson knew his windshield was broken. (16 RT 3717.) He ducked down under the steering wheel and heard another bullet strike his van. Dickson put the van in reverse and backed up as fast as possible. (16 RT 3720-3721.) He ran to the closest house where he saw any lights on and asked to call 911. (16 RT 3726-3727.) Dickson gave police the suspect's license plate. (17 RT 3795-3797.) He was not injured in the incident. (16 RT 3728.) Three shots were fired at his van. (17 RT 3814.) Two bullets hit the windshield and one lodged in the van's front grill. (17 RT 3816.)

By tracing the license plate, police determined that the car was registered to Phillip Brady at 4701 Northeastern 72nd Avenue, Apt. 278, in Building X. (17 RT 3835.) In the early morning hours of August 4, 1994, they located the car in the complex's parking lot and established a surveillance of the area. (17 RT 3836; 3839.) Police watched a male Asian or Hispanic carry two white plastic garbage bags to the dumpster. (17 RT 3840-3841.) One of the bags contained a tan jacket and a nylon-type windbreaker. (17 RT 3901.) At approximately 7:00 a.m., the SWAT team

evacuated residents of the apartments close to the Brady's unit. (17 RT 3841.) At the request of a SWAT team negotiator, Roger Brady came outside and surrendered to police without incident. (17 RT 3918.)

On August 7, 1994, Vancouver police returned to the Brady apartment. Phillip Brady had contacted police to report that he and his wife had discovered a weapon in the home and wanted to turn it in to police. (17 RT 3846-3847.) Police recovered a black plastic gun case containing a 7.62 assault rifle. (17 RT 3848.) Weapons comparisons done by the Oregon State Police Laboratory determined that the bullets removed from Ms. Correa and one of the two casings found at the scene matched the Davis .380 found in the Brady apartment. (17 RT 3881-3883.) Three casings found in the street near where Andrew Dickson's van was shot were matched to the 7.62 assault rifle police obtained from Phillip Brady. (17 RT 3885-3887.) During a subsequent search of the Brady apartment on August 11, 1994, police discovered 3 wigs and a pair of wool gloves underneath a bathroom sink. (17 RT 3918.)

5. Other Incidents Offered In Aggravation.

Over defense objections (see 13 RT 2883-2884; 2910-2911), LASD Deputy Chris Germann testified about Roger Brady's arrest on October 12, 1989, after the Home Federal Savings robbery in Calabassas. (13 RT 2913-2931.) Germann and several other police units, including a helicopter, pursued Roger (who was driving at a high rate of speed) for eight or ten miles through Topanga canyon. (13 RT 2915.) Roger drove to Observation Drive, the street where his parents lived. (13 RT 2914.) He stopped the car, got out and ran. (13 RT 2916.) Deputy Germann and Deputy Berg chased Roger on foot for approximately 15 minutes before Roger complied with the order issued over the helicopter's microphone for him to stop and lie down

on the ground. (13 RT 2918-2919.) Roger was cut in the face during the course of being handcuffed and taken into custody by Deputy Berg. (13 RT 2920.)

Deputy Germann took Roger to the nearest hospital to have his cut treated. Roger was very agitated and was, allegedly, verbally abusive to the nurse who was asking him questions in the examination area. When Germann told Roger to calm down, Roger looked at him and said words to the effect of "I should have gone for it. I should have shot it out with you guys." (RT 2927.) Deputy Germann did not take Roger seriously. He thought that Roger was just upset and blowing off steam. (*Id.*) Germann replied, "You had a BB gun." Roger then allegedly said "the next time it's not going to be just a BB gun." (13 RT 2927.) Deputy Germann continued telling Roger to calm down, and transported him to the station without incident. (13 RT 2927.) He did not include the alleged statements in his report. (13 RT 2931.) Germann first mentioned the statements six years later in August of 1995 when he was interviewed by prosecutors from Oregon. (13 RT 2930.) At that time, he knew that Roger was a suspect in the Ganz homicide. (13 RT 2906.)

Another item in aggravation was Brady's alleged shoplifting of a bottle of juice from a small market over 12 years previously. (See CT 2488-2491.) Mr. Khosrow Hakimian, one of the owners of Jay's Market, testified that Roger Brady took a small bottle of juice without paying for it. When confronted, he pushed Hakimian's arm aside to get away. (RT 3362-3366.)

In October of 1993, Roger Brady allegedly had a run in with the security guard at the Brady's Malibu condominium complex. (RT 3371-3377.) Phillip Brown testified that he wrote Roger a ticket for parking the Diahatsu Charade in a "No Parking" zone inside the complex. (RT 3377.)

As he was writing out the ticket, Roger told Brown that if he had his knife he would have "juked" him. Brown understood this to mean that Roger would have stabbed him. (RT 3377-3378.) Brown did not take Roger seriously. He and Roger saw one another many times after the ticket incident and never had any problems. They waved and greeted one another when Brown saw Roger coming or going from the condo complex. (RT 3381.)

IV. THE DEFENSE CASE IN MITIGATION.

A. Roger Brady's Family Background and Childhood.

Roger Brady's mother, Diep Nguyen Brady, testified about Roger's background and his early childhood. Roger Hoan Brady, was born in Viet Nam on October 31, 1965, to a Vietnamese mother and an American father. (See 34 CT 9509.) Diep Brady, his mother, grew up in Saigon (now Ho Chi Minh City) with her two brothers and five sisters. (19 RT 4282.) She was only able to attend school off and on because of the war. (*Id.*) Diep's father died when she was 12 years old. Her mother then had to go to work on a vegetable farm to support the family. (*Ibid.*) Both of Diep's brothers joined the South Vietnamese Army. In the early 1960s, Diep's brother introduced her to an American advisor, a 23 or 24 year old United States Marine named Phillip Brady. Diep spoke little English, but Phillip spoke some French and also some Vietnamese. (19 RT 4284.) Within two months, Diep's brother was killed in the fighting. (19 RT 4285.) She believed that Phillip had also been killed, but later learned that he had been found after being missing in action for seven days. (19 RT 4285.) She and Phillip began seeing each other when she went to Army headquarters to collect her brother's belongings. (*Id.*)

When Phillip Brady began seeing Diep, he was married with a wife and two daughters living in the United States. (19 RT 4288.) Although he

was a Marine, Phillip was working with the South Vietnamese and also with the Central Intelligence Agency ("CIA"). (19 RT 4289.) Phillip had contracted hepatitis and malaria by the time he became involved with Diep. He soon became so ill that he had to go to Okinawa and then to the United States for treatment. (19 RT 4285.)

Diep was pregnant with Roger by the time Phillip Brady was sent home for additional medical treatment. (*Id.*) She was very embarrassed and ashamed to be pregnant and unmarried. (*Ibid.*) During her pregnancy, Diep was deeply depressed and worried about how she would support herself and the baby. (19 RT 4286.) She had to live in her mother's home, where she was regarded as the "black sheep" of the family because she did not have a husband. (19 RT 4288.)

Phillip Brady did not return to Vietnam until his son, Roger, was around eight months old. (19 RT 4287.) This time, he worked with the CIA through a U.S. Aid agency. (19 RT 4289.) Diep, Phillip and Roger moved to the countryside and lived in a security compound called Bien Hoa. (*Id.*) There were no other children in the compound, and it was surrounded by soldiers. The war was very active and was close by. They constantly heard and saw rockets exploding and heard gunfire. (19 RT 4290.) The compound itself came under attack many times while they lived there. Because there were no other children at Bien Hoa, Roger played near the soldiers. (19 RT 4291-4292.) Diep and Roger had to stay inside the electrified, barbed wire fence that surrounded the compound. From inside, they could see the river where the North Vietnamese swam and exploded shells in the water. (19 RT 4292.) By the time he was two and one half, Roger could point to and identify the Viet Cong. (19 RT 4291.) The first movie Diep and Roger saw was "Bonnie and Clyde" when it was shown at

the compound. (19 RT 4294.)

In 1969 Phillip Brady moved Roger and Diep to another compound, Bin Duong. (19 RT 4296.) Bin Duong was close to the worst part of the fighting in the Iron Triangle area near the Cambodian border. (*Id.*) Diep and Roger frequently saw soldiers being killed right in front of them. (19 RT 4299.) They constantly heard the explosions of bombs dropped by B-52 bombers, and had to hide in a cement bunker during attacks. (19 RT 4296; 4300.) It was generally too dangerous for Diep and Roger to leave the compound. Once she and Roger went up in a helicopter and saw an attack in progress. Roger, who was then three and one half years old, pointed down saying "Enemy on ground." (19 RT 4298.)

Diep was very unhappy, but felt that she had no choice but to stay with Phillip because he had promised to marry her and to support her and Roger. (19 RT 4297.)[6] Phillip Brady was often gone for extended periods of time. (*Id.*) When he was around, Phillip was "sick in the head." (19 RT 4307.) He drank a lot of alcohol and used drugs. (19 RT 4307; 4362.)

Around 1969, Phillip became a news reporter and the family traveled to New York so he could be trained by NBC. (19 RT 4301; 4304.) Phillip subsequently returned to Viet Nam as a war correspondent. (19 RT 4305-4306.) NBC Journalist Arthur Lord testified as a defense witness. Lord had worked closely with Phillip Brady in 1971 and 1972 when they were covering the war in Viet Nam. Lord also socialized with Phillip Brady, and he met Diep and Roger (who was then a small boy) in Saigon. (19 RT 4630-4631.) Lord knew that Phillip smoked a great deal of marijuana, and that he also used "Thai sticks," and cigarettes soaked in opium. Lord stated, "I used

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[6] The record does not indicate the date of Diep and Phillip Brady's marriage.

to think I drank a lot until I drank with Phil." (19 RT 4362.) The Brady family was subsequently forced to leave Viet Nam within 24 hours when Phillip reported a negative story about the South Vietnamese government and he was put on the "Dosia Nu" or black book. (19 RT 4308.) Phillip went to Phnom Penh, Cambodia, and Diep and Roger were relocated to Hong Kong where Diep had no friends or family. (*Id.*) In December 1972, the Bradys' daughter, Linda, was born in Hong Kong while Phillip Brady was on assignment in Afghanistan. (19 RT 4309.)

Around two and one half years later, the Brady family moved to the United States. Phillip worked for NBC in New York, and they lived in an apartment in New Jersey. (19 RT 4310.) Roger started school, and was learning English. Phillip then decided to quit NBC. He moved the family to Venice, California. (*Id.*) Roger was not as happy in his new school in California. Phillip was not working. He sat around the house using drugs, smoking marijuana and drinking. Phillip often lost control, and would shout and swear at Diep in front of the children. (19 RT 4311-4312.)

Roger, a very shy child, was very proud to join the Boy Scouts when he was eight or nine years old. (19 RT 4320.) Phillip never took Roger anywhere and did not participate in scouting or any other activities. (*Id.*)

In 1975, Diep's family came to the United States as refugees. (19 RT 4312.) Phillip Brady's behavior had grown increasingly unstable. He used drugs in front of Roger and Linda, and Diep was afraid of him. (19 RT 4312-4313.) Diep took the children and moved to her mother's house. She and Phillip continued to argue and began divorce proceedings. (19 RT 4313-4314.) Roger became withdrawn at school, and ran away from home during this time. (19 RT 4314.) Phillip and Diep reconciled after a separation of approximately six months. (19 RT 4315.)

In 1977, the Bradys bought a home in a remote, rural area high up in Topanga Canyon. (19 RT 4316.) The house was little more than a shack on the hillside with a chicken coop behind it. Roger had to cut wood so they could heat the house in the winter. (19 RT 4327.) Phillip got a job with ABC News and was sent out of the country on assignment. Diep began taking cosmetology classes. Roger was left alone each morning to get to school by himself. (19 RT 4317-4318.) By 1979, Diep had finished cosmetology training and began to work full-time. Phillip was never around to care for the children. When Roger was eleven or twelve, he got a dog from the pound for company. (19 RT 4322.)

Phillip continued his daily use of drugs and alcohol. (*Id.*) He drank four or five beers as well as mixed drinks with lunch and dinner. He used marijuana at least once a day, and often snorted cocaine or used hashish in front of Roger and Linda. (19 RT 4348-4349.) Phillip would start and then quit jobs. (19 RT 4323.) His behavior was often extremely irrational and erratic. (19 RT 4349.)

Phillip was very hard on Roger, and scrutinized his every activity. (19 RT 4347.) He pushed Roger to do hard work around the house, and also expected him to succeed in school. (19 RT 4348.) Phillip grew marijuana in the back yard, and gave Roger the job of watering the plants. (19 RT 4318-4319.) Roger lived in a dark room underneath the house, while the rest of the family lived upstairs. (19 RT 4346.) He did not have friends visit or come to play at the Topanga house. (19 RT 4321; 4345.)

Three witnesses, who were around the same age as Roger Brady and his sister Linda, had known the Brady family when they lived in Topanga Canyon. Marighread Ghodas was a childhood friend of Linda Brady. (20 RT 4448.) Roger's cousins, Mai and Tommy Huynh, also testified for the

defense. (20 RT 4435-4454; 4455-4466.)

Mai and Tommy came to stay with the Brady family for several weeks each summer. (20 RT 4439; 4455.) They enjoyed the rural surroundings of Topanga Canyon, but they were apprehensive of Phillip Brady. (20 RT 4443.) Philip drank, smoked pot and used drugs openly. He was temperamental, unpredictable and often "scary." (*Id.*) Phillip was very hard on Roger, and verbally abused him in front of the other children. (20 RT 4443; 4454; 4461.) He favored his daughter, Linda, and was sometimes kind and more loving toward her. (20 RT 4454; 4462.) Ms. Gohdas was also aware of Phillip's drinking and drug use. She testified that Phillip favored Linda and was hard on his son, Roger. (20 RT 4454.)

Linda testified that Roger generally kept his emotions and feelings hidden. He never stood up to his father or confronted Phillip in any way. (19 RT 4352.) Roger was quiet and withdrawn even with his cousins. He rarely spoke to his cousin Mai although she lived with the family for entire summers. (20 RT 4439.)

Phillip left drugs and drug paraphernalia all over the house within easy reach of the children. (19 RT 4350.) Roger's behavior and appearance changed noticeably when he was around 12 or 13 years old. He lost a great deal of weight. His breath smelled of marijuana and alcohol, and his eyes were often bloodshot and red. (19 RT 4350.) His cousin noticed a marked change in Roger after he went through rehab in 1992 - 1993. After drug rehab, Roger was "friendlier" and more talkative. (20 RT 4446.)

B. Roger's time in custody and his return from prison.

When Roger went to Lompoc, Phillip took out a $60,000 second mortgage. He was not working and went to see Roger every other week. (19 RT 4334.) Roger was very disappointed when Phillip stopped visiting for

four months. (19 RT 4335.) In October of 1992, Roger was released from prison and placed on supervised release. (19 RT 4370.) Roger lived alone for a while after his release from prison. (19 RT 4336.) Phillip, however, pretended to be ill in order to convince Roger that his help was needed at home. Phillip made Roger drive to drug dealers for him. (19 RT 4335-4336.)

Roger was disturbed by his parents' constant arguments. He told Diep that he wanted to go back to prison because it was so difficult to live in that home. (19 RT 4339.) On March 16, 1993, Roger was so upset with Phillip that he called his probation officer and said that he wanted to go back to prison. (19 RT 4374.) A few days later, Roger failed to appear for drug and alcohol testing as required as a condition of release. (19 RT 4371; 4374.) Roger explained that he and Phillip had argued and he had been so upset that he got drunk. (19 RT 4375.)

It was around that time that Phillip decided to sell the Topanga house. He said that he wanted to move to Montana. Diep felt that he just did not like to work and wanted to live off of the proceeds of the sale. (19 RT 4340.) Diep, Phillip and Roger moved from the Topanga house to a condominium in Malibu. They subsequently moved to Vancouver, Washington. (19 RT 4340.)

C. The Testimony of Doctor Lorie Humphrey.

Neuropsychologist Doctor Lorie Humphrey testified as a defense witness. (22 RT 4885.) Dr. Humphrey performed a comprehensive examination of Roger Brady. (22 RT 4501; 4505.) She identified a number of indicators suggesting that Roger Brady was born with neurocognitive limitations. (22 RT 4502; 4530.) Roger's birth and delivery were traumatic. (22 RT 4529.) His head was misshapen for the first month of life. (22 RT 4529.) It is also possible that Roger experienced a series of small strokes in

utero. (22 RT 4529.) When a human being is under stress, normal brain development is impeded. (22 RT 4530.)

After administering approximately 29 different tests of cognitive function, Dr. Humphrey discovered several significant neurocognitive weaknesses and limitations indicating brain damage. (22 RT 4509.) There is a large discrepancy between Roger Brady's language skills and his ability to name objects. (22 RT 4510.) This discrepancy is a marker for brain damage. (22 RT 4512.) Roger was a slow worker through the testing, indicating slow processing of information. (22 RT 4516.) His visual perceptive abilities are well below average, also indicating brain damage. (22 RT 4520.)

Dr. Humphrey explained how Roger Brady's neurocognitive problems may have affected his social functioning. (22 RT 4525-4527.) Individuals like Roger do not read social cues effectively and have trouble "connecting" to others. (22 RT 4525-4528.) Their facial expression or affect is very flat, meaning that they do not show emotion. (22 RT 4526.) Children with these problems have great difficulty forming relationships with other children and adults. They typically become isolated and may have trouble holding jobs when they are older. (22 RT 4527-4528.) In Dr. Humphrey's opinion, people like Roger function optimally in highly structured environments with clearly defined tasks and expectations. (22 RT 4528-4529.)

I.

THE TRIAL COURT'S EXCLUSION OF EVIDENCE IMPLICATING ALTERNATE SUSPECTS WAS CONTRARY TO CALIFORNIA LAW AND VIOLATED ROGER BRADY'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction and Overview of Argument.

Within days of the Ganz homicide, law enforcement agencies formed a special task force to investigate the crime. The task force set up a telephone "tip line" which received over 2,000 calls in a period of several months. (8 RT 1979.) Each call was given a "clue number" and assigned to a member of the task force for further investigation. (*Id.*) Information obtained by the task force was included in pre-trial discovery materials provided to the defense. Defense counsel discovered four clues in which the informants identified suspects *other* than Roger Brady. (10 CT 2542-2547.)

Defense counsel filed a pretrial motion seeking to admit the four clues in the guilt phase of trial. (*Id.*) Counsel argued that the existence of alternate suspects could support a reasonable doubt as to Roger Brady's guilt. In addition, this evidence supported a defense "lingering doubt" theory in the event of a penalty phase. (10 CT 2543.) [7] The trial court heard

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One of the four clues was relevant and admissible on another basis. The informant in Clue No. 192 identified a suspect who was a friend of the prosecution's chief identification witness, Jennifer La Fond. Defense counsel argued that Clue No. 192 was relevant both as to the existence of another suspect and to impeach La Fond's identification of Roger Brady. (2 RT 503.) The trial court refused to allow this evidence to be used for either purpose. (*Id.*; see Argument IV, *infra.*)

the defense motion on October 2, 1998, prior to the start of the guilt phase. (10 CT 2630.) At the motion hearing, the trial court ruled against the admission of each clue. The trial court found that none of the information contained in the clues was sufficiently relevant. (See 2 RT 504-507.)

The trial court's decision to exclude the four clues evidence requires reversal of the convictions and the penalty judgment. The four clues were relevant according to California law which holds that evidence of third party culpability is highly relevant, as is evidence bearing on a witness' motives. (See *People v. Hall* (1986) 41 Cal.3d 826 [718 P.2d 99, 226 Cal.Rptr. 112]; *People v. Alvarez* (1996) 49 Cal.App.4th 679, 688 [56 Cal.Rptr.2d 814].) Exclusion of this evidence violated several provisions of the federal constitution, including Roger Brady's federal constitutional rights to due process of law, to present a defense and to confront and cross-examine witnesses as guaranteed by the Fifth, Sixth and Fourteenth Amendments. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-91 [106 S.Ct. 2142, 90 L.Ed.2d 636]; *Washington v. Texas* (1967) 388 U.S. 14, 22-23 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297].) Further, because this evidence was directly related to culpability, its exclusion undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38 [100 S.Ct. 2382, 65 L.Ed.2d 392]), and deprived him of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944]; *Johnson v. Mississippi*, (1988) 486 U.S. 578, 584-85 [108

S.Ct. 1981, 100 L.Ed.2d 575].)[8] For all of these reasons, the trial court's erroneous ruling requires reversal of the conviction and sentence of death.

B. Standard Of Review.

This Court typically reviews a trial court's evidentiary rulings for abuse of discretion. (See *People v. Burgener* (1986) 41 Cal.3d 505 [714 P.2d 1251, 224 Cal.Rptr. 112]; Evid. Code §§ 350, 352.) However, heightened scrutiny is appropriate and necessary because this claim involves error of constitutional magnitude in the context of a capital case. This evidence was essential to the defense, and its exclusion deprived Brady of his state and federal constitutional rights to due process of law, to present a defense, to confront and cross-examine witnesses, and to a fair trial and a reliable determination of the penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal.Const., art I, §§ 7, 15 and 17.) Admission of the third party culpability evidence was also mandated by the decisional law of this state (see *People v. Hall, supra,* 41 Cal.3d 826), and California's statutes. (See Evid. Code §§ 350; 352; 402.)

The United States Supreme Court has applied heightened scrutiny to procedures involved in capital cases based on its recognition that "death is [] different." (*Gardener v. Florida* (1977) 430 U.S. 349, 357-58 [97 S.Ct. 1197, 51 L.Ed.2d 393]. See also *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Godfrey v. Georgia* (1980) 446 U.S. 420 [100

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Because the trial court erroneously excluded this evidence in contravention of established state law, the court's action deprived him of a state-created liberty interest and denied him due process of law as required by the Fifth and Fourteenth Amendments to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227]; *Lambright v. Stewart* (9th Cir.1999) 167 F.3d 477.)

c. Clue Number 192.

When the composite drawings were published, a number of people called in reporting that the suspect resembled a drug dealer named Michael Herbert, a.k.a. "Miko." (2 RT 506.) Miko was subsequently proven to be associated with Jennifer La Fond. Police had information that La Fond and Miko were friendly, and that she had purchased drugs from him. (2 RT 506.) La Fond denied that Miko was involved in the Ganz killing. (10 CT 2546.) The trial court held that this evidence was not sufficiently relevant. Defense counsel was advised to raise the subject of La Fond's connection to Miko only if the witness herself mentioned it during her testimony. (2 RT 507.)

d. Non-numbered Clue.

In another clue (number unknown) an unidentified person sent a letter to the Manhattan Beach Police Department claiming responsibility for Officer Ganz's death. The author stated that she/he planned to leave the country until the search for Ganz's killer abated. The letter was processed for latent fingerprints, and contained none matching Roger Brady's. (10 CT 2546.) The trial court found that this clue "lacked sufficient indicia of reliability," and held that it was not relevant. (2 RT 505-506.)

2. The Prosecutor's Closing Argument.

Defense counsel cross-examined the task force investigators and law enforcement personnel involved in the Ganz homicide investigation. In accordance with the court's ruling, defense counsel did not refer to the four clues. In closing argument in the guilt phase, the prosecutor asserted that identity was a closed question making it appear as if the defense had effectively conceded the issue. Following a discussion of the elements of first degree murder, the prosecutor stated: "Now, the next issue, then, as I

indicated, is the issue of identity. As you realize, the defense did not appear to refute identity." (11 RT 2472.) Defense counsel objected and moved for a mistrial, which the trial court denied. (11 RT 2472-2473; 2474.) [9] Upon resuming her closing argument, the prosecutor specifically stated that the defense had presented no evidence to refute identity "other than the questioning of witnesses . . ." (11 RT 2474.) Soon thereafter the prosecutor noted that identity was established based on the identifications by the prosecution's witnesses: how do we know it was Mr. Brady? ¶ Starting with the descriptions by witnesses . . . (11 RT 2474-2475.)

D. The Four Clues Were Relevant And Admissible Under California Law And The Trial Court's Exclusion Of This Evidence Deprived Roger Brady Of Several Constitutional Rights.

1. Standards Applied To Third Party Culpability.

In *People v. Hall*, *supra*, 41 Cal.3d 826, the California Supreme Court established the standard for admitting defense evidence of third party culpability: "To be admissible, the third-party evidence need *not* show 'substantial proof of a probability' that the third person committed the act; *it need only be capable of raising a reasonable doubt of defendant's guilt.*" (*Id.* at p. 833 [emphasis added].) In defining "reasonable doubt" in this context, the *Hall* court stated: "Evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or

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9 See Argument IV, *infra*.

circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*)

In the *Hall* decision, the Supreme Court not only announced a new standard for the admission of third party culpability evidence, but also gave trial courts substantial guidance as to how that standard should be applied. Trial courts must analyze third-party culpability evidence just as they would any other proffered evidence; i.e., by evaluating the evidence for relevance (Evid. Code § 350), and then for the risks of undue prejudice, jury confusion or undue consumption of time (Evid. Code § 352).

Trial courts were expressly cautioned in *Hall* not to be unduly restrictive in assessing the relevance of third-party culpability evidence offered by the defense: "[Trial courts] should avoid a hasty conclusion . . . that evidence of [a third party's] guilt was incredible. Such determination is properly the province of the jury." (*People v. Hall, supra,* 41 Cal.3d 826, 834.) In other words, the defendant's proffered evidence must be considered truthful by the trial court while assessing its admissibility. Trial courts should resolve any doubts in favor of the defense.

> Furthermore, courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed, "If the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt."
> (1A Wigmore, *Evidence* (Tillers rev. ed. 1980) § 139, p. 1724.)

(*People v. Hall, supra*, 41 Cal.3d at p. 834.)

The evidence proffered by Roger Brady's counsel was admissible as third party culpability because it concerned specific named or unnamed alternate suspects and the jury would not have had to speculate. Following the decision in *People v. Hall*, the California Supreme Court has upheld several decisions excluding third party culpability evidence. These decisions, however, are factually distinguishable from Roger Brady's case, where all four of the clues specifically identified the alternate suspects, and three clues provided both first and last names. In *People v. Sandoval* (1992) 4 Cal.4th 155 [841 P.2d 862, 14 Cal.Rptr. 342] the California Supreme Court upheld the trial court's decision to preclude defense cross-examination of police detective for purposes of showing that victim was probably involved in criminal activity and might have been killed by *any number of* accomplices or rivals. It is proper to exclude third party culpability evidence where the defense cannot identify a specific suspect or suspects for the crime. (*Id.* at p. 176. See also *People v. Bradford* (1997) 15 Cal.4th 1299, 1325 [939 P.2d 259, 65 Cal.Rptr.2d 145] [evidence that victim's statement that she had previously been in fear of "a man" insufficient without more]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-18 [766 P.2d 1, 254 Cal.Rptr.2d 586] [defense prevented from introducing evidence that other suspects existed due to victim's association with "Hells Angel-type people" and drug dealers].)

To introduce third party culpability evidence, the defense must also show something more than speculation about another person's involvement. In *People v. Alcala* (1992) 4 Cal.4th 742 [842 P.2d 1192, 15 Cal.Rptr.2d 432], the defense identified an alternate suspect, but the proffered evidence consisted of nothing more than the suspect's mere presence in the area on the day after the crime. The California Supreme Court noted that the

reversal is the "harmless-error" analysis of *Chapman v. California, supra,* 386 U.S. 18, 24. (See *Delaware v. Van Arsdall, supra,* 475 U.S. 673, 680.) Under the *Chapman* standard, reversal is required unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Id.*)

In *Delaware v. Van Arsdall, supra,* 475 U.S. 673, the United States Supreme Court applied the *Chapman* standard to a case where the trial court erroneously limited defense cross-examination of a prosecution witness. The Supreme Court stated: "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Id.*, at p. 684.) The Supreme Court in *Van Arsdall* provided specific guidance to reviewing courts applying the *Chapman* standard to a case where defense cross-examination had been improperly curtailed:

> Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. [Citations].

(Delaware v. Van Arsdall, supra, 475 U.S. at p. 684.) As discussed below, the United States Supreme Court's analysis in *Van Arsdall* requires reversal of Roger Brady's convictions and sentence.

Using the four clues evidence, defense counsel could have exploited the weaknesses in the prosecution's case to establish a reasonable doubt as

to Roger Brady's guilt or, failing that, a lingering doubt at the penalty phase which could incline one or more jurors to vote for a life sentence. It was not necessary for the jurors to be convinced that a third party committed the homicide in order for the clues to be relevant in this case. The excluded clues demonstrated bias and incompetence by police investigators.[11] The jury learned that police had investigated Roger Brady as a suspect soon after the crime. However, the prosecution was able to lead the jurors to believe that there were plausible reasons for police not to arrest Brady at that time. If the jurors had learned that the task force also received information in the form of clues naming other suspects, defense counsel could have effectively challenged the competence of the entire investigation.

The California Supreme Court has applied the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] to determine whether the erroneous exclusion of evidence was sufficiently prejudicial to require reversal. (See *People v. Kidd* (1961) 56 Cal.2d 759, 767 [366 P.2d 49, 16 Cal.Rptr. 793].) Under the *Watson* standard, reversal is required where it is "reasonably probable" that a more favorable result would have been obtained absent the error. (*People v. Watson, supra,* 46 Cal.2d 818, 836.) Exclusion of impeachment evidence which deprives a criminal defendant of a defense is "clearly prejudicial." (*People v. Vogel* (1956) 46 Cal.2d 798, 805 [299 P.2d 850].) Reversal of Roger Brady's convictions and sentence is required under the *Watson* standard because it is at least reasonably

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As previously noted, Clue No. 192 ought to have been admitted for the additional purpose of impeaching prosecution witness Jennifer La Fond's identification of Roger Brady and its exclusion was prejudicial for additional reasons. (See Argument III, *infra*.)

requires "evidence which is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117,1124 [831 P.2d 1159, 9 Cal.Rptr.2d 577]; see also *People* v. *Anderson* (1968) 70 Cal.2d 15 [447 P.2d 942, 73 Cal.Rptr. 550]; *Jackson v. Virginia* (1979) 443 U.S. 307, 313-314 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

Reversal of the first degree murder verdict is also required to protect fundamental state and federal constitutional rights. The improper conviction violated Brady's constitutional rights to due process of law (U.S. Const. Amends. V and XIV; Cal.Const., art. I, §§ 7, 15, and 16), because the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt." (*Jackson v. Virginia, supra,* 443 U.S. 307, 313-314; *Mullvaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508].) The improper conviction violated Roger Brady's constitutional rights to present a defense (U.S. Const. Amends. V, VI, and XIV; Cal. Const., art. I, §§ 7, 15, and 16), because "[a] meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in the favor of the accused." (*Jackson, supra*, at p. 314.) Finally, because the improper conviction occurred in a capital case, Roger Brady was deprived of his constitutional right to fair and reliable guilt and penalty determinations (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. 625, 638; *Zant v. Stephens, supra,* 462 U.S. 862, 879; *Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585.)

B. Standard of Review.

Appellate claims regarding the sufficiency of the evidence for first degree murder are reviewed de novo. A reviewing court examines the entire record, in the light most favorable to the verdict, "to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Marks* (2003) 31 Cal. 4th 197, 230 [72 P.3d 1222, 2 Cal.Rptr.3d 252]; *People v. Silva* (2001) 25 Cal. 4th 345, 368 [21 P.3d 769, 106 Cal.Rptr.2d 93].)

C. The Prosecution's Evidence, Testimony And Argument.

1. The prosecution's theory of the case.

The state's theory of the case centered on the fact that Roger Brady was on federal parole in December of 1993.[12] The prosecutor contended that Brady shot Ganz to prevent him from searching the car during the traffic stop. If the officer had searched the car, he might have found a gun. Gun possession would violate Brady's parole conditions, and in all likelihood result in his return to federal prison. (11 RT 2467-2468.) According to the prosecutor's theory, Roger Brady was so concerned about

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United States Probation Officer James Bouchard testified that Roger Brady was on supervised release from federal custody on December 27, 1993. (9 RT 2158, 2163-2164.) The conditions for supervised release prohibited Brady from possessing dangerous weapons (9 RT 2160-2161), and specified that parole would automatically be revoked for a violation of this condition. (9 RT 2163.) Bouchard testified that an arrest for gun possession would result in a parole violation hearing and, if the federal court found that Brady had possessed a gun, federal law required his return to prison. (9 RT 2164.)

a possible parole violation and returning to federal custody that he preferred to take the risk of killing a policeman in the parking area of a shopping mall, in front of two bank surveillance cameras and in full view of numerous potential witnesses. (11 RT 2468.)

Throughout her closing argument, the prosecutor exhorted the jury that first degree murder was "the only reasonable conclusion" based on the evidence. (See, e.g., 11 RT 2462; 2465; 2469; 2471; 2480.) The prosecutor's theory of the case proceeded on two assumptions: (1) that Roger Brady was the killer, and (2) that his motive had been to avoid arrest at all costs.[13] From this starting point, the prosecutor argued that the jury must infer premeditation and deliberation from a certain few circumstances of the crime.

a. Time and opportunity to plan.

The prosecutor argued that premeditation and deliberation could be inferred because the amount of time involved in the traffic stop afforded Brady the "opportunity" to consider his options and decide to kill Officer Ganz.

> [A]s soon as the defendant turns into the Manhattan Village Mall and Officer Ganz and his nephew begin to follow into the mall and then the emergency overhead lights go on to prepare for a traffic stop, the defendant took a good long time. He didn't stop at the first bank, the Wells Fargo, he didn't pull into that parking lot. And you get a good sense of it from the video as he drove down, continuing and continuing, and it

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The state also alleged that the murder had been committed for the purpose of avoiding a lawful arrest pursuant to Penal Code §190.2(a)(5). (2 CT 330.) The trial court denied defense motions to dismiss this special circumstance for insufficient evidence. (See 1 CT 77-80; 272-290; 306; 1 RT 15; 10 RT 2387.)

> wasn't up until the point at the Bank of America even after passing much of that particular building that he finally stopped.[14] Did he think about what he was going to do? Did he deliberate about it? Did he weigh and consider? You bet he did. He was planning and he had ample time and ample opportunity, and he had the motive.

(11 RT 2469-2470.) The prosecutor noted Jennifer La Fond's and Don Ganz's testimony about the suspect leaning over to reach for something such as a drivers license or car registration. She argued that Brady took this time to plan the killing. (11 RT 2471.)

b. Manner of the shooting.

The prosecutor next claimed that premeditation and deliberation were shown based on the manner of the killing. (See 11 RT 2471-2472; 2511-2514.) Under the proscutor's scenario, Brady fired the first shot from inside the car, striking Ganz in the right shoulder. Ganz turned and fled back to the police car. Brady got out of his car and followed, firing one or more shots at Ganz. One of the shots struck Ganz in the back and lodged in his bullet proof vest. Ganz took cover behind the police car. Brady followed and, stopping near the police car's rear tire, extended his arms over the trunk of the car with both hands on the gun (adopting what the prosecutor repeatedly referred to as a "combat stance") and fired the fatal shot to Ganz's face. (See, e.g., 11 RT 2517, 2518.)

The prosecutor maintained that the state's version of events was in fact how the shooting had unfolded based on the evidence. However, she also asserted that even if jurors adopted defense counsel's version of how the shooting had taken place, first degree murder must be inferred from a

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[14] The video referred to is People's Exhibit No. 10.

few particular circumstances. First, the fact that three shots were fired, two striking the victim in the front of the body and one striking his back, was argued to be irrefutable evidence of premeditation:

> We know that the victim was hit three different times in three different parts of his body; the shoulder, the face, and the back. So we clearly do not have a second degree murder here because we have the defendant having to go through the affirmative act of pulling the trigger three separate times that resulted in injuries and ultimately the murder of Officer Ganz.

(11 RT 2467-2468.) In her rebuttal closing statement, the prosecutor again claimed that a first degree murder verdict was required because three shots struck the victim:

> Let's say the suspect never got out of the car, what you still have are three shots being fired that we know of. And maybe there were more shots, but three that hit the officer. And we know they hit the officer from three different parts of his body, two from the front and one from the back. So even if the suspect, in this case the defendant, never got out of his car because defense would like you to think there's doubt about that, because defense wants you to come back with a second, even that theory, again, which I do not think is based on any evidence that was presented in this courtroom, you still have nothing but a first degree premeditated and deliberated murder. Defense cannot overcome the fact that Martin Ganz was struck three times. So, even looking at it in that light, you still have to come back with a first degree.

(11 RT 2511.)

Two additional aspects of the suspect's behavior supposedly indicated premeditation and deliberation. The prosecutor noted the testimony describing the suspect advancing on the fleeing officer. The suspect's manner of shooting, taking the so-called "combat stance" with

both hands on the gun and his arms extended, was also argued to be further evidence of intent.

> We have numerous witnesses that talk about the defendant being out of his car at the point in time of the first shot when we have witnesses, many of them, directing their attention to where the shot came from. We have witnesses who see Officer Ganz at that point turning around starting to run, and then we have the defendant getting out of his car in a combat stance which shows taking the time to think and to plan and to aim. Again, this wasn't a random or rash or impulsive act, but he's taking that combat stance, one or two hands, because the witnesses differ on what they could see, and pointing in the direction of Officer Martin Ganz.

(11 RT 2469; see also 2517-2519.) The prosecutor summarized the circumstances alleged to establish premeditation and deliberation in her rebuttal closing argument, stating:

> You have eyewitness testimony and physical evidence this was a brutal, cold, calculated murder that the defendant Roger Brady did not want to go back to prison, that he shot Officer Ganz once wasn't enough, that he got out of the car, that he chased him, shot him in the back, and that was not enough. That he continued chasing him until he could finally finish him off.

(11 RT 2522-2523.)

D. There Was Insufficient Evidence Of Premeditation And Deliberation To Sustain A First Degree Murder Conviction.

A killing is the product of deliberation and premeditation *only* if the killer acted as a result of careful thought and weighing the considerations, as with a deliberate judgment or plan, carried on coolly and steadily according to a preconceived design. (*People v. Anderson*, *supra*, 70 Cal.2d 15, 26. See also *People v. Thomas* (1945) 25 Cal.2d 880 [156 P.2d 7];

People v. Holt (1944) 25 Cal.2d 59 [153 P.2d 21].) While acknowledging the difficulty of distinguishing first degree murder from second degree murder in certain cases, the California Supreme Court insists that the distinction be maintained. (*People v. Holt, supra,* 25 Cal.2d 59.) "This Court has repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill." (*People v. Wolff* (1964) 61 Cal.2d 795, 821 [394 P.2d 959, 40 Cal.Rptr.271]; *People v. Caldwell* (1965) 43 Cal.2d 864, 869 [279 P.2d 539]; *People v. Thomas, supra,* 25 Cal.2d 795.)

In the absence of direct evidence of the defendant's state of mind, premeditation and deliberation may be inferred from circumstantial evidence. (*People v. Eggers* (1947) 30 Cal. 2d 676, 686 [185 P.2d 1].) However, the evidence supporting the inference must be both credible and sufficient. (*People v. Anderson, supra,* 70 Cal.2d 15.) Three types of evidence are of particular interest in reviewing a jury's finding of premeditation and deliberation: (1) evidence of the defendant's planning activity prior to the homicide; (2) evidence of motive arising from a prior relationship and/or conduct with the victim; and, (3) the manner of the killing, from which it may be inferred that the defendant had a preconceived design to kill. (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27; *People v. Wharton* (1991) 53 Cal.3d 522, 546 [809 P.2d 290, 280 Cal.Rptr. 63].) [15]

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As the *Anderson* Court noted, discernible patterns appear in the California cases. "Analysis of the cases will show that [the Supreme Court] sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of

The *Anderson* factors are guidelines and not rigid requirements. "*Anderson* was simply intended to guide an appellate court's assessment of whether the evidence supports an inference that the killing occurred as the result of pre-existing reflection rather than unconsidered or rash impulse." (*People v. Pride* (1992) 3 Cal. 4th 195, 247 [833 P.2d 643, 10 Cal.Rptr.2d 636]; *People v. Thomas* (1992) 2 Cal. 4th 489, 516-517 [828 P.2d 101, 7 Cal.Rptr.2d 199].) The presence of all three factors is not a "*sine qua non*" to finding premeditation and deliberation, and the factors are not exclusive. (See *People v. Sanchez* (1995) 12 Cal. 4th 1, 32 [906 P.2d 1129, 47 Cal.Rptr.2d 843]; *People v. Davis* (1995) 10 Cal. 4th 463, 511 [896 P.2d 119, 41 Cal.Rptr.2d 826] [*Anderson's* factors are descriptive, not normative]; *People v. Perez, supra,* 2 Cal. 4th 117, 125 [*Anderson* analysis "was intended only as a framework to aid in appellate review."].) Premeditation and deliberation may be found where there is very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing. (*People v. Raley* (1992) 2 Cal. 4th 870, 886 [830 P.2d 712, 8 Cal.Rptr.2d 678]. See also *People v. Mayfield* (1997) 14 Cal.4th 668 [928 P.2d 485, 60 Cal.Rptr.2d 1].)

The California Supreme Court's wish to avoid rigid application of *Anderson's* three part test does not, however, indicate a lessening of the prosecution's burden of proof concerning premeditation and deliberation. That burden was not met in Roger Brady's case. There were strong reasons to question the reliability of the eyewitness testimony describing the way in which the shooting occurred. Even if the eyewitness accounts are presumed

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(1) or evidence of (2) in conjunction with either (1) or (3)." (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.)

to be accurate, that testimony, even when combined with the prosecution's other evidence, does not compel the conclusion that this crime was preceded by premeditation and deliberation. For all of the reasons discussed below, the prosecution failed to carry its burden of proving first degree murder beyond a reasonable doubt. This Court should, therefore, reverse Roger Brady's first degree murder conviction and modify the judgment to reflect a conviction for second degree murder. (See, e.g., *People v. Bender* (1945) 27 Cal.2d 164, 186 [163 P.2d 8]; *People v. Holt, supra,* 25 Cal.2d 59; *People v. Mendes* (1950) 35 Cal.2d 537, 544 [219 P.2d 1].)

1. The prosecution did not establish that the crime was committed in order to avoid arrest.

In order to infer that the defendant acted to avoid arrest or capture, the circumstances must "lead [the defendant] and any objective observer to believe that an arrest was highly likely." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1300 [850 P.2d 1, 18 Cal.Rptr.2d 796].) The traffic stop preceding the Ganz homicide was not the sort of police contact likely to result in an arrest. The suspect was pulled over for a minor traffic infraction -- stopping past the limit line in the left turn lane. He complied with the policeman's order to "Move back," pulled over when directed to do so and cooperated when the officer approached his car. The state's own witnesses described this as a "routine traffic stop." [16] Don Ganz's testimony establishes that Officer Ganz approached the stop with that expectation.

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16 See 6 RT 1533-1537 [testimony of David Brumley]; 6 RT 1581-1582 [testimony of David Sattler]; 6 RT 1581-1582 [testimony of Robert Doyle]; 7 RT 1612-1613 [testimony of Bruce Lee]; and, 7 RT 1770-1777 [testimony of Jennifer La Fond].

(See 6 RT 1461-1465, 1471-1472.) There were, therefore, no objective indications that this stop would end with the driver's arrest.

There was no evidence at the time of the traffic stop that the suspect was committing a crime. Where avoidance of arrest is inferred as a motive for murder there is typically a direct nexus between the circumstances of the stop and the defendant's fear of arrest. In *People v. Cummings, supra,* 4 Cal.4th 1233, the two defendants shot a police officer who had stopped them for a traffic violation. The men were driving a stolen car and had been carrying out a long series of robberies in the previous months and weeks, the last of which was committed two days before the murder. (See also *People v. Robillard* (1960) 55 Cal.2d 88 [358 P.2d 295, 10 Cal.Rptr. 167] [defendant was on parole from both state and federal sentences, was driving a stolen car, possessed evidence from several other crimes he had recently committed, and, during the course of the traffic stop, overheard a report on the police radio that the car he was driving was stolen].) Courts in other jurisdictions are similarly inclined to infer motive where the killer of a law enforcement official was engaged in other illegal activity. (See *Sims v. State* (Fla. 1983) 444 So.2d 922 [defendant shot deputy sheriff who entered a pharmacy as he and accomplices were carrying out a robbery]; *State v. Workman* (Tenn. 1984) 667 S.W.2d 44 [defendant had just been arrested following a restaurant robbery, broke free and shot policeman as they exited building]; *Swindler v. State* (1978) 264 Ark. 107 [569 S.W.2d 120] [defendant was driving a stolen car, and had an outstanding warrant charging him with unlawful flight to avoid prosecution in another case]; *Lovell v. State* (1997) 347 Md. 623 [702 A.2d 261] [defendant possessing a handgun and a large quantity of cocaine reasonably concluded that arrest

was imminent based on his interactions with the officer and upon seeing backup police units arrive].) [17]

The prosecutor in this case placed undue emphasis on Roger Brady's parole status, effectively claiming that this factor alone provided a motive for murder. Even when a defendant is on parole, this does not compel the inference that the crime was motivated by a desire to avoid arrest. (See *Doyle v. State* (Fla. 1984) 460 So.2d 353 [where defendant molested and killed child who knew him and could identify him the evidence was insufficient to support judge's finding that murder was committed to avoid arrest even though defendant had previously been given a five year suspended sentence to be imposed if he carried out any other crime]. See also *State v. Porter* (1997) 130 Idaho 772 [948 P.2d 127] [evidence insufficient where, although victim would have been witness against defendant at proceeding regarding battery charge, nothing in record supported conclusion that defendant killed victim because of that pending misdemeanor proceeding].)

For all of the reasons discussed above, the circumstances of this traffic stop did not indicate that an arrest would result. The prosecutor supplied no credible reason for Roger Brady (assuming for the sake of

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See also *Provenzano v. State* (Fla. 1986) 497 So.2d 1177 [defendant shot the bailiff in a courtroom during trial of members of organized crime family, and then shot second bailiff in hallway outside the courtroom in attempt to escape]; *Johnson v. State* (Fla. 1983) 438 So.2d 774 [defendant fatally shot police officer who stopped him as possible suspect in robbery-murder that occurred 30 minutes earlier on the same road];; *Tafero v. State* (Fla. 1981) 403 So.2d 355 [defendant parolee fatally shot two police officers at a highway rest stop after they spotted illegal firearms and drugs in his car and ordered him out of the vehicle].

argument that Brady was the suspect), to fear arrest. Unlike the defendant in *People v. Robillard*, *supra*, 55 Cal.2d 88, Brady was not driving a stolen car. The Diahatsu was registered to his father, Phillip Brady. Ganz stopped the suspect for a minor traffic infraction - stopping past the limit line too far into the intersection. This was not a case in which a suspect had led police on a high speed chase, or had been driving so fast or recklessly that he could expect to be arrested and charged on that basis. Even if Ganz had determined that Brady was on parole, the circumstances of the traffic stop did not support a search of the car. Roger Brady had no reason to fear arrest under these circumstances and, as noted above, the prosecution's own witnesses established that from the perspective of an objective observer an arrest was not imminent. The prosecutor's argument for motive was constructed on a series of inferences which are not supported by the facts.

2. There was no evidence of advanced planning.

The circumstances of the Ganz shooting do not reveal the type of advanced planning or preparation needed to support an inference of premeditation under California law. The officer initiated the traffic stop, and there was a relatively short period of time - perhaps a few minutes - between the suspect being directed to pull over and the shooting. The prosecutor argued that premeditation and deliberation could be inferred because the traffic stop gave Brady the "ample time and ample opportunity" to plan. (11 RT 2470-2471.) California law does not permit such an inference. Although deliberation and premeditation can occur in a brief period of time, (CALJIC No. 8.20; *People v. Thomas, supra,* 25 Cal.2d 880, 900) it is essential for the prosecution to show that premeditation *actually occurred*. "The prosecution may not rely "on the mere passage of time as a proxy for proving reflection." (*State v. Thompson* (2003) 204

Ariz. 471, 476 [65 P.3d 420, 425]; see also *State v. Dann* (2003) 205 Ariz. 557 [74 P.3d 231].)

Evidence of extensive planning and preparation may be a sufficient basis for a first degree murder conviction. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237-1238 [805 P.2d 899, 278 Cal.Rptr. 640]; *People v. Wharton, supra,* 53 Cal.3d 522, 548) The defendant's planning of the crime has often been viewed as "the most important prong" of the *Anderson* analysis. (*People v. Alcala* (1984) 36 Cal.3d 604, 627 [842 P.2d 1192, 15 Cal.Rptr.2d 432]; *People v. Lucero* (1988) 44 Cal. 3d 1006; 1018 [750 P.2d 1342].) Planning is inherent in certain methods of killing such as poisoning, arson or use of a destructive device.[18] Premeditation may be inferred from circumstantial evidence indicating that the killing was contemplated in advance. (See *People v. Hovey* (1988) 44 Cal.3d 543, 556 [749 P.2d 776, 244 Cal.Rptr. 121] [inference of intent supported where defendant armed himself with a knife, kidnaped 12 year-old girl, tied and blind-folded her, and drove to remote location]; see also, *People v. Alcala, supra,* 36 Cal.3d 604, 627.) Planning may be inferred from circumstantial evidence in cases where the defendant's actions are not easily explained *other* than as preparations for murder. (See, e.g., *People v. Eggers*, *supra*, 30 Cal.2d 676 [defendant sold wife's rings under an assumed name and forged her signature to certificate of ownership for car]; *People v. Cooper*

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The relationship of planning and preparation to culpability is reflected in a variety of statutes, including Penal Code section189, which assigns a presumption of premeditation for certain specified crimes: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other willful, deliberate, and premeditated killing."

(1960) 53 Cal.2d 755 [349 P.2d 964, 3 Cal.Rptr. 148] [defendant's descriptions of his time consuming, careful and surreptitious preparations to strangle victims]; *People v. Caritativo* (1956) 46 Cal.2d 68, 72 [292 P.2d 513] [defendant forged the will of the first victim to obtain her property and then forged a suicide note for her husband (the defendant's second victim) making it appear that the husband was in fact the killer].)

The California Supreme Court has never inferred premeditation and deliberation based solely on the defendant's supposed "opportunity" to plan a crime. The fact that the defendant had an opportunity to reflect before deciding on a course of action is relevant only in combination with *other* compelling circumstances which permit the inference of premeditation needed for first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96 [954 P.2d 990, 74 Cal.Rptr.2d 418] [evidence sufficient where there was a long history of animosity between defendant and the victim (who was his elderly wheelchair bound mother), the rifle was loaded, "racked" and ready to fire, contrary to defendant's claim of accidental discharge, and the victim was shot at close range].)

3. The Circumstances Do Not Support An Inference Of Premeditation.

The prosecutor argued that premeditation and deliberation must be inferred from the way in which the shooting occurred. (See 11 RT 2471-2472; 2511-2514.) According to the prosecution's theory of the case, the first shot was the shoulder wound which would not have been fatal. The suspect supposedly chased the officer for the purpose of "finishing him off," and delivered the fatal gunshot wound to the face when the victim was crouched at the rear of the patrol car. Support for this version of events came primarily from the testimony of eyewitnesses. The prosecutor

claimed that presence of expended shell casings near the police car corroborated the witnesses' testimony about the suspect shooting downward toward the rear of the patrol car. (See 11 RT 2513-2514.) Additionally, the prosecutor argued that planning was shown by the fact that three shots were fired (two striking the officer in the front of the body and one striking his back) (11 RT 2511), and repeatedly asserted that the suspect firing from a so-called "combat stance" was proof of first degree murder. (11 RT 2468; 2517-2519.)

> We have witnesses who see Officer Ganz at that point turning around starting to run, and then we have the defendant getting out of his car in a combat stance *which shows taking the time to think and to plan and to aim.* Again, this wasn't a random or rash or impulsive act, but he's taking that combat stance . . .

(11 RT 2468 [emphasis supplied].)

Defense counsel pointed out that the evidence the prosecutor relied on was not entirely credible. A number of facts were not consistent with the prosecution's theory. No shell casings were found near the rear of the police car as would be expected if the suspect had proceeded that far to deliver the final, fatal shot. (11 RT 2491-2492.) The medical experts could not determine the order of the shots, making the defense theory (whereby the fatal shot came first) equally plausible. (See 8 RT 2066.) Finally, counsel challenged the credibility of the eyewitness testimony describing the assailant pursuing the officer and "executing" him at the rear of the police car, and the use of the "combat stance." (11 RT 2491-2492.) The eyewitnesses did not tell the police about the suspect chasing the officer in their interviews on December 28, 1993. This significant aspect of the

incident was left for their trial testimony. (11 RT 2497-2498.) [19] As defense counsel observed, the witnesses' accounts grew more dramatic over time and also, perhaps due to the influence of media reports, more similar to one another's.

Even assuming, arguendo, that the witnesses were entirely credible and prosecution's version of events was essentially accurate, the facts still do not support an inference of premeditation and deliberation. None of the circumstances the prosecutor relied upon were sufficient, considered either together or separately, to conclude that the killing was premeditated. It is inconsequential that the suspect fired three or more shots at the officer. Death resulting from "indiscriminate multiple attacks of both severe and

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Witness David Brumley told police that he heard four shots fired, but saw none. He turned around in time to see the officer falling behind the patrol car. (6 RT 1567-1569.) Five years later at trial, Brumley testified to hearing three shots and seeing two shots fired. (6 RT 1540-1541.) At the last shot the suspect was standing near the police car's rear tire with both hands on the gun and arms extended out and down over the rear of the police car. (6 RT 1542; 1545-46.) Witness Robert Doyle told police that his back was to the incident. He heard three shots, but saw none. (7 RT 1648.) At trial, Doyle testified that he heard three shots and saw two. (6 RT 1586, 1590.) Doyle also added to his testimony the observation that the suspect was near the police car's door when he fired over the car's roof or trunk. (6 RT 1587.) Witness La Croix told police that she heard three shots but saw none. (7 RT 1674; 1677-78.) By the time of Roger Brady's trial, she testified to hearing four or five shots and seeing the final two or three shots fired. (7 RT 1666-1667.) La Croix added to her testimony having seen the suspect shooting downward at the officer. (7 RT 1667.) Witness David Sattler stated in his police interview he heard two shots but saw nothing. (7 RT 1709.) Once again, this witness' trial testimony was far more helpful to the prosecution. Sattler testified that he had seen the suspect, in silhouette, standing in a "combat stance" and firing downward at the rear of the police car. (7 RT 1698-1699.)

superficial wounds" does not establish premeditation and deliberation. (*People v. Anderson, supra,* 70 Cal.2d 15, 21.) Even shooting a police officer at close range does not necessarily demonstrate premeditated intent to kill. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 695-696 [715 P.2d 665, 224 Cal.Rptr. 705]; see also *Braxton v. United States* (1991) 500 U.S. 344, 349 [111 S.Ct. 1854, 114 L.Ed.2d 385] [shooting at a federal marshal establishes "a *substantial step* toward [attempted murder], and *perhaps* the necessary intent." [emphasis added]].) On the contrary, firing a few gun shots in rapid succession as part of an ongoing encounter is "consistent with a sudden, random 'explosion' of violence" or an eruption of "animal fury" which is insufficient to prove premeditation and deliberation. (*People v. Alcala, supra,* 36 Cal.3d at p. 623; *People v. Tubby* (1949) 34 Cal.2d 72, 78 [207 P.2d 51].)

The suspect chasing the officer is also not persuasive evidence of premeditation and deliberation in the context of this case. The pursuit, following immediately after the initial shot, was part of a single course of conduct. Under these circumstances, the suspect getting out of his car and following the officer for several yards is "consistent with a sudden, random 'explosion' of violence," and not evidence of the calm, calculated thought associated with premeditation and deliberation. (*People v. Alcala, supra,* 36 Cal.3d at p. 623.)

Cases where the defendant's pursuit of the victim is noted as a circumstance indicating planning are distinguishable. The defendant's pursuit of the victim after an intervening event which should have provided a "cooling down" period may indicate persistence in carrying out a preconceived plan. (See, e.g., *People v. Davis, supra,*10 Cal.4th 463 [premeditation and deliberation inferred from manner of killing where

victim was severely injured in car crash, was pursued by defendant and strangled over a period of five minutes when she was debilitated and in severe pain from internal injuries]; *People v. Raley, supra,* 2 Cal.4th 870 [defendant's premeditation inferred from, *inter alia*, elaborate advance planning and number of hours after stabbing during which he made a calculated decision to let victims bleed to death rather than seek medical attention]; *People v. Rittger* (1960) 54 Cal.2d 720, 730 [355 P.2d 645, 7 Cal.Rptr. 901] [defendant attacked victim with a knife, stabbed him repeatedly and persisted in attack for some time before fatal wounds inflicted]; *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 101-102 [214 Cal.Rptr. 33] [entire course of conduct indicated premeditation where defendant and his friends engaged victim in conversation in a bar and then returned to their own tables, and after some interval defendant knocked the victim to the ground, met no resistance and began shooting].)

The suspect's alleged use of a "combat stance" when firing is wholly irrelevant. [20] The term "combat stance," itself is problematic. Although the prosecutor and several witnesses used the term, it has no widely accepted meaning within the military, law enforcement, or marksmanship communities, with regard

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The California Supreme Court has inferred premeditation and deliberation in gunshot homicide cases where the testimony of medical experts and/or ballistics evidence established an "execution style" killing. (See, e.g., *People v. Hawkins* (1995) 10 Cal.4th 920 [897 P.2d 574, 42 Cal.Rptr.2d 636].) There was no such evidence here. Cases in which the victim is shot with a close range or "contact wound" also support the inference that the shooter premeditated and deliberated before the murder. (See, *People v. Marks, supra,* 31 Cal.4th 197, 278; *People v. Bloyd* (1987) 43 Cal.3d 333, 348 [729 P.2d 802, 233 Cal.Rptr. 368].) In this case the medical experts agreed that none of the victim's injuries resulted from close range or "contact wounds." (See 8 RT 2066 [testimony of prosecution witness Dr. Riley].)

to the use of a firearm. In these communities, the two common stance variations are known as the Weaver Stance and the Isosceles Stance. Of note, the Isosceles Stance (arms and wrists locked straight out in front of the body) is considered by many experts to be the default position assumed by most shooters under stress, rather than a stance reflecting training or deliberation. (See, e.g., Rayburn, Michael T, Police Magazine, 2004; see also www.policemag.com/survivalguide.pdf.) This prosecutor essentially made up a term and imbued it with a meaning that it does not have to support a first degree murder conviction.

E. Conclusion.

The circumstances surrounding this shooting (viewed separately or together) do not provide a sufficient basis from which to infer premeditation and deliberation. (*People v. Eggers, supra,* 30 Cal. 2d 676.) Even when the evidence is viewed in the light most favorable to the prosecution, there is insufficient support in the record from which to infer that Roger Brady acted with premeditation and deliberation. For all of the reasons discussed above, the prosecution failed to prove first degree murder beyond a reasonable doubt. Reversal of the conviction is therefore required.

III.

THE TRIAL COURT EXCLUDED EVIDENCE OF POSSIBLE BIAS IN THE TESTIMONY OF A KEY PROSECUTION WITNESS CONTRARY TO STATE LAW AND IN VIOLATION OF ROGER BRADY'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Background And Proceedings In The Trial Court.

The jury needed to accept the prosecution's crime scenario in order to infer premeditation and deliberation required to sustain a first degree murder conviction. Robert Daniel Ferrer, aka Robert Daniel Doyle, testified for the prosecution in the guilt phase of trial. Doyle/Ferrer was an important witness because his was the strongest testimony supporting the state's version of how the shooting had taken place. There were, however, reasons to view his testimony skeptically.

Doyle/Ferrer's trial testimony was markedly different than the statement he gave to police immediately after the crime. On the evening of December 27, 1993, Doyle/Ferrer was working at a supermarket in the Manhattan Village Mall. (6 RT 1580; 9 RT 2255.) At approximately 11:00 p.m., he was outside collecting shopping carts from the market's parking lot. (6 RT 1580.) Doyle/Ferrer saw a police car with its lights on making what he believed to be a routine traffic stop. (6 RT 1581-1583.) He turned away to speak to some people, and then heard a gunshot. Doyle/Ferrer turned in the direction of the sound, toward the suspect's car. (*Id.*)

Nearly five years later at trial, Doyle/Ferrer's account of the events was significantly different. Doyle/Ferrer claimed to have seen the officer get out of the patrol car and approach the suspect car. (6 RT 1582.) When he heard the first shot, Doyle/Ferrer turned in the direction of the sound, toward the suspect's car. (6 RT 1583.) The officer was running away from

the suspect car back toward the patrol car. The suspect was chasing him. (6 RT 1584.) The suspect, who Doyle/Ferrer estimated to be around twelve feet behind the officer, appeared to be holding a gun in his right hand. (6 RT 1585.) The officer ducked down or crouched behind the patrol car where Doyle/Ferrer could not see his head. (*Id.*) The suspect ducked down and then came up again, as if he were trying to see over the patrol car. (6 RT 1585-1586.) Doyle/Ferrer testified that he saw the suspect fire the second shot, standing on the driver's side of the patrol car alongside the car doors. (6 RT 1586.) The suspect extended his arms across the roof of the patrol car and down toward the officer. (6 RT 1587.) He fired a third shot from that same position. (6 RT 1590.)

Police interviewed Doyle/Ferrer at approximately 7:00 a.m. on December 28, 1993. (9 RT 2255.) In his interview, Doyle/Ferrer told the detectives that he had been outside the market in the parking lot when he noticed flashing lights on a police car. (*Id.*) Glancing out of the corner of his eye, Doyle/Ferrer saw what appeared to be a routine traffic stop. (9 RT 2256.) He turned away to speak to some people; and then heard three shots fired. (9 RT 2255.) Doyle/Ferrer turned back and saw someone bobbing up and down peering over the rear of the patrol car. As Doyle/Ferrer watched, the person turned and ran back to the car parked in front of the patrol car. (9 RT 2255, 2257.)

In his December 28, 1993, interview Doyle/Ferrer did *not* tell detectives that he had seen the officer get out of the patrol car and walk to the suspect car. (9 RT 2256.) He told police that he had *heard* three shots, but expressly stated that he turned to view the scene *after* the shots were fired. (7 RT 1648-1649; 1655; 9 RT 2256.) Doyle/Ferrer did *not* tell police that he saw the suspect fire two of the shots. (9 RT 2258.) He *never* stated

in his interview that he had seen the suspect shooting down at Ganz over the patrol car. (7 RT 1658; 9 RT 2258.)

At trial, Doyle/Ferrer also testified about events immediately after the shooting. His testimony conveyed his own feelings of shock and helplessness, and also related the emotional responses of others who came to help the officer. Doyle/Ferrer ran to help immediately, and was the first person to arrive at the crime scene. (6 RT 1592; 7 RT 1754.) He gave a graphic description of trying to help Ganz breathe by lifting his head up from the pool of blood. (6 RT 1593-1594; 1597.) Doyle/Ferrer also described Don Ganz's hysterical reactions, and Jamie Timmons' fear and distress at the crime scene. (6 RT 1593.)

Doyle/Ferrer's dramatic and detailed testimony supported the prosecution's first degree murder theory, and was certainly compelling for the jurors. There were, however, reasons to question the credibility of this witness. Doyle/Ferrer testified on Tuesday, October 27, 1998, concluding his direct examination testimony before the court adjourned for the evening. (See 6 RT 1579-1598.) When he began his testimony, and at all times prior to trial, the witness was identified as Robert Daniel Ferrer. (*Id.*) After he stated his name in court as "Robert Daniel Doyle," defense counsel learned that, under the name Robert Doyle, the witness had a misdemeanor conviction for violation of Penal Code section 243(e)(1), abuse or battery of a spouse or co-habitant. [21] According to the prosecutor, Doyle/Ferrer had

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The prosecutor made an offer of proof explaining the change of surname which was satisfactory to the court and counsel (7 RT 1636-1638), and the witness subsequently explained the name change to the jury. (7 RT 1643-1644.) However, Doyle/Ferrer's behavior in connection with this case raised further concerns about his reliability. After his direct testimony on

been arrested on this charge on April 14, 1997, and entered a nolo contendere plea on April 15, 1997. He was placed on summary probation. (7 RT 1634-1635; 1640.) The prosecutor claimed to have only just learned of Doyle/Ferrer's misdemeanor conviction. (7 RT 1640.)

Defense counsel sought the court's permission to cross-examine Doyle/Ferrer about his probationary status. (7 RT 1638.) Doyle/Ferrer's probationary status was relevant and admissible under *Davis v. Alaska,*[22] because this fact might cause the witness to shade his testimony in favor of the prosecution. (7 RT 1638-1639.) In this connection, defense counsel pointed out significant differences between Doyle/Ferrer's direct examination testimony and the account he provided in the interview on the morning of December 28, 1993. (7 RT 1639.) The trial court refused the defense request. (*Id.*) The judge noted that battery was not a crime

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the afternoon of October 27, 1998, the trial judge ordered the witness to return the next morning by 10:00 a.m. to begin cross-examination. (6 RT 1598.) Doyle/Ferrer was not present when court convened the next day at 10:20 a.m. (7 RT 1599.) The court and counsel discussed scheduling and other matters while they waited for the witness. (7 RT 1599-1607.) The prosecution's chief investigator, Detective Perales, paged Doyle/Ferrer and called him at work and elsewhere but was unable to reach him. (7 RT 1607.) The trial court noted that the witness had been specifically told to return by 10:00 a.m. on the morning of October 28, 1998. (7 RT 1607.) The court denied defense counsel's motion to strike the witness's testimony and allowed the prosecutor to begin the direct examination of another witness while efforts to find Doyle/Ferrer continued. (7 RT 1608-1609.) Doyle/Ferrer was eventually contacted sometime between 11:00 and 11:30 a.m. (7 RT 1629-1630.) He explained that he had overslept and promised to come to court immediately. (7 RT 1630.) When the witness had not arrived at 11:55, the court recessed for lunch. (7 RT 1634.) Doyle/Ferrer was present when court reconvened at 1:38 p.m. (7 RT 1635.)

22 *Davis v. Alaska*, *supra*, 415 U.S. 308.

involving moral turpitude, citing the California Court of Appeal's decision in *People v. Mansfield* (1988) 200 Cal.App.3d 82 [245 Cal.Rptr. 800]. (7 RT 1638.) The trial court's ruling was not responsive to defense counsel's objection. The court mistakenly treated this as an impeachment-by-prior-conduct question. The judge ignored the fact that the witness, having recently received very favorable disposition of his own criminal charge, was motivated to be helpful to the police and the prosecutor.

B. Overview Of Legal Arguments.

The trial court erred by refusing to allow defense counsel to challenge Doyle/Ferrer's credibility with the evidence of his probationary status. As defense counsel stated, Doyle/Ferrer's status gave him a reason to shade his testimony in the prosecution's favor. California law generally favors the inclusion of evidence bearing on the witnesses' motives. (See *People v. Hall, supra,* 41 Cal.3d 826; *People v. Alvarez, supra,* 49 Cal.App.4th 679, 688, and cases discussed, *infra.*) Doyle/Ferrer's testimony was significant to the prosecution's case. His account of the suspect pursuing the officer, and shooting twice from the rear of the patrol car, supported the prosecutor's argument for a first degree murder verdict. The description Doyle/Ferrer gave of the suspect running from the scene also provided a basis for the prosecution to request the flight instruction, which was given over defense objections. If defense counsel had been permitted to undermine Doyle/Ferrer's credibility with the information that he was on probation, the prosecution would have lost valuable support for its positions in these areas. The trial court's ruling was error under state law and contrary to constitutional principles. Several constitutional guarantees support the defendant's right to challenge the prosecution's case with information undermining the credibility of the state's witnesses.

Exclusion of this evidence violated Brady's federal constitutional rights to present a defense and to confront and cross-examine witnesses as guaranteed by the Sixth and Fourteenth Amendments. (*Crane v. Kentucky*, *supra*, 476 U.S. 683, 690-91; *Washington v. Texas, supra,* 388 U.S. 14, 22-23; *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 302.) Further, because this witness's testimony was evidence directly related to culpability and the court's erroneous ruling prevented defense counsel from exposing bias in that testimony, the exclusion of evidence of Doyle/Ferrer's probationary status undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense (*Beck v. Alabama, supra*, 447 U.S. 625, 637-38), and deprived Roger Brady of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens, supra,* 462 U.S. 862, 879; *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304; *Johnson v. Mississippi*, *supra,* 486 U.S. 578, 584-85.)

Finally, because the trial court erroneously excluded the evidence in contravention of established state law, the court's action deprived Roger Brady of a state-created liberty interest and denied him due process of law as required by the Fifth and Fourteenth Amendments to the federal constitution. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Lambright v. Stewart, supra,* 167 F.3d 477.) For all of these reasons, the trial court's erroneous ruling requires reversal of the conviction and sentence of death.

C. Standard Of Review.

This Court typically reviews a trial court's evidentiary rulings for abuse of discretion. (See *People v. Burgener*, *supra*, 41 Cal.3d 505; Evid. Code §§ 350, 352.) However, heightened scrutiny is appropriate and necessary because this claim involves error of constitutional magnitude in

the context of a capital case. This evidence was important to the defense, and its exclusion deprived Brady of his constitutional rights to due process of law, to present a defense, to confront and cross-examine witnesses, and to a fair trial and a reliable determination of guilt and the penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal.Const., Art. I, §§ 7, 15 and 17.) Admission of the evidence of possible bias in Doyle/Ferrer's testimony was also favored according to the decisional law of this state (see, e.g., *People v. Hall*, *supra*, 41 Cal.3d 826), and the policies expressed in California's Constitution and statutes (see Cal. Const., Art. 1, § 28(d) and (e); Evid. Code §§ 350, 352).

The United States Supreme Court has applied heightened scrutiny to procedures involved in capital cases based on its recognition that "death is [] different." (*Gardner v. Florida* (1977) 430 U.S. 349, 357-58 [97 S.Ct. 1197, 51 L.Ed.2d 393]. See also *Lockett v. Ohio, supra,* 438 U.S. 586; *Godfrey v. Georgia*, *supra*, 446 U.S. 420.) As the Ninth Circuit Court of Appeal has noted, this increased concern with accuracy in capital cases has led the Supreme Court to "set strict guidelines for the type of evidence which may be admitted, must be admitted, and may not be admitted." (*Lambright v. Stewart, supra*,167 F.3d 477, citing *Skipper v. South Carolina*, *supra*, 476 U.S. 1; *Booth v. Maryland, supra,* 482 U.S. 496.) The reasoning of these cases establishes that the errors complained of are constitutional; therefore, reversal is required unless the trial court's exclusion of this evidence is shown to have been harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.)

D. Doyle/Ferrer's Probationary Status Was Relevant And Admissible Evidence According To California Law.

For at least the past 20 years, California has favored inclusion of a broader range of evidence in criminal proceedings. In 1982, voters passed Proposition 8, which contained the "Truth-in-Evidence" amendment to the California Constitution. (Cal. Const., Art. 1, § 28(d).) The constitutional amendment reflects a general policy favoring the inclusion rather than restriction of information in criminal trials. The simple, categorical language of section 28(e) clearly covers evidence for all purposes, including impeachment. Under Section 28(d), the trial court retains its discretion under Evidence Code section 352 to limit evidence, including past misdemeanor conduct, after balancing its relevance against its potential to confuse, prejudice or mislead the jury. (See, e.g., *People v. Wheeler, supra,* 4 Cal.4th 284; *People v. Beagle* (1972) 6 Cal.3d 441, 453-454 [492 P.2d 1, 99 Cal.Rptr. 313]; *People v. Castro* (1985) 38 Cal.3d 301, 309.) While trial courts retain their traditional discretion, the clear trend is away from exclusion of evidence in criminal proceedings. Commenting on the proper exercise of trial court discretion to exclude evidence in a criminal case, the California Supreme Court has stated: "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to present all relevant evidence of significant probative value to his or her defense." (*People v. Cunningham* (2001) 25 Cal.4th 926, 998 [25 P.3d 519, 108 Cal.Rptr.2d 291]. Accord, *People v. Babbitt* (1988) 45 Cal.3d 660, 684 [755 P.2d 253, 248 Cal.Rptr. 69].) [23] In the present case, defense counsel

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Other California courts have expressed agreement, applying this principle to a variety of cases. (See, e.g., *People v. Reeder, supra*, 82 Cal.App.3d 543, 552; *People v. De Larco* (1983) 142 Cal.App.3d 294 [190

needed to undermine the testimony given by the eyewitnesses in order to prevent a first degree murder verdict. The information regarding Doyle/Ferrer's probationary status was an important part of this effort and its exclusion was very detrimental to the defense case.

The trial court's ruling was contrary to California's statutes and case law, both of which favor broad inclusion of evidence bearing on witnesses' credibility and motive for testifying. (See *People v. Alvarez, supra,* 49 Cal. App.4th 679, 688 ["As a general rule, motive for testifying may be relevant and probative in a given case."].) The California Evidence Code also reflects the desire to admit a wide variety of evidence bearing on motive and credibility. Evidence Code section 780 addresses evidence bearing on the credibility of a witness. The statute permits the trier of fact to consider "any matter that has any tendency in reason to prove or disprove the truthfulness of [the witness] testimony at the hearing;" and sub-section (f) specifically includes "the existence or nonexistence of a *bias, interest or other motive* [emphasis supplied]."

As defense counsel explained, Doyle/Ferrer's testimony was important for the prosecution and attacking his credibility was critical for the defense. The evidence of his probationary status was highly relevant to his credibility. Armed with this information, defense counsel could have accounted for the increasing detail and pro-prosecution slant in his trial

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Cal.Rptr. 757] [commenting that "comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.'" (*Id.*, at pp. 305-306, quoting *People v. Lavergne* (1971) 4 Cal.3d 735, 744 [484 P.2d 77, 94 Cal.Rptr. 405]; *People v. Murphy* (1963) 59 Cal.2d 818, 829 [382 P.2d 346, 31 Cal.Rptr. 306].)

testimony as compared to his police interview of December 28, 1993. With this background information, the jury could reasonably have concluded that Doyle/Ferrer had embellished his account of the events. The jurors may well have determined that there remained a reasonable doubt regarding the way in which the crime occurred and found, therefore, that the evidence was insufficient to establish first degree murder. With the evidence concerning Doyle/Ferrer's possible bias, counsel could have argued far more forcefully that his description of the shooting (as well as the other eyewitnesses') had been influenced by publicity, the passage of time and a desire to aid law enforcement. The jury ought to have had the benefit of this relevant evidence when assessing Doyle/Ferrer's motives, and his and the other eyewitnesses' credibility.

E. The Trial Court's Exclusion of This Evidence Denied Roger Brady His State And Federal Constitutional Rights.

1. Sixth Amendment And Fourteenth Amendment Rights.

The United States Supreme Court has repeatedly affirmed the criminal defendant's right to confront and cross-examine adverse witnesses. In doing so, the Court has relied on several constitutional bases. In *Davis v. Alaska*, *supra*, 415 U.S. 308 the Court commented extensively on the significance of the accused's Sixth Amendment confrontation rights, emphasizing that these rights can best be effectuated through vigorous cross-examination.

> Cross-examination is the principal means by which the believability of a witness and the credibility of his testimony are tested.
>
> * * *

> A more particular attack on the witness' credibility is effected by cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." [Citation] We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [Citation].

(*Id.* at p. 316.)

In *Chambers v. Mississippi*, *supra*, 410 U.S. 284, the Supreme Court used a due process rationale, holding:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." [Citations.] It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." [Citation.] Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. [Citation.] But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. [Citation.]

(*Id.* at 295.)

Consistent with these principles, the Supreme Court has been generally suspicious of trial court limitations on defense cross-examination. This is especially so where the proposed questioning might expose bias or interest on the part of a prosecution witness. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 676 ["exposure of a witness' motivation in testifying is

a proper and important function of a constitutionally protected right of cross-examination."].)

2. Fifth, Sixth and Fourteenth Amendment Rights.

Courts have traditionally held that the right of the accused in a criminal case to present and develop his/her theory of the defense is constitutionally protected. Thus, restrictions on defense evidence may face careful scrutiny. The Ninth Circuit recently reversed a state court murder conviction where a restriction on cross-examination had undermined the defendant's ability to present evidence supporting the defense theory of third party culpability. In *Thomas v. Hubbard*, *supra*, 273 F.3d 1164, the Ninth Circuit made clear that the defense does *not* need to make a threshold showing that its theory of the case is plausible before being entitled to present the evidence or conduct cross-examination in support of the theory.

> Even if the defense theory is purely speculative . . . the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: "[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt."

(*Id.* at 1177, quoting *United States v. Vallejo*, *supra*, 237 F.3d 1008, 1023 (quoting 1A John Henry Wigmore, *Evidence in Trials at Common Law*, § 139 (Tillers rev. ed. 1983).)

The Ninth Circuit's reasoning and the incorporated comments of Professor Wigmore apply equally to the present case. As in *Thomas v. Hubbard*, the chief defense strategy was to create a reasonable doubt about the identity of the suspect and/or the circumstances of the crime. The

defense had no witnesses to the crime, and cross-examining the eyewitnesses was the only way to challenge the prosecution's case for first degree murder. By restricting cross-examination of Doyle/Ferrer, the trial court deprived the defense of its most meaningful challenge to this witness's testimony about the way in which this crime took place. The trial court's ruling, therefore, effectively denied Roger Brady his rights to a fair trial and to present a defense guaranteed by the Fifth, Sixth and Fourteenth Amendments. (*Chambers v. Mississippi, supra*, 410 U.S. 284; *Washington v. Texas, supra,* 388 U.S. 14.)

3. Eighth Amendment and Fourteenth Amendment Rights.

A "heightened standard of reliability" must be met in order to sustain any capital conviction or sentence of death. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638.) The trial court's ruling excluding the evidence of Doyle/Ferrer's probationary status prevented the jury from considering relevant information capable of raising a reasonable doubt concerning Roger Brady's culpability for first degree murder. Because the excluded evidence was directly related to culpability, its exclusion undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense. (*Id.*)

In capital sentencing, the Eighth and Fourteenth Amendments also require an "individualized consideration of the penalty," including the circumstances of the offense. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Zant v. Stephens, supra,* 462 U.S. 862, 879; *Johnson v. Mississippi, supra*, 486 U.S. 578, 584-85.) The United States Supreme Court has found that the prejudice caused by the exclusion of relevant testimony may be "devastating" because the error raises the possibility that the verdict was based on "caprice and emotion." (*Gardner v. Florida,*

supra, 430 U.S. 349, 357-358.) Moreover, the Supreme Court has long held that the sentencer must be permitted to consider as a mitigating factor "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. 586, 604; see also *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394 [107 S.Ct. 1821, 95 L.Ed.2d 347; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1.)

For all of the reasons previously discussed, the proffered defense evidence was not only relevant but was capable of creating a reasonable doubt as to Roger Brady's guilt on the first degree murder allegation. This evidence was also plainly relevant to the circumstances of the offense which is a factor for jury consideration in the penalty phase. Because the jury was prevented from considering this relevant evidence in both phases of the capital trial, the convictions and sentence of death lack the reliability required by the Eighth and Fourteenth Amendments to the federal constitution and must be reversed.

4. State Law Errors Implicating Federal Constitutional Rights To Due Process Of Law, Fundamental Fairness And Reliable Determinations Of Guilt And The Penalty.

The trial court's refusal to allow defense counsel to question Doyle/Ferrer about the misdemeanor conviction and his probation for that offense was more than an abuse of its discretion under California's laws of evidence. By excluding evidence which ought to have been admitted under state law the trial court deprived Roger Brady of a state-created liberty interest and thus denied him his federal constitutional right to due process of law. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) The United States Supreme Court and the federal circuits have been particularly vigilant

concerning trial court applications of the state's own statutes and rules in the context of capital litigation. (See, e.g., *Ford v. Wainwright*, *supra*, 477 U.S. 399, 414; *Beck v. Alabama, supra,* 447 U.S. 625.) "'[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.'" (*Lambright v. Stewart*, *supra*, 167 F.3d 477, 486-487, quoting *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300, citing *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Moreover, a state court's erroneous admission or exclusion of evidence may violate the federal constitution by causing fundamental unfairness to the criminal defendant. (See *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1466; *Batchelor v. Cupp* (9th Cir. 1982) 693 F.2d 859, 865.)

The trial court's erroneous exclusion of evidence establishing that Doyle/Ferrer had a motive to testifying favorably for the prosecution was contrary to state law. The court's failure to correctly apply California law deprived Roger Brady his federal constitutional rights to due process of law and a fundamentally fair trial. In addition, the court's ruling also deprived him of a fair and reliable determination of the sentence in violation of the Eighth Amendment. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [124, L.Ed.2d 182, 113 S.Ct. 2078]; *Beck v. Alabama*, *supra*, 447 U.S. 625, 637.) For all of these reasons, this Court must reverse Roger Brady's convictions and sentence of death.

F. Reversal Is Required Applying Either The *Chapman* Standard Or The Less Stringent Standard Of *People v. Watson*.

1. *Chapman v. California* applies where erroneous evidentiary rulings infringe on constitutional rights.

As discussed above, the trial court denied Roger Brady several fundamental constitutional rights by excluding defense evidence of Doyle/Ferrer's possible bias in favor of the prosecution. Because the trial court's rulings infringed on these fundamental rights, the proper standard of reversal is the "harmless-error" analysis of *Chapman v. California, supra,* 386 U.S. 18, 24. (See *Delaware v. Van Arsdall, supra,* 475 U.S. 673, 680.) Under the *Chapman* standard, reversal is required unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Id.*)

In *Delaware v. Van Arsdall* the United States Supreme Court applied the *Chapman* standard to a case where the trial court erroneously limited defense cross-examination of a prosecution witness. The Supreme Court stated: "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Id.*, at p. 684.) The Supreme Court in *Van Arsdall* provided specific guidance for applying the *Chapman* standard where defense cross-examination had been improperly curtailed:

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. [Citations].

(*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

Van Arsdall requires reversal of Roger Brady's convictions. Robert Doyle/Ferrer's testimony was important to the prosecution's case in several respects. The prosecution's case for first degree, premeditated murder was built around the manner in which the shooting allegedly occurred. Doyle/Ferrer described the suspect chasing down the officer, stopping to assume the "combat stance," and then aiming two shots over the trunk as Ganz tried to take cover behind the patrol car. (See 6 RT 1584-1587.) His testimony provided one of the most powerful descriptions of the crime and was central to the prosecutor's argument that first degree murder was the "only reasonable conclusion." (See 11 RT 2462; 2465; 2469; 2471; 2480; and 2482.)

Although other witnesses also claimed to have seen the suspect standing at the rear of the patrol car and firing downward at the officer, Doyle/Ferrer's testimony was not cumulative. There were good reasons to discount the other testimony. As defense counsel was able to point out in closing argument, by the time of trial the eyewitnesses' accounts had all become considerably more detailed than their initial police interviews. Moreover, their testimony grew more similar over time. (See 11 RT 2487; 2497-2498; 2520.) [24] If defense counsel had been permitted to expose

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Witness David Brumley told police that he heard four shots fired, but saw none. He turned around in time to see the officer falling behind the patrol car. (6 RT 1567-1569.) Five years later at trial, Brumley testified to hearing three shots and seeing two shots fired. (6 RT 1540-1541.) At the last shot the suspect was standing near the police car's rear tire with both hands on the gun and arms extended out and down over the rear of the police car. (6 RT 1542; 1545-46.) Witness La Croix told police that she heard three shots but saw none. (7 RT 1674; 1677-78.) By the time of

Doyle/Ferrer's bias these disclosures, combined with the discrepancies in other eyewitness accounts, would have eliminated most of the support for the first degree murder theory. The jurors would have had at least a reasonable doubt as to the degree of the crime and would have been compelled, according to the court's instructions, to return a verdict of second degree murder.

Doyle/Ferrer's testimony assisted the prosecution in other ways apart from supporting its first degree murder theory. Doyle/Ferrer's testimony provided the strongest support for the flight instruction. (CALJIC 2.52; 32 CT 9121; 11 RT 2425.) [18] He testified that he saw the suspect "turn around and run right back to his car." (6 RT 1590, 1597.) [19] Testimony given by

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Roger Brady's trial, she testified to hearing four or five shots and seeing the final two or three shots fired. (7 RT 1666-1667.) La Croix also added that she had seen the suspect shooting downward at the officer. (7 RT 1667.) Witness David Sattler stated in his police interview that he saw nothing, but heard two shots. (7 RT 1709.) Once again, this witness's trial testimony was far more helpful to the prosecution. There he reported seeing the suspect, in silhouette, standing in a "combat stance" and firing downward at the rear of the police car. (7 RT 1698-1699.)

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The trial court overruled defense counsel's objection to the sufficiency of the evidence supporting the flight instruction. (10 RT 2363.)

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David Brumley testified that the suspect walked back to his car. Brumley heard some tires screech, but he did *not* see the suspect speeding away from the scene. (6 RT 1549.) Denise La Croix testified that the suspect "ran" back to his own car but did *not* state that he sped out of the mall parking lot. (7 RT 1667-1668.) Witnesses Lee and Gomez did not see the suspect return to his car or leave the area. (See 7 RT 1621; 1830.) Neither Jennifer La Fond nor Don Ganz saw the suspect return to his own car, although Don Ganz testified that he heard tires screech. (6 RT 1490-1491; 7 RT 1787-1788.)

other prosecution witnesses was directly contrary. David Sattler described how the suspect calmly went back to his car and left the parking lot slowly, using his turn signals. (7 RT 1701; 1705.) Jamie Timmons testified that the suspect returned to his car and drove away slowly. (7 RT 1752-1753.) Jennifer La Fond looked up to see the suspect drive off at a rate of speed only "a little over the speed limit for inside the mall." (7 RT 1790.)

Finally, Doyle/Ferrer's account of events at the crime scene added a great deal of drama and emotional impact to the prosecution's case. As the first person to arrive at the crime scene, Doyle/Ferrer observed the injuries and the frightened and hysterical reactions of Don Ganz and the other people who arrived soon after. (6 RT 1591-1594.) Doyle/Ferrer described how he held the officer out of the pool of blood that was choking him, and how he and others cared for the wounded officer until the ambulance arrived. (6 RT 1591-1598.) If defense counsel had been able to undermine Doyle/Ferrer's credibility by showing that he had a motive for embellishment, this would have also have encouraged skepticism about his dramatic descriptions of the crime scene. Under these circumstances, the state cannot meet its burden of establishing that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) Reversal is, therefore, required.

2. Reversal Is Required Under *People v. Watson.*

This Court has applied the standard of *People v. Watson, supra,* 46 Cal.2d 818, 836, to determine whether the erroneous exclusion of evidence was sufficiently prejudicial to require reversal. (See *People v. Kidd*, *supra*, 56 Cal.2d 759, 767.) Under the *Watson* standard, reversal is required where it is "reasonably probable" that a more favorable result would have been obtained absent the error. (*People v. Watson, supra,* 46 Cal.2d 818, 836.)

Reversal of Roger Brady's convictions and sentence is similarly required under the *Watson* standard because it is at least reasonably probable that the inclusion of the evidence revealing Doyle/Ferrer's bias would have raised a reasonable doubt as to guilt.

Exclusion of impeachment evidence which deprives a criminal defendant of a defense is "clearly prejudicial." (*People v. Vogel, supra*, 46 Cal.2d 798, 805.) As discussed previously, the trial court's rulings prevented counsel from introducing evidence of bias on the part of a prosecution witness whose testimony was central to the state's case for first degree murder. For all of the reasons discussed above, it is at least reasonably probable that the evidence of Doyle/Ferrer's bias toward the prosecution would have created a reasonable doubt as to Roger Brady's guilt.

G. Excluding Relevant Evidence Prevents The Reliability Required By The Eighth And Fourteenth Amendments.

1. The exclusion of this evidence was not harmless beyond a reasonable doubt.

In capital sentencing generally, the sentencer may not be precluded from considering *any* mitigating factor. (*Lockett v. Ohio, supra*, 438 U.S. 586; *Eddings v. Oklahoma, supra*, 455 U.S. 104; *Penry v. Lynaugh* (1989) 492 U.S. 302 [109 S.Ct. 2934, 106 L.Ed.2d 256].) Even evidence which is not relevant as defined by state rules of evidence may be relevant to capital sentencing. (*Skipper v. South Carolina, supra*, 476 U.S. 1, fn. 2.) Doyle/Ferrer's testimony about the manner of the shooting was independently aggravating and, as discussed above, supported the prosecution's case for first degree murder and also the flight instruction. Evidence about the way in which the homicide occurred is highly relevant in the penalty phase of a capital trial, and may be used as mitigation under

Penal Code section 190.3, factor (k) and/or as a circumstance of the offense under factor (a). In *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, *cert. denied*, (1993) 507 U.S. 951, the Ninth Circuit held that exclusion of such evidence was constitutional error, since it was relevant mitigating evidence relating to the circumstances of the offense and to the defendant's character.

The information concerning Doyle/Ferrer's term of probation was not evidence in mitigation pertaining directly to Roger Brady. However, the same analysis should apply because the effect of excluding this evidence was the same. As previously discussed, the prosecution sought the death penalty here based on the circumstances of the crime. Doyle/Ferrer's testimony provided a detailed account of those circumstances which, absent the impeaching evidence excluded by the trial court, went unchallenged. The evidence of Doyle/Ferrer's probationary status suggests possible bias in his testimony, and ought to have been considered by the penalty phase jury. Under these circumstances, the state cannot prove beyond a reasonable doubt that the jury would have reached the same result absent the error.

2. The state law standard of *People v. Brown* requires reversal.

In *People v. Brown* (1988) 46 Cal.3d 432, this Court reaffirmed the "reasonable possibility" test as the appropriate standard for assessing the effect of state law error in the penalty phase of a capital trial:

> [W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.

(*Brown, supra*, at p. 448.) In *People v. Ashmus* (1991) 54 Cal.3d 932, 983-984, this Court again invoked *Brown*, explaining that to apply the standard

required the reviewing court to reverse based on even the possibility that a hypothetical juror *might* have reached a different decision absent the error: "We must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*Id.* at pp. 983-984.)

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal. (*People v. Watson, supra,* 46 Cal. 2d 818, 836.) The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*People v. Brown, supra,* 46 Cal.3d at 447.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role 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. When the "result" under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure "reliability in the determination that death is the appropriate punishment in a specific case."

(*Id.*, at p. 448, *quoting Woodsen v. North Carolina, supra,* 448 U.S. at 305. See also *People v. Ashmus, supra,* 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard].)

In Roger Brady's case, it is at least reasonably possible that the jury would have returned a verdict of life without the possibility of parole if the

trial court had not excluded the evidence impeaching Robert Doyle/Ferrer. The evidence of Doyle/Ferrer's probationary status would have undermined his credibility by revealing a pro-prosecution bias. As discussed above, the trial court's erroneous exclusion of this evidence prevented jury consideration of information raising a reasonable doubt about the state's case for first degree murder. If this evidence had been admitted, it would have been the basis for a lingering doubt concerning the sufficiency of the evidence that Roger Brady acted with premeditation and deliberation.

Without this defense evidence undermining Doyle/Ferrer's testimony, the jury had no reason to reconsider its finding of premeditation and deliberation in the penalty phase. The state's premeditation theory was directly contradicted by the defense expert's testimony in the penalty phase about Roger's deficits in deliberative processing. (See 20 RT 4510-4520 [testimony of Lorie Humphrey, Ph.D.].) Discrediting Doyle/Ferrer's testimony about the way in which the events unfolded would have allowed the jury to consider seriously the defense evidence about Roger Brady's mental state. This may well have swayed the jury to vote for a life sentence rather than returning a death verdict.

For all of these reasons, the excluded evidence was highly relevant in the penalty phase of Roger Brady's capital trial. In the present case, reversal is required because it is at least reasonably possible that a life sentence would have resulted if defense counsel had been able to use this evidence to call Doyle/Ferrer's testimony into question. Reversal of the death judgment is therefore required.

IV.

THE PROSECUTOR'S IMPROPER COMMENTS ON ROGER BRADY'S FAILURE TO TESTIFY IN THE GUILT PHASE DEPRIVED HIM OF STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction and Overview of Argument.

For forty years the United States Supreme Court has held that the Fifth and Fourteenth Amendments forbid prosecutorial comment on the defendant's silence at any stage of a criminal trial: "the Fifth Amendment prohibits the prosecutor from commenting, either directly or indirectly, on the defendant's failure to testify in his defense." (*Griffin v. California* (1965) 380 U.S. 609, 615 [85 S.Ct. 1229, 14 L.Ed.2d 106]; see *People v. Turner* (2004) 34 Cal.4th 406, 414 [99 P.3d 505, 20 Cal.Rptr.3d 182]; *People v. Frye* (1998) 18 Cal.4th 894, 977 [959 P.2d 183, 77 Cal.Rptr.2d 25]. See also *People v. Modesto* (1967) 66 Cal.2d 695, 711 [427 P.2d 788, 59 Cal.Rptr. 124], overruled on other grounds in *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383, fn.8 [438 P.2d 372, 66 Cal.Rptr. 724].) Roger Brady's conviction and sentence must be reversed because the prosecutor violated the clear directive established by *Griffin* and recognized in California law.

The prosecutor made the improper comments during her closing argument in the guilt phase. Turning from a discussion of the evidence allegedly supporting a first degree murder verdict, the prosecutor stated: "Now, the next issue, then, as I indicated, is the issue of identity. *As you realize, the defense did not appear to refute the issue of identity.*" (11 RT 2472 [emphasis added].) Defense counsel promptly objected and asked to be heard at sidebar, where she moved for a mistrial. (11 RT 2472-2473.)

The trial court denied the defense motion and took no corrective action. (11 RT 2473-2474.)

As defense counsel noted, the prosecutor's remarks could only be understood as an improper comment upon Roger Brady's failure to take the stand and deny any involvement in the crime. [20] The prosecutor demonstrated that this interpretation was absolutely correct when she continued her argument after the trial court refused to intervene. She stated: "As I indicated, you heard all the evidence that's been presented in this case. *And other than the questioning of witnesses that were presented, there was not any evidence presented to suggest that anyone other than the defendant committed this crime.*" (11 RT 2474 [emphasis added].)

The prosecutor's remarks were *Griffin* error compelling reversal of Roger Brady's convictions and sentence. Such comments contravene the presumption of innocence and deny the criminal defendant the rights to a fair trial and to due process of law. (U.S. Const., Amends. V and XIV; Cal. Const., art. I, §§ 7 and 15; *Darden v. Wainwright* (1986) 477 U.S. 168, 181-183 [106 S.Ct. 2464, 91 L.Ed.2d 636].) In a capital case, *Griffin* error also deprives the defendant of the rights to a fair and reliable determination of guilt and of the penalty. (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, §17; *Beck v. Alabama,supra,* 447 U.S. 625, 638.)

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Defense counsel stated: "I'm not sure where else counsel is going with a comment such as that. I mean I recollect asking a number of questions on cross-examination about the circumstances surrounding the identification process, if you will, the fact that the witnesses were shown photographs and did not identify the defendant. At this juncture, I would be moving for a mistrial based on I think there's only one possible inference that the jury could draw, and that is counsel is referring to the fact that the defendant did not testify." (11 RT 2473.)

B. Standard of Review.

This Court independently reviews the record to determine whether the error was harmless beyond a reasonable doubt. (*People v. Turner, supra,* 34 Cal.4th 406, 414; *People v. Hovey, supra*, 44 Cal.3d 543, 572.)

C. Defense Challenges To The Witnesses' Identifications Of Roger Brady.

Defense counsel could scarcely have done more to refute the prosecution's claim that Roger Brady was responsible for the Ganz homicide. Two witnesses identified Brady at trial: Don Ganz and Jennifer La Fond. (See 6 RT 1499-1500; 7 RT 1790; 1795-1797.) Defense counsel cross-examined each of them extensively. As discussed below, defense counsel also cross-examined other witnesses and challenged the prosecution's case in other respects in order to discredit Don Ganz's and La Fond's identifications.

1. Don Ganz's Identification.

Don Ganz was a critical prosecution witness not only because he identified Roger Brady as the assailant, but because he was with the victim and could give an account of the events leading up to the crime. Although he gave police a relatively detailed description, Don Ganz was unable to identify anyone when police showed him photographs of potential suspects. (6 RT 1498.) On August 13, 1994, Don was flown to Oregon to view a live line-up of six possible suspects. (*Id.*) He identified someone *other* than Roger Brady. Only after meeting with Detective Perales, after viewing the live line-up, did Don state that suspect number five (Roger Brady) also looked familiar. (6 RT 1499, 1529.)

Between the time of the Oregon line-up and the trial in this case Don Ganz saw Roger Brady in circumstances which were strongly suggestive of Brady's guilt and encouraged Don to identify him as the shooter. Don Ganz testified that he recognized Brady on November 6, 1995, when Roger Brady walked into the courtroom in Oregon. According to Don's testimony in Los Angeles, Brady glanced over at the audience and made eye contact with Don Ganz. (6 RT 1499.) Don stated, "it was the same as when he had that gun pointed at me." (6 RT 1499.)

Defense counsel realized that Don's testimony was significant because it arguably provided an explanation for Don's inability to identify Brady in the line-up, *i.e.*, Don made the connection only when Roger Brady was able to look him in the eye from a fairly close distance. Defense counsel asked the court to reconsider an earlier evidentiary ruling before starting her cross-examination of Don Ganz. Counsel sought permission to elicit additional background information about the Oregon proceedings in order to demonstrate that the suggestive atmosphere influenced Don Ganz's identification. The fact that the *only* time Ganz identified Roger Brady was in a setting in which Brady was clearly in custody undermined the credibility of his identification. This was especially so in light of Don's previous failures to identify Brady in more neutral settings and at times closer to the incident. (See 6 RT 1501-1505.)

Don was brought to Oregon in November of 1995 to testify against Roger Brady as a prosecution witness. When he allegedly recognized Brady, Don was sitting in court accompanied by his mother and the prosecutor in this case, Deputy District Attorney Barbara Turner. (6 RT 1530.) Roger Brady was the only defendant on trial. (6 RT 1530.) Brady was clearly in custody, and was being escorted into the courtroom by

uniformed officers. (6 RT 1529.) Through defense counsel's cross-examination, the jury was given a context in which to understand Don Ganz' sudden and unequivocal identification of Roger Brady almost two years after the crime.

Defense counsel challenged every possible aspect of Don Ganz's identification. Counsel questioned Ganz about his vantage point during the crime, and the depiction of events as portrayed in the video reconstruction of his viewpoint during the incident. (6 RT 1513-1515; People's Exh. 10.) Defense counsel asked Don about the view he had of the suspect when he peeked over dashboard after hearing the first shots fired. (6 RT 1525.) A large portion of the defense cross-examination concerned Don's repeated failures to identify Roger Brady, first in police photographs (6 RT 1526-1527) and later at the live line-up in Oregon. (6 RT 1527-1529.) Defense counsel called attention to a discrepancy in Don Ganz' testimony whereby he testified at trial that he failed to identify Roger Brady in Oregon out of fear, but earlier had told Detective Perales that he was not nervous at the Oregon line-up. (See 6 RT 1529.) The challenge to Don Ganz's identification shows the absurdity of the prosecutor's assertion that the defense did not contest the issue of identity – unless the prosecutor meant to fault the defendant for not taking the stand to deny that he was the shooter.

2. Jennifer La Fond's Identification.

Defense counsel made equivalent efforts to refute Jennifer La Fond's identification of Roger Brady. La Fond's extensive cross-examination was calculated to undermine the jurors' confidence in both her identification of Roger Brady and in her overall account of the events. (See 7 RT 1803-1821.) Defense counsel established that La Fond

followed the case's coverage on television and in the print media. (7 RT 1804-1806.) La Fond testified that she had a "three or four second look" at the assailant (7 RT 1808), but admitted on cross-examination that she had not identified a suspect from any of the photographs (which included Roger Brady's picture) police showed her in the weeks and months after the crime. (7 RT 1815-1816.)

Defense counsel also called attention to several subtle but significant inconsistencies in La Fond's statements. In the Oregon trial, La Fond testified that she did not see the officer outside of his patrol car other than the time when he was sweeping the flashlight across the back of the suspect car. (7 RT 1819-1820.) La Fond also testified in Oregon that she heard no more gunshots after parking her car. (7 RT 1820.) [21]

3. Detective Delores Perales.

The defense efforts to refute Don Ganz's and Jennifer La Fond's identifications were not limited to cross-examining those two witnesses. Counsel also cross-examined LASD Detective Delores Perales thoroughly about her interactions with Don Ganz and Jennifer La Fond, particularly in regard to their failed attempts to identify a suspect. Perales stated that Don Ganz seemed to understand all of her questions and was fully able to respond during his interview immediately after the shooting on the morning of December 28, 1993. (9 RT 2200.) La Fond and the other

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La Fond's testimony in this trial differed somewhat. On direct examination she testified that she drove alongside the officer and saw Ganz getting out of his patrol car. (7 RT 1771.) She described seeing Officer Ganz "dashing" behind the patrol car, running forward with a "crouched" down or "almost diving motion." (7 RT 1784-1785.) La Fond claimed to have heard the initial shot, and then two more shots during and after the time she parked her car. (7 RT 1786-1787.)

witnesses were also alert and not unduly upset. (9 RT 2202-2203.) Defense counsel's cross-examination of Perales revealed another contradiction between La Fond's immediate account of the crime and her trial testimony. La Fond told Perales that she had gotten out of her car and hidden behind it. (9 RT 2203.) At trial La Fond described how she stayed inside her car, and "ducked down" behind the steering wheel. (7 RT 1787.)

Defense counsel also questioned Detective Perales about La Fond's and Don Ganz's repeated failures to select Roger Brady's picture from a notebook of photographs of possible suspects. [22] (9 RT 2204-2206; 2218-2219.) Perales answered a number of questions regarding the selection of subjects and the various procedures used in the Oregon live line-up. (9 RT 2220; 2225-2227.) She was specifically asked about Don Ganz's viewing of the Oregon live line-up on August 13, 1994. (9 RT 2220-2224.) Don identified the person in position number three, someone other than Roger Brady, in the line-up. (9 RT 2220; 2224.) Detective Perales sat down and talked to Don after they left the viewing room. (9 RT 2220.) She specifically asked him if he had been nervous or afraid while viewing the line-up. (9 RT 2220.) [23] By that time, Perales and the other investigators had focused on Roger Brady as the prime suspect. (9 RT 2223-2224.) After speaking with Detective Perales, Don Ganz changed his mind and

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Referring to People's Exhibit No. 54, which included a photograph of Roger Brady on page 15.

23

Defense counsel was not allowed to elicit Don's response from Detective Perales. The trial court sustained the prosecutor's hearsay objection. (See 9 RT 2221-2223.)

said that number five (Roger Brady) also looked like the suspect. (See 6 RT 1529.)

Finally, defense counsel cross-examined Detective Perales to determine whether any publicity about the Oregon case might have influenced either Don Ganz's or Jennifer La Fond's identifications. Perales was questioned about press releases given to the media on or about August 13, 1994, the day of the live line-up. (9 RT 2210-2217.) Detective Perales was also questioned about the publicity surrounding the investigation, and decisions LASD made to release certain information throughout the course of the investigation. (See 9 RT 2207-2219.)

4. Challenges To Other Identification Evidence.

Defense counsel went to great lengths to refute not only the two eyewitness identifications, but every other piece of evidence connecting Roger Brady to the crime. Prosecution witness Bob Pentz of Aerospace Corporation underwent a lengthy defense cross-examination over his company's analyses purporting to establish that the Brady Diahatsu was the car shown on the Bank of America surveillance videotape. (8 RT 1956-1970.)

Defense counsel extensively cross-examined all of the investigators and law enforcement personnel who took part in the investigation. LASD Deputy Timothy Miley was questioned about his surveillance of the Brady home in January of 1994, and the reasons for discontinuing the investigation of Roger Brady as a possible suspect. (See 8 RT 1996-2008; 2010.) LASD Sergeant John Yarbrough testified about the system for following up on leads and clues received from the public, and the department's decision to place Clue No. 1270 (naming Roger Brady) on inactive status. (See 9 RT 2084-2093.) LASD Deputy Dwight Van Horn

was cross-examined about his determination that the same gun was used in the Oregon case and in the Ganz homicide. (See 9 RT 2134-2150.)

D. The Prosecutor's Remarks Could Only Be Understood As *Griffin* Error Given The State Of The Evidence In This Case.

The California Supreme Court has repeatedly held that "'*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand.'[Citation.]" (*People v. Miranda* (1987) 44 Cal.3d 57, 112 [744 P.2d 1127, 241 Cal.Rptr. 594].) The essence of *Griffin* error is prosecutorial comment which is "manifestly intended to call attention to the defendant's failure to testify," or is "of such a character that the jury will naturally and necessarily take [the remark] to be a comment on the failure to testify." (*Lincoln v. Sun* (9th Cir.1987) 807 F.2d 805, 809; *United States v. Cotnam* (7th Cir. 1996) 88 F.3d 487, 497.)

In the present case, the prosecutor's remarks cannot be justified as appropriate comments on the state of the evidence. (Compare *People v. Medina* (1995) 11 Cal.4th 694, 755 [906 P.2d 2, 47 Cal.Rptr.2d 165].) The prosecutor completely misrepresented the trial record by claiming that the defense did not refute the evidence of the identification of Roger Brady. As discussed above, the record is replete with instances of vigorous defense challenges not only to Don Ganz's and Jennifer La Fond's identifications, but to every piece of evidence allegedly connecting Roger Brady to this crime. Defense counsel did everything possible to refute the identification *short of calling Roger Brady to the stand.* Therefore, the prosecutor's remarks about the defense's failure to "refute the issue of identity" can only be understood to the one thing that defense counsel did *not* do: have Roger Brady testify.

In *People v. Northern* (1967) 256 Cal.App.2d 28 [64 Cal.Rptr. 15], the Court of Appeal found *Griffin* error based on very similar comments in the prosecution's closing argument. The defendant in *Northern* did not testify in his trial for narcotics sales to an undercover police officer. The prosecutor's closing argument contained the following remarks:

> Looking at this evidence *which, incidentally, has not been refuted by the Defendant*, there is no controverting evidence from the other side.
>
> The case, as I see it, referring to the evidence coming from the witness stand, is overwhelmingly strong as compared to that coming from that Defendant . . . *There is no evidence offered by the Defendant to controvert what the People offered.* They certainly have that opportunity . . .I was in the process of stating that the evidence in this case is uncontroverted in that, *although the defense has an opportunity to offer evidence rebutting the evidence offered by the People, this was not done in this case.*

(*Id.* at p. 30 [emphasis in original].) The Court of Appeal found *Griffin* error despite the prosecutor's several assertions that he was simply commenting on the state of the evidence. Moreover, the Court of Appeal specified that its finding was based solely on the prosecutor's first comment regarding evidence which "*has not been refuted by the Defendant.*" The Court stated: "[A]s we read the first of the comments quoted above, it is difficult to interpret it as anything except a direct reference to defendant's failure to take the witness stand." (*People v. Northern, supra*, at pp. 30-31.) The prosecutor's first comment in Roger Brady's case, which drew a defense objection and the subsequent motion for mistrial, is virtually identical to the improper statement in *Northern.* [24]

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24 The prosecutor in Roger Brady's case stated; "*the defense did not*

Both in this case and in *Northern*, the prosecutors' subsequent references to the state of the evidence did not change the overall impression left with the jurors, i.e., that the defendant was obliged to "refute" the state's evidence. As discussed below, the prosecutor's further remarks in Roger Brady's trial were not even arguably remedial and, in fact, compounded the prejudice of the initial error.

It is similarly impossible to justify the prosecutor's comments as references to defense failures to introduce material evidence or to call a logical witness. (*People v. Medina, supra,* 11 Cal.4th 694, 755.) The only other witness defense counsel could have called was Roger Brady himself. (*People v. Bradford, supra*, 15 Cal.4th 1229, 1339; *United States v. Cotnam, supra*, 88 F.3d at p. 497.) The jury surely understood the prosecutor to mean that Brady himself ought to have testified to refute the identification. This Court has found *Griffin* error based on prosecutorial comments implying that the state's case was uncontradicted when only the defendant could have contradicted it. (See *People v. Murtishaw* (1981) 29 Cal.3d 733, 757, fn 19 [631 P.2d 446, 175 Cal.Rptr. 738] [". . . and there is not testimony that it did not happen that way"].) Other state and federal courts have reached similar results. (See *Williams v. Lane* (7th Cir. 1987) 826 F.2d 654, 665 ["She told it to you and nobody else told you anything different"]; *People v. Rodgers* (1979) 90 Cal.App.3d 368, 371 [153 Cal.Rptr. 382] ["Nobody told you that it didn't happen"].)

Following the sidebar conference and the trial court's denial of defense counsel's motion for a mistrial based on *Griffin* error, the

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appear to refute the issue of identity" (11 RT 2472), while the prosecutor's remark in *People v. Northern* was "Looking at this evidence *which, incidentally, has not been refuted by the Defendant . . .*"

prosecutor continued her closing speech, stating: "*And other than the questioning of witnesses that were presented, there was not any evidence presented to suggest that anyone other than the defendant committed this crime.*" (11 RT 2474 [emphasis added].) These comments were equally improper under *Griffin* for all of the reasons previously discussed. The only other witness defense counsel could have called was Roger Brady himself. (*People v. Bradford, supra*, 15 Cal.4th at p. 1339; *United States v. Cotnam, supra*, 88 F.3d at p. 497.) The second remark reinforced in the jurors' minds the idea that the defendant was obliged to present evidence of third party involvement and/or to refute the identification through his own testimony.

E. Reversal Is Required Because The State Cannot Prove That The Error Was Harmless Beyond A Reasonable Doubt.

Either direct or indirect prosecutorial references to a criminal defendant's failure to testify are reversible error under the Fifth and Fourteenth Amendments to the federal constitution. (*Griffin v. California, supra,* 380 U.S. 609, 615; *People v. Turner, supra*, 34 Cal.4th 406, 414; *People v. Frye, supra,* 18 Cal.4th 894, 977.) Reversal is, therefore, required unless the state can prove beyond a reasonable doubt that the error was harmless. (*Chapman v. California, supra,* 386 U.S. 18, 24.) In the context of Roger Brady's capital trial the prosecutor's improper remarks cannot be deemed to have been harmless beyond a reasonable doubt.

The prosecutor's remarks in this case were not the type of indirect, brief and mild references to the defendant's failure to testify without suggestion of an inference of guilt, which the California Supreme Court has found to constitute harmless error. (See *People v. Jackson* (1980) 28

Cal.3d 264, 304 [618 P.2d 149, 168 Cal.Rptr. 603].) California's decisions hold that *Griffin* error requires reversal where the improper remarks either "fill an evidentiary gap" in the prosecution's case or "touch a live nerve" in the defense. (*People v. Modesto, supra*, 66 Cal.2d at p. 714.) The prosecutor's comments in this case did both.

There were several gaps in the prosecution's case against Roger Brady which the prosecutor attempted to close through the improper assertion that "the defense did not appear to refute the issue of identity." (11 RT 2472.) As discussed above, the repeated failures of the two eyewitnesses closest to the victim and the suspect (Don Ganz and Jennifer La Fond) to identify Roger Brady was a significant hole in the state's case. (This gap would have grown still wider if defense counsel had been permitted to impeach La Fond with the information that she was friendly with the alternate suspect, "Miko," named in Clue No. 192.) Another weakness in the state's case was law enforcement's decision to dismiss Roger Brady as a suspect. The fact that the Ganz Task Force received Clue Number 1270 specifically identifying Roger Brady as the suspect, immediately investigated his background, established surveillance of the family home, searched the Brady's condominium and the family Diahatsu Charade, and, in addition, interviewed Roger Brady himself, strongly indicated that the identification was not as credible as the prosecutor wanted the jury to believe. By shifting the jurors' focus to the defendant's failure to testify, and asserting that Brady should have offered evidence to "refute" the identification, the prosecutor deflected attention from the weaknesses in her own case.

The "live nerve" in the defense case was evidence connecting Roger Brady to the gun used in the Ganz homicide. However, while this

evidence was significant it was not conclusive proof of identity. Brady could have obtained the gun illegally after someone else used it to shoot Officer Ganz. The prosecutor's improper argument touched on this "live nerve" by effectively telling the jury to presume that identity was established because Roger Brady did not take the stand to deny any involvement and to explain how he came to have the gun.

The statements made by the prosecutor in the guilt phase of Roger Brady's capital case were clear examples of *Griffin* error. The state cannot establish beyond a reasonable doubt that the errors were harmless. Reversal of Roger Brady's conviction and sentence of death is, therefore, required.

V.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

The trial court instructed the jury (at the prosecution's request) with CALJIC No. 2.52, related to flight after the commission of a crime:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. The weight to which this circumstance is entitled is a matter for you to decide.

(32 CT 9121; 11 RT 2425.) This instruction should not have been given because it allowed the jury to draw an inference against Roger Brady which lacked sufficient support in the evidence. The instructional error, especially when considered in conjunction with the other errors in the guilt phase of trial, deprived Brady of his rights to due process, a fair trial, a jury trial, equal protection and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal.Const., art I, §§ 7, 15, 16 and 17.) Accordingly, the convictions and the judgment of death must be reversed.[25]

A. CALJIC 2.52 Improperly Duplicated the Circumstantial Evidence Instructions.

It was unnecessary for the trial court to instruct the jury with CALJIC No. 2.52. This Court has held that specific instructions relating to

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25 Defense counsel objected to the trial court's decision to instruct the jury with CALJIC No. 2.52. (10 RT 2363-2364.)

the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080 [864 P.2d 40, 25 Cal.Rptr.2d 867], overruled on another ground, *People v. Hill* (1998) 17 Cal.4th 800 [952 P.2d 63, 72 Cal.Rptr.2d 656.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00 and 2.01. (32 CT 9108-9109; 11 RT 2414-2416.) The trial court also gave CALJIC 2.02, concerning the sufficiency of circumstantial evidence to prove specific intent or mental state, as requested by the prosecution. (32 CT 9110; 11 RT 2416.) These instructions informed the jurors that they might draw inferences from the circumstantial evidence, *i.e.*, that they could infer facts tending to show Roger Brady's guilt, from the circumstances of the alleged crimes. There was no need to repeat this general principle under the guise of permissive inferences of consciousness of guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [93 S.Ct. 2208, 37 L.Ed.2d 82] [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [92 S.Ct. 862, 31 L.Ed.2d 36] [holding that arbitrary preference to particular litigants violates equal protection].)

B. The Instruction Was Unfairly Partisan and Argumentative.

The consciousness-of-guilt instruction was not just unnecessary, it was also impermissibly argumentative. The trial court must refuse to

deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [827 P.2d 388, 6 Cal.Rptr.2d 822].) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871 [802 P.2d 906, 277 Cal.Rptr. 122]), or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC No 2.52 was impermissibly argumentative. Structurally, it is almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th 408, which read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.)

The use of CALJIC 2.52 here told the jury, "[i]f you find" certain facts (flight in this case and a misguided and unjustified attempt at

discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold CALJIC No. 2.52 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not. "There should be absolute impartiality as between the People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158 [146 P.2d 469]; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310 [15 S.Ct. 610, 39 L.Ed.2d 709].) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon*, *supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet*, *supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instruction given in this

case also violated due process by lessening the prosecution's burden of proof. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (*see, e.g.*, *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103,123 [862 P.2d 808, 24 Cal.Rptr.2d 808] [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532 [822 P.2d 385, 3 Cal.Rptr.2d 667], and a number of subsequent cases (*e.g.*, *People v. Arias* (1996) 13 Cal.4th 92, 142 [51 Cal.Rptr.2d 770, 913 P.2d 980]), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the

allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].) [26]

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Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748), and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745, holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements.)

In this case, the argumentative consciousness-of-guilt instructions invaded the province of the jury, focusing the jury's attention on evidence

favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. They therefore violated Brady's due process right to a fair trial and his right to equal protection of the laws (U.S. Const. Amends. V and XIV; Cal.Const., art I, §§ 7, 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const. Amends. VI and XIV; Cal.Const., art I, § 16), and his right to a fair and reliable capital trial (U.S. Const. Amends. VIII and XIV; Cal.Const., art I, § 16).

C. The Consciousness-Of-Guilt Instruction Allowed An Irrational Permissive Inference About Brady's Guilt.

All the consciousness-of-guilt instructions suffer from an additional constitutional defect – they embody improper permissive inferences. Each instruction permits the jury to infer one fact, such as Roger Brady's consciousness of guilt, from other facts, *i.e.*, flight (CALJIC No. 2.52). (See *People v. Ashmus*, *supra*, 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. of Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is

normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury"].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67 [85 S.Ct. 754, 13 L.Ed.2d 658]; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro*, *supra*, 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the consciousness-of-guilt evidence was relevant to whether Roger Brady was responsible for first degree murder. (*People v. Anderson*, *supra*, 70 Cal.2d 15, 32-33.) According to the prosecutor's theory of the case, Brady shot Ganz because he feared that the traffic stop would lead to a search of his car, the discovery of a gun he allegedly possessed in violation of the terms of his federal parole, and all of this

would ultimately cause his return to prison for the parole violation. (See 11 RT 2467-2468.) Under the facts here, at least two types of irrational inferences were permitted.

The first irrational inference concerned Roger Brady's mental state at the time the shooting was allegedly committed. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only that Brady killed Officer Ganz, but also that he had done so while harboring the intent or mental state required for conviction of first degree murder. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained:

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*People v. Anderson*, *supra*, 70 Cal.2d. at p. 33.) [27]

Therefore, Roger Brady's actions after the crimes, upon which the consciousness-of-guilt inferences were based, simply were not probative of

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Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, SUBSTANTIVE CRIMINAL LAW (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics, fn. omitted.)

whether he harbored the mental state for first degree premeditated murder at the time of the shooting. There was no rational connection – much less a link more likely than not – between Brady's alleged flight and consciousness by him of having committed the homicide with (1) premeditation; (2) deliberation, (3) malice aforethought, or (4) a specific intent to kill. Roger Brady's alleged flight cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder, as opposed to second degree murder or manslaughter.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [39 P.3d 432, 116 Cal.Rptr.2d 401] [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 and 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 and 2.52].) However, Roger Brady respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of CALJIC 2.52 was reversible constitutional error.

The foundation for this ruling is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833 [760 P.2d 423, 251 Cal.Rptr. 227], which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.)

The *Crandell* analysis is mistaken. First, the instructions do not speak of "consciousness of some wrongdoing;" they speak of

"consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instructions to mean something they do not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 32 CT 9128 [CALJIC No. 2.90 stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that Brady was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad. They expressly advise the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination. [28]

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In a different context, this Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849 [919 P.2d 1280, 55 Cal.Rptr.2d 347]; *People v. Bloyd*, *supra*, 43 Cal.3d 333, 352.)

Because the consciousness-of-guilt instructions permitted the jury to draw irrational inferences of guilt against Roger Brady, use of those instructions undermined the reasonable doubt requirement and denied him a fair trial and due process of law (U.S. Const. Amends. V and XIV; Cal.Const., art I, §§ 7, 15.) The instructions also violated his right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const. Amends. VI and XIV; Cal.Const., art I, §§ 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. Const. Amends. VIII and XIV; Cal.Const., art I, §§ 17.)

D. Reversal is Required.

Giving CALJIC 2.52 was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, Roger Brady's murder conviction, the special circumstance findings and the death judgment must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].) This the prosecution cannot do.

The jury was given an unconstitutional instruction which encouraged them to draw impermissible inferences. Moreover, the error affected the pivotal contested issues of the case: was Brady guilty of the

killing; and if so, what was the nature and degree of the homicide. Roger Brady did not testify. In her closing argument the prosecutor committed *Griffin* error, essentially telling the jurors to infer that Roger Brady was guilty of first degree murder because he did not take the stand to deny responsibility for the crime. The combined effect of the consciousness-of-guilt instruction and the *Griffin* error was to tell the jury that Brady's own conduct reflected his awareness of his guilt. In the context of this case, this instruction was not harmless beyond a reasonable doubt. Therefore, the judgment and sentence of death must be reversed.

ERRORS IN THE PENALTY PHASE

VI.

THE TRAIL COURT'S ADMISSION OF AN EXCESSIVE QUANTITY OF IRRELEVANT AND INFLAMMATORY VICTIM IMPACT EVIDENCE WAS CONTRARY TO CALIFORNIA LAW AND VIOLATED ROGER BRADY'S CONSTITUTIONAL RIGHTS.

A. General Introduction And Overview Of Victim Impact Claims.

The State concluded its case in the penalty phase with what was effectively an extended memorial service for the victim, Officer Martin Ganz. For the better part of one afternoon and the entire next day the jurors learned about every aspect of Ganz's life and the effects of his death on his family, friends and the community. Eight witnesses (in addition to the treating emergency room physician) testified for the prosecution, providing emotional and detailed descriptions of their loss and heartbreak.[1] The testimony (140 transcript pages) was accompanied by exhibits which included family photographs, certificates, awards, an assortment of memorabilia and two highly prejudicial videotapes. The sheer quantity of the victim impact material was sufficient to overwhelm the jury. The evidence presented in this case, however, was equally remarkable for its content.

The victim character evidence was detailed and exhaustive. Jurors received a virtual life history of Martin Ganz, starting with the day he was born and ending with a poignant description of his final moments in the hospital where he died surrounded by grieving fellow officers. Four of Officer Ganz's sisters told stories about their childhood hardships, and how their brother persevered in his childhood dream of becoming a police

officer. Each of the witnesses described at least one of Ganz's exceptional character traits and related anecdotes illustrating his bravery, generosity and strong sense of duty. Ganz's fiancee´ testified about their courtship and their plans to marry and begin a family. Fellow officers and the Chief of Police testified about Officer Ganz's unusual gift for police work, his dedication to the job and the many positive changes he had made in the community during his career. Every award, honor or commendation Ganz received both before and after joining the police force was either shown to the jury or described in detail. Jurors viewed two highly emotional videotapes. One consisted of professionally filmed and edited television coverage of the funeral mass and the elaborate police department burial. Dramatic aerial shots showed the enormous funeral procession of police cars and motorcycles stretching for several miles. There are repeated views of powerful symbols including the American flag draped over the coffin, the rifle salute and the bag piper. In an eerie contrast, the other is a homemade videotape of the victim opening Christmas gifts with his sisters, his beloved godson Don Ganz, and other young nieces and nephews less than two days before his death.

While all of this evidence was poignant, some of the testimony about the impact of the victim's death was startling and disturbing. Three witnesses, -- two fellow officers and Ganz's fiancee´ -- told of suffering severe psychological and emotional trauma. Karl Nilsson, Ganz's supervisor, developed a drinking problem, lost a relationship with a woman he planned to marry, and nearly lost his career. Officer Neal O'Gilvy nearly suffered a nervous breakdown just after the shooting and remained deeply depressed for years afterward. Pam Hamm, Ganz's fiancee´, testified about her belief in the supernatural and related an anecdote supposedly

demonstrating that Martin Ganz continues to contact her five years after his death. The officer's four sisters described how they, their families and the extended family continued to experience sustained grief and depression. According to the sisters, their mother "gave up on life" and died within six months of losing her only son.

The evidence and testimony was emotionally wrenching. The prosecutor maximized its dramatic effect in an inflammatory closing argument where she urged the jury to return a death sentence for Roger Brady out of respect for Officer Ganz and his family. The prosecutor also lectured the jurors about the debt of gratitude society owes to the police and stated that it was their responsibility to return a death verdict as a show of support for law enforcement. (See Argument VII, *infra.*)

This argument raises inter-related legal challenges to the victim impact evidence and testimony. The scope of the victim impact presentation vastly exceeded the limited constitutional authorization of the United States Supreme Court in *Payne v. Tennessee.* The sheer quantity of evidence was sufficient to violate due process and to undermine the fundamental fairness required in capital sentencing, and the content was overwhelmingly prejudicial. Certain categories of evidence and testimony were irrelevant; they were not "circumstances of the capital crime" under California's death penalty statute according to any reasonable definition of the term. Other evidence, although arguably relevant according to the decisions of the California Supreme Court in this area, was unduly prejudicial and ought to have been excluded or substantially limited according to clearly established state law.

Appellant's claims are based on the quantity and the specific content of the victim impact evidence, testimony and prosecutorial argument. The

evidence in this case was voluminous and presents multiple forms of prejudice. Counsel is aware of the risk that the present reader may react emotionally to this testimony. However, these substantial excerpts of the record are included to demonstrate the qualitative and quantitative excesses of the prosecution's victim impact presentation. After reviewing the selections of testimony which follow, it cannot be doubted that this material was emotionally overwhelming for the jurors who spent nearly two days in the courtroom immersed in this victim impact presentation.

B. Overview Of Legal Claims.

By admitting this excessive and inflammatory victim impact evidence and argument the trial court created a fundamentally unfair atmosphere for the penalty phase of Roger Brady's trial, thereby depriving him of his state and federal constitutional rights to due process of law and a reliable sentencing determination. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15, 17 and 24; *Payne v. Tennessee* (1991) 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597]; *People v. Edwards* (1991) 54 Cal.3d 787 [819 P.2d 436, 1 Cal.Rptr.2d 696].) The trial court also abused its discretion under California law by admitting irrelevant victim impact evidence with no connection to the circumstances "materially, morally or logically" surrounding the capital crime. (Evid. Code §350; *People v. Edwards*, *supra*, 54 Cal.3d 787, 835.) In a number of other instances the evidence, although arguably relevant, ought to have been excluded because the potential for undue prejudice outweighed its probative value. (Evid. Code §352; *People v. Haskett*, (1982) 30 Cal.3d 841, 846 [640 P.2d 776, 180 Cal.Rptr. 640]; *People v. Edwards, supra*, 54 Cal.3d 787; *People v. Love* (1960) 53 Cal.2d 843 [350 P.2d 705, 3 Cal.Rptr. 665].)

Appellant also urges this Court to reconsider its rejection of certain other claims in previous cases. First, he contends that the trial court deprived him of a state created liberty interest and due process of law by admitting this evidence and argument contrary to established California law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346; *Lambright v. Stewart, supra,* 167 F.3d 477; contra, *People v. Boyette, supra,* 29 Cal.4th 381, 445-446, fn. 12.) Second, the California Supreme Court's construction of Penal Code Section 190.3(a) under which the "circumstances of the crime" encompasses virtually everything which "materially, morally, or logically" surrounds the crime is unconstitutional. This broad interpretation of Section 190.3(a) renders the statute void for vagueness, encourages arbitrary decision-making, and fails to provide proper notice to the defendant. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15, 17 and 24; contra, *People v. Wilson* (2005) 36 Cal.4th 309, 358 [114 P.3d 758, 30 Cal.Rptr.3d 513]; *People v. Boyette*, *supra*, 29 Cal.4th 381.) For all of the reasons discussed below, this Court must reverse the judgment of death.

C. The Basic Law Of Victim Impact.

1. The Limited Constitutional Authorization of *Payne v. Tennessee.*

In 1991 the United States Supreme Court radically altered the evidentiary landscape of capital sentencing with its decision in *Payne v. Tennessee, supra,* 501 U.S. 808.) The Court partially overruled its previous decisions in two cases (*Booth v. Maryland , supra*, 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207]), which had strictly prohibited the introduction of victim impact

evidence or prosecutorial argument on the subject in the sentencing phase of a capital trial. A divided Supreme Court held that the Eighth Amendment is not a per se bar to all "evidence about the victim and about the impact of the murder on the victim's family." (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825, 827.)

The *Payne* majority reasoned that *Booth v. Maryland*, *supra*, 482 U.S. 496, had been too restrictive as it "barred [the state] from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' [citation omitted] or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) Two general rationales were advanced in support of allowing victim impact. First, victim impact evidence may demonstrate "the specific harm" caused by the defendant's capital crimes which would be relevant "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness . . . ." (*Id.* at p. 825.) Second, the state was entitled to present victim impact to balance mitigating evidence presented by the defense. (*Ibid.*) In the event that unduly prejudicial victim impact evidence was admitted, the defendant could seek relief under the due process clause of the Fourteenth Amendment. (*Id.* at p. 825.)

Payne v. Tennessee removed the "bright line" prohibition on victim impact imposed by *Booth* and *Gathers* and authorized the use of two types of evidence about the capital murder victim: "victim character," *i.e.*, evidence concerning the victim's good qualities, life history and personal achievements; and "victim impact," which is evidence of the effect of the

victim's death on others.[29] However, the Supreme Court in *Payne* did not specify the constitutional limits of this authorization.[30]

If the Court's holding is interpreted in light of the case in which it was made, *Payne v. Tennessee* plainly does not imply approval of extensive victim impact material. The victim impact evidence challenged in *Payne* was actually quite restrained, particularly in light of the underlying facts. In *Payne*, a twenty-eight-year-old mother and her two-year-old daughter were killed with a butcher knife in the presence of the mother's three year old son who survived critical injuries in the attack. The disputed testimony was a brief response to a single question posed to the surviving child's grandmother. When asked about what she had observed in the child after

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As used herein, "victim character," refers to evidence concerning the victim's good qualities, life history and personal achievements; and "victim impact" is evidence of the effect the victim's death will have on others. Although recognizing that the United States Supreme Court has not distinguished between these two types of evidence, the Texas Court of Criminal Appeals adopts these categories for purposes of the discussion in *Mosley v. State* (Tex.Crim.App. 1998) 983 S.W.2d 249, 261

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Now well into its second decade as the law of the land, the range of admissible victim impact under *Payne* continues to be a source of controversy. In the nearly fifteen years since *Payne* was decided the Supreme Court has not taken the opportunity to address the substantive limits or procedural requirements of victim impact evidence and argument. The Court's failure to provide further guidance in this area has been widely lamented at all levels of the state and federal judiciary. Legal scholars have also observed that the need for direction grows more acute as courts face an "overwhelming trend" toward the admission of victim impact in greater quantities and in a widening array of forms. (See Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 280.)

witnessing his mother's and sister's murders, the grandmother testified that the boy cried for his mother and that he missed her and his sister. In closing argument, the prosecutor said, "His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Ibid.*)

The precise constitutional parameters of victim character evidence are also uncertain based on the Court's opinion in *Payne v. Tennessee.*[31] *Payne* allows jurors to receive some information about the victim's personal characteristics beyond those facts disclosed in the guilt phase of trial. The Supreme Court's references to victim character evidence, however, cannot reasonably be understood as authorizing the introduction of extensive biographical information or detailed descriptions of specific character traits. *Payne* speaks of permitting the jury to see a "quick glimpse of the [victim's] life." The majority comment that the victim need not remain a "faceless stranger" in the penalty phase of a capital trial. (*Payne* at p. 825, quoting *Gathers*, 490 U.S. at p. 821 [109 S.Ct. at 2216] (O'Connor, J., dissenting).) Elsewhere, the Court notes that the "uniqueness" and "individuality" of the victim may be considered as a means of balancing the defense evidence in mitigation. (See, e.g., *Payne* at pp. 839-839 (conc. opn. of Souter, J., and

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The Supreme Court did not need to address this question directly in *Payne* because the testimony at issue there was actually "victim impact" as opposed to "victim character" evidence. The grandmother in *Payne* testified very briefly about her grandson's reactions to the deaths of his mother and younger sister. The prosecutor's closing argument also focused on the crime's immediate and long term impact. No specific qualities were attributed to the victims and, as noted by the *Payne* dissenters, the jurors gained no more information about the victims in the penalty phase than they had received in the guilt phase of the trial. (*Payne, supra*, at pp. 865-866 (dis. opn. Stevens, J. and Blackmun, J.).)

Kennedy, J.).) It could reasonably be argued that *Payne* sanctions **only** a very limited amount of victim character information, i.e., enough to prevent the victim from becoming "faceless." (See Blume, *Ten Years of Payne*, *supra*, at pp. 266-267.) What is clear from the *Payne* opinion is the conspicuous absence of blanket approval for any and all victim impact and victim character evidence.

Payne does not sanction the wholesale admission of evidence about the victim's character, personal history, unique attributes and accomplishments. Nor does the Supreme Court in *Payne* suggest that evidence about the "impact" of the crime is limited only by the prosecutor's imagination in devising a causal link, no matter how tenuous, between the capital crime and some subsequent ill. The victim character and victim impact evidence presented in this case was that far reaching. The jury in Roger Brady's case heard a full day and a half of testimony covering approximately 140 transcript pages. The prosecution presented eight witnesses: the victim's four sisters, his fiancee´, and three friends and colleagues (including the Chief of Police whose status surely commanded special respect). Through their testimony the jury learned of a widening circle of friends, siblings, family members, and in fact an entire community, harmed by the victim's death. The witnesses, many of whom were visibly distraught during their testimony, described every aspect of Martin Ganz's character and personality. Through their testimony, anecdotes, recollections and family stories, they presented what was literally a cradle to grave life history of the victim. The poignancy of the testimony was enhanced by numerous exhibits including a professionally produced videotape of the elaborate police department funeral, video footage of the victim and his

family on Christmas morning, several awards and commendations and an array of over 20 photographs.

Roger Brady's case contains victim impact and victim character evidence of a magnitude never contemplated in *Payne v. Tennessee*. As discussed further in the sections which follow, the reasoning of *Payne* and other decisions in the state and federal courts requires that the sentence of death must be reversed due to the enormity of the prejudice which surely flowed from the evidence and argument in this case.

2. The Relevance And Admissibility Of Victim Impact In California.

Shortly after the United States Supreme Court's decision in *Payne v. Tennessee,* the California Supreme Court decided *People v. Edwards* (1991) 54 Cal.3d 787 [819 P.2d 436, 1 Cal.Rptr.2d 696], holding that victim impact evidence and argument is relevant and admissible under factor (a) of Section 190.3 – which allows the jury to consider the circumstances of the capital murder when deciding whether to impose life imprisonment or the death penalty. (*Id.* at pp. 835-836.)[32] The *Edwards* Court defined "circumstances" so broadly as to include almost any imaginable form of victim impact evidence:

> The word circumstances as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather, it extends to "[t]hat which

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32 The California Supreme Court has long held that aggravating evidence is admissible in the penalty phase only where it is relevant to one of the factors set forth in California's death penalty statute. (Pen. Code §190.3; *People v. Boyd, supra*, 38 Cal.3d 762, 775-776.)

> surrounds morally, materially, or logically" the crime. (3 Oxford English Dict. (2d ed. 1989) p. 240, "circumstance," first definition.)

(*People v. Edwards, supra,* at p. 833.)

It is generally agreed that this set of relevant circumstances includes the guilt phase evidence,[33] and any of the victim's personal characteristics which were known or apparent to the defendant.[34] Although both federal and state principles require that there must be some "outer limits" for victim impact evidence, the California Supreme Court has given few indicates, in the fifteen years since *Edwards*, of where they may be found. The Court has refused to exclude from the realm of relevant circumstances matters which the defendant did not know and could not readily observe,[35] and has been

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See, e.g., *People v. Clark (Richard)* (1993) 5 Cal.4th 950 [857 P.2d 1099, 22 Cal.Rptr.2d 689] [prosecutor's argument concerning victim's age, vulnerability and innocence]; *People v. Zapien* (1993) 4 Cal.4th 929 [846 P.2d 704, 17 Cal.Rptr.2d 122] [argument about the crime's impact on victim's children] *People v. Fierro* (1991) 1 Cal.4th 173, [821 P.2d 1302, 3 Cal.Rptr.2d 426] [prosecutor's comment that victim was killed in front of his business of 40 years and that his wife, who was present, will have to live with the memory of the shooting].

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See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [861 P.2d 1107, 24 Cal.Rptr.2d 421] [victim's plan to enlist in the army which she discussed with the defendant]; *People v. Montiel* (1993) 5 Cal.4th 877 [855 P.2d 1277, 21 Cal.Rptr.2d 705] [victim's general good health and positive outlook in spite of his need for a walker]; *People v. Edwards, supra,* 54 Cal.3d at p. 832 [photographs of victims shortly before their death to demonstrate how they appeared to the defendant].

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See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646 [110 P.3d 289, 27

(continued...)

similarly disinclined to confine victim impact in other respects. For example, victim impact witnesses are not limited to persons who were present at the scene or soon thereafter,[36] and need not be members of the victim's immediate family. [37]

An exceptional range and quantity of victim impact and victim character material was admitted in Roger Brady's case. As discussed below, a substantial portion of this evidence was irrelevant under California law because it could not reasonably be connected to a circumstance of the capital crime. Appellant also observes, however, that much of this evidence and testimony would never have been admitted under a narrower definition of "circumstances." Other jurisdictions have adopted clear and specific guidelines for victim impact which provide notice to the defense and reduce the risk of a trial court erroneously admitting irrelevant victim impact in an unconstitutionally vague and arbitrary application of California's statute. [38]

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[35](...continued)
Cal.Rptr.3d 360]; *People v. Pollock* (2004) 32 Cal.4th 1153 [89 P.3d 353, 13 Cal.Rptr.3d 34].

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People v. Taylor (2001) 26 Cal.4th 1155 [3 Cal.Rptr.2d 827, 34 P.3d 937].

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People v. Pollock, supra, 32 Cal.4th 1153; *People v. Marks, supra,* 31 Cal.4th 197.

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The California Supreme Court has acknowledged that the United States Supreme Court has not considered whether factor (a) is unconstitutionally vague to the extent that it "is interpreted to include a broad array of victim impact evidence . . . " (*People v. Boyette, supra,* 29

(continued...)

The time has come for the California Supreme Court to refine and narrow the definition of relevant circumstances set forth in *Edwards*. Roger Brady urges the California Supreme Court to reconsider its rulings declining to expressly limit victim impact evidence to matters which the defendant knew or might have observed. (See, e.g., *People v. Roldan, supra*, 35 Cal.4th 646; *People v. Pollock, supra,* 32 Cal.4th 1153.) Alternatively, it is respectfully suggested that this Court adopt a narrower definition of "circumstances" for purposes of Penal Code section 190.3 which would be less susceptible to arbitrary decision-making and would provide effective notice to the defendant. [39]

Evidence which is relevant pursuant to Penal Code Section 190.3(a), remains subject to exclusion if it is cumulative, misleading or unduly prejudicial. (Evid. Code §352; *People v. Box* (2000) 23 Cal.4th 1153, 1200-1201 [5 P.3d 130, 99 Cal.Rptr.2d 69]; *People v. Staten* (2000) 24 Cal.4th 434, 462-463 [11 P.3d 968, 101 Cal.Rptr.2d 213].) Victim impact is subject to exclusion or limitation like any other proffered evidence. (See, e.g.,

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[38](...continued)
Cal.4th 381, 445, fn. 12.)

[39]

A more traditional and conservative approach to statutory interpretation would be to define "circumstance" as "[a]ttendant or accompanying facts, events or conditions." (Black's Law Dict. (6th ed. 1990) p. 243.) A federal court has defined "circumstances" as "facts or things standing around or about some central fact." (*State of Maryland v. United States* (4th Cir. 1947) 165 F.2d 869, 871.) Another state court has defined "circumstances of the offense" as "the minor or attendant facts or conditions which have legitimate bearing on the major fact charged." (*Commonwealth v. Carr* (1950) 312 Ky. 393, 395 [227 S.W.2d 904, 905].)

People v. Gurule (2002) 28 Cal.4th 557, 654 [51 P.3d 224, 123 Cal.Rptr.2d 345].) *People v. Edwards* cautions that excessively emotional victim impact evidence carries an unacceptable risk of improper prejudice:

> Our holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett, supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it 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. On the other hand, 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.

(*Id.* at p. 836, fn. 11.)

However, as noted above with respect to relevance, the exclusion of victim impact evidence for undue prejudice has largely remained merely a theoretical possibility. Recently, this Court again made reference to the "extreme case" in which victim impact evidence that would "divert the jury's attention from its proper role" ought to have been excluded. (*People v. Smith* (2005) 35 Cal.4th 334, 365 [107 P.3d 229, 25 Cal.Rptr.3d 554].)[40]

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The Court in *Smith* found the brief testimony of the mother of the child victim was not inflammatory. The Court commented: "We do not, however, know of any cases after *Payne* and *Edwards* holding victim impact evidence inadmissible, or argument based on that evidence improper. The references in *Payne* and *Stanley* [*People v. Stanley* (1995) 10 (continued...)

Roger Brady's is the extreme case where reversal is necessary. The victim impact evidence was more plentiful, its content more inflammatory and the manner of its presentation more emotionally provocative than in any other case considered by the California Supreme Court. As discussed in greater detail in the sections which follow, this evidence and argument contain several distinct forms of improper prejudice, any one of which would support a claim for reversal. The combination of inflammatory evidence and argument produced an overwhelmingly prejudicial atmosphere in which the jury was unable to perform its proper function at sentencing. Under these circumstances, there is an unacceptable risk that this jury's decision to impose a death sentence was based on emotion rather than reason. (*Gardner v. Florida*, *supra*, 430 U.S. 349, 358; *Gregg v. Georgia* (1976) 428 U.S. 153, 189 [49 L.Ed.2d 859, 96 S.Ct. 2909].)

D. Evidence Describing The Victim's Death And The Crime Scene.

In the guilt phase, jurors heard extensive and graphic testimony describing the injuries Officer Ganz sustained, the amount of blood and the life-saving efforts of the paramedics. In the penalty phase, the prosecutor was able not only to repeat for the jury all of the disturbing details of the crime scene and the victim's injuries but to do so through the highly subjective accounts of his distraught friends, Sergeant Karl Nilsson and

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[40](...continued)
Cal.4th 764, 832 [897 P.2d 481, 42 Cal.Rptr.2d 543]] to the exclusion of unduly inflammatory victim impact evidence contemplates an extreme case, which is not the situation here." (*People v. Smith*, *supra*, at p. 365.)

Officer Neal O'Gilvy,[41] who were on duty the night he died and came to the scene of the shooting.

The death scene testimony should never have been heard by this jury for several reasons. This testimony was cumulative of an abundance of other evidence pertaining to the circumstances of the crime. It revealed nothing about Officer Ganz's unique characteristics and little if any relevant information about the impact of his death. Elsewhere in their testimony, O'Gilvy and Nilsson spoke about Martin Ganz as a person and in his role as a police officer. They told jurors how much they missed Ganz, and the reasons for their feelings. Those areas of testimony may be legitimate topics for the penalty phase following *Payne v. Tennessee*. However, the subjective observations of a witness who was admittedly hysterical are not. This is precisely the sort of inflammatory evidence which violates due process and contravenes the Eighth and Fourteenth Amendment requirements that capital sentencing be based upon a reasoned moral judgment and not the product of an emotional response.

1. The Penalty Phase Testimony.

Sergeant Karl Nilsson was Martin Ganz's supervisor at the Manhattan Beach Police Department ("MBPD"). (18 RT 4084.) Nilsson had seen Officer Ganz when the evening shift came on duty on December

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41 Defense counsel objected to Officer O'Gilvy testifying in the penalty phase because, contrary to the court's order excluding witnesses, O'Gilvy was present through much of the trial and frequently dressed in police uniform. (See 19 RT 4220-4222.) Counsel also objected on discovery grounds as the prosecutor did not timely notify the defense that O'Gilvy would be a penalty phase witness. (*Id.*)

27, 1993. (18 RT 4086-4087.) Later that evening Nilsson was at the Police Station chatting with Sergeant Milligan. It had been a quiet night, with very little activity broadcast over the police radio. (18 RT 4087.) Nilsson testified about what happened next:

> While Sergeant Milligan and I were talking over the events, we heard screams on the police radio, and the screams continued. And I had no idea what it was. Sergeant Milligan at first didn't either. But then all of a sudden, he got this look on his face, and he ran for his police car. I ran for mine.
>
> And we started driving, and I had no idea where I was driving to. But I heard on the radio that we had a shooting and that the shooting was in our mall near the Sav-on's and about halfway there I heard that a policeman had been shot and was on the ground.

(18 RT 4087.)

MBPD Officer Neal O'Gilvy was a close friend of Martin Ganz. (19 RT 4224.) O'Gilvy was in a patrol car with another officer when he heard something over the police radio. They went directly to the mall. O'Gilvy described his growing anxiety as he desperately hoped that it was not Martin Ganz who had been shot:

> While I was going there I tried to get on the radio and told -- asking Marty to respond on the radio to me. I didn't want it to be him, so I figured that if he would talk to me, it would be fine, it would be somebody else.
>
> ***
>
> And I heard people going 07, which meant they were on location where Marty was. And they had found him, and he had been shot.

> And that's when I got back on the radio and thought maybe he was shot in the leg or arm or something like that. I just needed to hear his voice.

(19 RT 4229-4230.)

Sergeant Nilsson described what followed when he reached the location at the mall:

> I remember skidding to a stop and looking and then breathing a sigh of relief because my two young officers were standing by their police cars looking up in the sky. So I felt everything was all right.
>
> I got out of my car and walked towards them. And I got about 10, 12 feet when I realized that they just couldn't deal with the look of what was before them. And it was Martin laying on the asphalt, a gunshot wound to his face.
>
> A lovely lady was kneeling down before his head cradling his head in her lap. I walked over to them, and I did something that has caused me great grief ever since. I got close to him, and I held him.
>
> And he was coughing a great deal. Large amounts of thick blood and other substances were coming out of his mouth. He was choking to death. The pool that he had left was so large his head had to be elevated out of it so he could breath. His leg, his right leg, was jerking very badly.
>
> There was a gaping wound to his face, and I noticed the wound to his shoulder. He was on his left side. I saw the shoulder wound and then the facial wound. I felt that he was gravely injured and wasn't going to survive. I stayed with him with that woman until the paramedics arrived and they took him away.

(18 RT 4087-4088.)

Officer O'Gilvy's testimony was equally graphic and even more prejudicial. Asked what he observed upon arrival at the crime scene, O'Gilvy told the story of Martin Ganz's death in an uninterrupted and increasingly emotional narrative that covers seven transcript pages.

> People were standing there, and I ran through two of the security guards from the mall. And I kind of turned around and screamed at them. I said, "Don't let anybody come near me or come into this area," or something like that.
>
> And I went to Marty, and the young girl from the pharmacy was holding him. She had him in her lap, his head. And there was a lot of blood. And I kept looking at him. And I was trying to see where the wounds were. The girl kept looking at me, and she said, "What's his name?" and I said, "His name is Marty." She asked me again, and I said, "His name is Marty." And then she asked me again, and I looked her right in the eye, and I said, "His name is Marty." She said, "Okay. Okay."
>
> And he was having a real hard time breathing. So I took his -- tried to get his gun belt off because I wanted to get his vest off. He just couldn't breath. So I started taking all his stuff off, and the paramedics got there while I was doing this.
>
> And I grabbed onto his hand and said, "Nobody is going to be hurt. It's going to be okay." He kept trying to get up. It's just he couldn't get up. And I kept telling him to stay down. The girl was doing a good job keeping him down on the ground.
>
> I was trying to find the wounds, and I couldn't find them because he was shot in the shoulder. I never really got a good look at his face.
>
> And then the paramedics got there, and there was a Chinese fire drill then because everybody was trying to do --

maintain a crime scene. I had to -- the paramedics got there. I said, "We got to go now." They said, "We know. We know. We're doing it."

"Let's go. Let's go." So they loaded him up. They didn't do anything for him, just loaded him up, put him on the gurney, put him in the back of the paramedic wagon.

(19 RT 4230-4231.) Officer O'Gilvy insisted on going in the ambulance against the orders of his supervisor. (19 RT 4231-4232.) He testified about the paramedics' efforts to save his friend:

And I was holding onto his hand and I just -- kind of felt like to me like it was -- if I could just take some of the pain from him, that he'd be okay.

And so I get -- I kept telling him, "It's going to be okay. Nobody is going to hurt you. We're going to be there. There's a lot of people right here helping you. Just hold on. You can make it. You can make it."

So about halfway to the hospital the paramedics -- I've done this business long enough to know when things are not going good at all. We had eye contact, and I knew. I knew we were losing him.

So they said, "We're going to Harbor," which is more of a trauma, County hospital. They deal with gunshot wounds on a regular basis whereas South Bay Hospital is not renowned for their gunshot wound facilities there in their E.R.

So we changed position, and I got on the radio and tried to tell everybody we were changing our direction, we were going to Harbor General. So all these units are changing their location to the Harbor General and are blocking the streets for us.

> And Marty's grip was getting weaker on my hand, and I kept telling him, "Come on. Come on. Come on. You can do this. You can do this." And the paramedics, they wear head sets on their heads so they can hear what's going on.
>
> And finally they just -- they were working hard on him. He couldn't breath, so they had to flip him on his stomach so -- and then he just -- blood was coming out of his mouth. He was holding onto my hand. He kept squeezing it, and I kept screaming at him that he had to fight.
>
> And he started getting weaker and weaker. And he was losing a lot of blood. They finally got some of his clothing off. They were trying to find out where the exit wound -- because we could finally see that he had been hit in the face. And they were trying to find the exit wound.

(19 RT 4232-4233.)

O'Gilvy stayed by his friend's side at the hospital. He described the medical efforts to save Martin's life, and gave an emotionally devastating account of those final moments.

> So we got to the hospital, and there were probably 15 people waiting for us from the hospital staff. And we got him out of the ambulance. But before we got him to the inside of the doors to the E.R., every stitch of clothing he had on him was cut off because everybody was desperately trying to find the exit wound from his head.
>
> We got him inside, and everybody started working on him immediately. They were bringing in blood, and they were putting blood in him as fast as he was pumping it out, and it just literally loosing [sic]--
>
> I was standing next to the gurney, and I was screaming at him, "Keep fighting."

> And they had to come in and take some x-rays. And they had some portable machine that they use. They brought it in, and the nurses and the doctors had a policy they're not allowed to be there for the x-ray machine. And one nurse says, "Well, I'm staying." And the other person says, "Well, I'm staying." Next thing you know, nobody left. They went ahead and took the x-rays. And they worked.
>
> Meantime, all these police officers are coming in and additional staff is coming in, and Steve Tobias was another police officer that had followed the ambulance down there with me.
>
> We were just standing there next to him and trying to encourage him to keep going. And I took his hand, and I knew then that -- that he wasn't going to win. He was just bleeding too fast. They couldn't put it in fast enough. He was just pumping it right back out.
>
> So it was really strange because just like the movies they walk [sic] -- he looks up at me, says, "I'm sorry." I said, "What do you mean? Don't tell me that."
>
> So his hand went limp. I backed off. And other officers started coming into the room, and they didn't realize how severe it was.

(19 RT 4233-4235.)

Continuing his narrative, O'Gilvy described the responses of other police officers who had come to the hospital.

> But I'll never forget this Torrance officer walks in and he's got this look of, you know, scared and mad. And he just saw everybody stop working on Marty. And he says, "Why are you stopping? Keep going. Keep going. Don't stop." He says, "I'll help you. I'll help you. Don't stop."

> I saw one of the other guys who took him to the side and told him what happened. He just broke down and started crying. And after a couple of minutes, they took me down in a room, me and Steve Tobias, and put us in a room to wait for the coroner.
>
> And I just stayed in there, cried my eyes out and waited. I made some phone calls and let people know what had happened, that Marty had passed on and he had fought to the very end.
>
> And then it was just sitting in this room probably about ten feet by -- no-- yeah, about ten foot by ten foot, just sat in there with him, told him he was -- told him I'm sorry that we weren't there, didn't stop anything that happened to him and we didn't mean to let him down. It was symbolic, but I just had to tell him that we should have been there.
>
> Then the coroner showed up, and I didn't want to leave him by himself. And there was a discussion of what was going to happen. And I said, "He's not going by himself. You make sure somebody is riding with him he deserves that."
>
> So they put him back in the coroner wagon, and one of the other officers followed him up to the coroner. And that's where we are today.

(19 RT 4235-4236.)

After one or two more brief questions, Officer O'Gilvy broke down on the witness stand. (See 19 RT 4236-4237.) O'Gilvy was the prosecutor's last witness to testify in the penalty phase. (19 RT 4242.) The jury was excused for the evening after he completed his testimony (19 RT 4243), leaving them to contemplate this dramatic experience until the next

day. The prosecutor made use of O'Gilvy's descriptions of Ganz's death several times in closing argument. (See 21 RT 4767, 4768.)

2. The Death Scene Testimony Was Cumulative And Unduly Inflammatory.

Evidence pertaining to a circumstance of the crime (pursuant to Pen. Code §190.3(a)), remains subject to exclusion if it is cumulative, misleading or inflammatory. (*People v. Staten* (2000) 24 Cal.4th 434, 462-463 [11 P.3d 968, 101 Cal.Rptr.2d 213]; *People v. Box, supra,* 23 Cal.4th 1153, 1200-1201.) Nilsson's and O'Gilvy's testimony ought to have been excluded for all of these reasons.

The crime scene descriptions were cumulative and also unnecessary by the time of the penalty phase. The crime scene was described in considerable detail and from multiple perspectives in the guilt phase. Several civilians and two police witnesses related every pertinent detail about Officer Ganz's position, his injuries and the measures taken to help him while awaiting the ambulance. Witnesses described Ganz's responses to stimuli, and were questioned in some detail about the degree to which he was conscious and aware of what had occurred. Both the prosecution and the defense presented expert medical testimony in the guilt phase for the purpose of determining the extent of Ganz's physical impairment and mental awareness immediately after the shooting. (See 8 RT 2038-2073 [testimony of autopsy physician, Deputy Medical Examiner Solomon Riley, M.D.]; 9 RT 2232-2248 [testimony of defense neurologist John Gruen, M.D.].) The circumstances of the crime did not need clarification.

Nilsson's and O'Gilvy's penalty phase testimony was not needed to humanize the victim or to communicate the immediate emotional impact of

the crime. The guilt phase testimony regarding the crime scene was by no means detached or sterile. The witnesses' accounts included a number of poignant observations which served to convey the emotional impact of what they and others experienced. For example, civilian witness Jamie Timmons described raising Officer Ganz's head out of the pool of blood, holding him in her lap and reassuring him that his nephew was safe. (7 RT 1755-1757.) Officer Timothy Zins was visibly distraught during his guilt phase testimony about finding Ganz at the crime scene. (See 7 RT 1842-1848.) Officer Hodgen Crossett also testified in the guilt phase, and described finding Ganz lying in a girl's lap covered with blood.[42] (8 RT 1864-1869.)

It cannot be doubted that Officer O'Gilvy's narrative describing the ambulance ride and Martin Ganz's death at the hospital was highly inflammatory. The California Supreme Court has long recognized the extreme prejudice inherent in such "death bed" depictions. In *People v. Love, supra*, 53 Cal.2d 843 (Traynor, C.J.), cited with approval in *People v. Edwards, supra,* 54 Cal.3d 787, and *People v. Haskett*, *supra*, 30 Cal.3d 841, 846, the Court reversed a death judgment based on the admission of similar evidence. In *Love*, the defendant was convicted of murdering his wife at close range with a shotgun. In the penalty phase, the jury saw a photograph of the victim lying dead on the hospital table. The jury also heard a tape recording taken in the hospital emergency room shortly before Mrs. Love died. The recording dealt with the facts of the shooting but also preserved Mrs. Love's groans as she died from her wound. (*Id.* at pp. 854-

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The trial court overruled defense counsel's objections that this testimony was cumulative and unduly prejudicial. (See 8 RT 1858-1861.)

855.) The California Supreme Court reversed, holding that this evidence had no significant probative value in the penalty phase and was likely to inflame the jurors and to distract them from their duty to make a "reasonable decision" concerning the appropriate penalty. (*Love, supra,* at p. 856.)

Officer O'Gilvy's testimony was both more inflammatory and less reliable than the evidence in *Love*. While the audio recording in *Love* was prejudicial, it was also objectively verifiable evidence pertaining to the victim's experience. O'Gilvy's testimony was not objective and its accuracy is doubtful. The assertion that Ganz looked at him and spoke immediately before he died is directly contradicted by the prosecution's own medical expert who opined that Ganz would have been unconscious almost immediately following the fatal head wound. (See 9 RT 2053; 2072.) Under these highly stressful circumstances, it is probable that O'Gilvy imagined the death bed scene where he gets the chance to say good-bye to his friend. O'Gilvy's account was not needed to explain the causes of death or the victim's likely experience in terms of pain, suffering and awareness. Dr. Stanley Klein treated Officer Ganz when he arrived at the hospital. In his penalty phase testimony, Dr. Klein addressed these subjects over defense objections. (See 18 RT 3964-3978.)

Setting aside concerns about the reliability of this evidence, O'Gilvy's testimony was so inflammatory that it should not have been presented. This testimony could not have had any probative value sufficient to overcome its prejudicial effect. The manner in which this testimony was presented is relevant to assessing prejudice. O'Gilvy's testimony was neither "brief" nor "subdued." (Compare *People v. Roldan, supra,* 35

Cal.4th 646, 732-733; *People v. Boyette, supra,* 29 Cal.4th 381, 445.) The emotion of O'Gilvy's seven page death scene narrative virtually leaps off the pages of the record. The effect of seeing this witness and hearing this testimony in the courtroom was surely even greater. The audio recording in *People v. Love* was less inflammatory than a dramatic death bed story told by a distraught friend and fellow police officer.

California law grants the trial court discretion to exclude evidence which is cumulative, inflammatory or misleading. The trial court abused its discretion by failing to exclude O'Gilvy's and Nilsson's testimony (and particularly O'Gilvy's account) from the penalty phase evidence considered by this jury. (Evid. Code §352; see *People v. Box, supra,* 23 Cal.4th 1153, 1200-1201; *People v. Staten, supra,* 24 Cal.4th 434, 462-463.) This was precisely the sort of testimony which injects an arbitrary factor into the sentencing process by provoking an emotional response from the jurors. (*People v. Edwards, supra,* 54 Cal.3d 787; *People v. Haskett, supra*, 30 Cal.3d 841, 846.) This testimony alone would have been sufficient to deprive Roger Brady of his constitutional rights to due process of law, fundamental fairness and a reliable determination of the penalty. In combination with the other inflammatory evidence and argument, reversal of the sentence is clearly required.

E. The Evidence and Testimony Concerning The Victim's Funeral Was Irrelevant and Overwhelmingly Prejudicial.

One of the most disturbing aspects of the prosecution's case in the penalty phase was the emphasis placed on Martin Ganz's funeral. The prosecution effectively recreated the experience of attending a full

ceremonial burial service for an officer killed in the line of duty. Five witnesses, Pam Hamm,[43] Mary Pfaff, Sergeant Nilsson, Officer O'Gilvy and Chief of Police Mertens, relived the event on the witness stand, providing poignant descriptions of the entire day. Their testimony was accompanied by a professionally filmed and edited videotape of the church services and grave side ceremonies. The video was filled with powerful images, including the rifle salute, the flag draped casket, the playing of the bagpipes, and, of course, the estimated 4,000 to 5,000 mourners most of whom are police officers in full dress uniform.[44]

This evidence, predictably, was inflammatory and it was also wholly irrelevant. Descriptions of a victim's funeral are not "circumstances of the crime" according to any reasonable understanding of that concept. As defense counsel noted, funeral descriptions and imagery do not further an understanding of who the deceased was in life. (See 16 RT 3608-3614; 3654-3658.) Funerals and the attendant rituals and ceremonies are designed to evoke a range of emotions from the living. The testimony and the videotape surely had that effect in this case. It is impossible to believe that these jurors remained detached and rational in the face of this evidence. For all of the reasons discussed below, the trial court's decision to admit the videotape and the accompanying testimony was error under California law

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At the time of trial, she had married and was known as Pam Hamm Magdaleno.

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The funeral evidence was challenged on several grounds. Defense counsel objected to both the testimony and the videotape on state and federal constitutional grounds, and also lack of relevance and undue prejudice according to state law. (See 16 RT 3608-3613; 3654-3658.)

and denied Roger Brady his rights to due process of law and to a fair and reliable sentencing proceeding.

1. The Evidence And Testimony Concerning The Funeral.

The descriptions of Ganz's funeral were nearly as thorough as the testimony about his character and life history. The youngest sister, Mary, coordinated funeral arrangements with the Police Department. Mary testified that she had to step into that role because their mother was overcome with grief. (19 RT 4212.) She described calling her mother with the news that Martin had been shot and killed:

> I mean, how do you tell her that after she already lost two children and a husband and he's the only boy that's going to take care of her for the rest of her life? How do you tell a mother that?
>
> You just tell it and say, "What do you want me to do?" And she said, "Mary, I can't handle it. You got to do it." So I did.
>
> I went and saw the Chief and told him, "Here's my number."

(19 RT 4207.) Pam Hamm testified about her part in the funeral preparations (19 RT 4184), and Janet testified that she had attended the viewing. (19 RT 4155.)

The jury viewed the videotape during Mary's testimony as she provided commentary prompted by questions from the prosecutor. (See 19 RT 4214; People's Exh. 167.) Funeral services began at the American Martyrs Catholic Church in Manhattan Beach. (19 RT 4212.) On the video, the officers of the Manhattan Beach Police Department are seen filing past the casket which is covered with an American flag. There are

images of the priest performing the ceremony, and an overhead view of the large church sanctuary. The next series of images show thousands of mourners, many in police uniform, leaving the church. The casket is carried out by eight men including Martin Ganz's best friend and roommate, Fred Winters, his friend from the Marines,Steve Shook, and several MBPD officers. (19 RT 4213.)

The procession from the church to the Inglewood Cemetery was elaborate and enormous. (19 RT 4213.) Between 4,000 and 5,000 mourners joined the procession which stretched for several miles. The video contains aerial images taken by television news helicopters to capture the enormity of the event. A fleet of limousines carried the family members from the church to the grave site. Literally thousands of patrol cars and police motorcycles are seen following the hearse. Martin Ganz's police motorcycle was part of the procession, prominently displayed on a trailer surrounded by flowers. (19 RT 4213.) Sergeant Nilsson described the drive to the cemetery:

> I remember the procession from the service to the cemetery. I was one of the first police cars in the procession. And as we were entering the cemetery, I heard on the radio that there was still police cars in Manhattan Beach leaving in that same procession. It was over seven miles long. It was quite emotional. It was something that I didn't want to do. I couldn't -- I couldn't face it. But I had to.

(18 RT 4092-4093.)

The videotaped images and testimony from the grave side services were possibly the most dramatic and prejudicial aspects of the prosecution's

evidence. The video shows the funeral procession as it enters the cemetery. A limousine with some of the family members stops opposite a huge white tent where mourners are gathering. Pam Hamm emerges from the limousine dressed in black and carrying a single white rose. She then leans back into the car to speak with the elderly Mrs. Ganz. (People's Exh. 167.) Mary testified that their mother was too emotional to go inside the church or to attend the grave side service. Mrs. Ganz remained inside the limousine at all times. (19 RT 4123.)

The scene shifts to show a bagpiper leading the way from the hearse to the seating area under the tent. The sounds of the bag pipes are heard as the camera shows the eight pallbearers (two in United States Marine dress uniform, some in civilian clothing and others in police dress uniform) carrying the flag covered casket upon which Officer Ganz's hat is placed. The scene then shifts to a line of uniformed riflemen standing beside a large American flag. When the order is given they raise their weapons and fire a salute to Officer Ganz. The bagpipes continue to play as the color guard ceremonially folds the American flag that had been covering the casket. The camera pans out and then closes in on several especially distraught mourners including a Marine who is crying. There are similar images of Pam, Don, Rachel, and other family members seated in the front row of seats under the tent.

Once the flag is folded, Mary is seen walking toward Chief Mertens. Chief Mertens presents her with the American flag that had been draped on the coffin. The two have a brief whispered conversation and then, as the camera follows, Mary walks to the limousine and presents the flag to her mother through the open car window. Referring to the flag, Mary stated:

> It was for my mother. I don't know what's in the video, but she was in a car. She couldn't get out. She was too emotional.
>
> So they said they would present it to me, and I in turn took it from the Chief and asked him at the service right then if I could walk it to the car because it wasn't for me. It was for her.

(19 RT 4123-4214.)

In the next scene a song plays over the sound system and the camera pans the audience as they listen silently. More people break down in tears, holding each other and crying. Don Ganz is sobbing and his mother Rachel has her arm around him and rubs his back to comfort him. Chief Mertens kneels to speak to Don and, with a steadying hand on Don's shoulder, presents him with Martin Ganz's police hat. Chief Mertens said that this was the most difficult moment of the day. (19 RT 4135.) [45] The camera moves in for a close-up of Don with the hat sitting in his lap as he dissolves in tears with his mother's arms around him. The view narrows further and lingers for a moment on a close-up of the hat. The final scene shows a long line of uniformed police officers filing past the casket one last time.

The prosecutor asked Officer Neal O'Gilvy, toward the end of his testimony, what had been the next most difficult thing after seeing Martin Ganz die. At this question, O'Gilvy became emotional and said that the

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Chief Mertens misspoke during his testimony where he stated that he had given the flag to Don Ganz. It was later clarified that he presented Don with Martin Ganz's *hat*, and the flag was given to Mary for her mother. (See 19 RT 4137-4138.)

funeral had been very upsetting. (19 RT 4237.) Sergeant Nilsson also found Martin Ganz's funeral the most difficult of all of the officers' funerals he has attended throughout his career. (18 RT 4092-4093.)

2. This Evidence Was Irrelevant And Overwhelmingly Prejudicial.

The only fact communicated by this evidence was that Martin Ganz was given the full ceremonial burial which is customary for a police officer killed in the line of duty. The burial, however, was not relevant to the penalty decision. The jury already knew Ganz was a police officer (having returned the Penal Code section 190.2(a)(7) special circumstance in the guilt phase), and also knew (from the existence of this special circumstance) that society attaches particular significance to the killing of a police officer.[46] As defense counsel pointed out, the funeral evidence did not display any characteristics unique to Officer Ganz. (See 16 RT 3600-3612.) The funeral rites would have been more or less the same for any officer killed in the line of duty. (*Id.*) As defense counsel further noted, this material was inherently prejudicial. (*Ibid.*)

A funeral is a ritual which honors the deceased and allows the survivors to express their strongest and most immediate reactions; typically, intense grief, shock and despair. Mourning is an active, participatory experience. It is rarely a phenomenon viewed with detachment and it is this aspect above all which made this evidence so improper. The Missouri Supreme Court accurately identified the prejudice funeral-related evidence causes in a legal proceeding. In *State v. Story* (Mo. 2001) 40 S.W.3d 898,

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See Note, *Protecting The Foot Soldiers Of An Ordered Society* (1990) 58 UMKC L.Rev. 675.

the court held that a photograph of the victim's tombstone was not relevant to show the impact of the victim's death, "and it inappropriately drew the jury into the mourning process." (*Id.* at 909.) In *Welch v. State* (Okla. 2000) 2 P.3d 356, the Oklahoma Court of Criminal Appeals held that it was error to admit evidence that the victim's son put flowers on his mother's grave and brushed the dirt away. The Oklahoma Court found that this evidence "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative." (*Id.* at 373.)

While the testimony would have been highly prejudicial on its own, the videotape made an indelible impression on the jurors. Film is undoubtedly a powerful and effective medium for arousing the emotions of the audience. In recognition of this fact, courts have been cautious in admitting victim impact evidence in the form of videotaped presentations. In *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, the Tenth Circuit expressed its approval the district court's ruling prohibiting the introduction of wedding photographs and home videos. (*Id.* at p.1219, fn. 47, cert. den., 526 U.S. 1007 [143 L.Ed.2d 215, 119 S.Ct. 1148] (1999).) Videotape has occasionally been admitted to demonstrate victim impact in situations where it would be difficult to convey the same information through verbal testimony alone. (See, e.g., *Whittlesey v. State* (Md. 1995) 340 Md. 30 [665 A.2d 223] [where body was badly decomposed 90 second videotape showing victim playing piano was relevant to show victim's appearance].) A "brief and narrowly presented" videotape segment might not be unduly prejudicial in the context of a particular case. (*State v. Allen* (1999) 128 N.M. 482, 505 [994 P.2d 728].) The videotaped evidence and the overall context of the trial in *State v. Allen* bear no relationship to the

circumstances of this case. The videotape in *Allen* was less than three minutes long, as opposed to the nearly five minute (4:57) video this jury saw. (See People's Exh. 167.) The video in *Allen* was not prepared as a tribute to the victim. The victim was seen only briefly in a group of people on an elk hunting trip; there were no close-ups of her and she did not speak. Most of the video showed mountain scenery. The *entire* victim impact presentation in Allen occupied only 30 minutes of an 18-day trial and only one witness (a family friend) testified very briefly about the emotional impact of the victim's death [47]

The result is different where, as in the present case, the videotaped evidence was intended as a tribute to the victim. The balance of probative value against potential prejudice in these cases clearly favors exclusion. (See *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330.) In *United States v. Sampson* (D.Mass. 2004) 335 F.Supp.2d 166, the federal district court excluded a videotape that had been prepared for a victim's memorial service. The 27-minute-long tape featured a variety of photographs of the victim throughout his life. The district court observed that the tape was "fitting and lovely for its original, intended purpose, but not appropriate for presentation to the jury in this case." (*Id.* at p.193 fn.12.) As in this case, the videotape was especially improper because it was cumulative to the

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In other instances defendants have waived the issue by failing to object at trial. (See *Tollete v. State* (Ga. 2005) 621 S.E.2d 742 [defendant failed to challenge admission of short, silent videotape segment of victim on grounds of undue prejudice]; *State v. Gray* (Mo. 1994) 887 S.W.2d 369, 389 [rejecting defendant's "tangential" argument on appeal that victim impact evidence, including Christmas video of both victims with their family, violated due process in brutal rape/murder of two sisters.].)

victim impact testimony and evidence. The court stated: "Even without the music, admission of the video would have been unfairly prejudicial in light of the fact that the jury heard powerful, poignant testimony about [the victim's] full life and the impact of his loss on his family, and saw photographs of him in conjunction with this testimony." (*Id.* at pp. 192-193.) The district court stated further that, in the context of all of the other victim impact material presented, the video "would have constituted an extended emotional appeal to the jury and would have provided much more than a 'quick glimpse' of the victim's life. Together with the evocative accompanying music, the videotape's images would have inflamed the passion and sympathy of the jury." (*Ibid.*) The videotape of Martin Ganz's funeral should have been excluded for these same reasons.

It is impossible to overestimate the emotional effect of the funeral presentation combined with the victim impact and victim character evidence concerning Martin Ganz. The jurors in Roger Brady's case spent hours (one and one-half court days) learning everything imaginable about Martin Ganz. His background, character, family relationships, career and future hopes and aspirations were described at length and in glowing terms through the heartfelt remembrances of eight of the people who had been closest to him. The jurors came to know Ganz and the witnesses, whom they were bound to view sympathetically. As the friends and relatives were forced to relive the experience of the funeral through their testimony, the jurors experienced it alongside them. This jury could not have been more effectively drawn into the mourning process, nor could their objectivity have been more thoroughly compromised.

The prosecution did not need descriptions of the funeral to demonstrate the impact of Martin Ganz's death or to show the jury a glimpse of his life. The victim impact evidence was voluminous, and the emotional climate of this case was already highly charged before the funeral videotape and the accompanying testimony. This evidence served no legitimate purpose. Its only effect was to further upset the already distraught witnesses and to inflame the jury. The certainty of prejudice was obvious, and the trial court's decision to admit this evidence and testimony was an affront to basic constitutional principles of due process and fundamental fairness, and requires reversal of the sentence.

F. The Detailed and Extensive Victim Character Evidence Was Largely Irrelevant, Cumulative and Highly Prejudicial.

The jury responsible for choosing life or death for Roger Brady was deluged with biographical information about the victim, Officer Martin Ganz. Eight witnesses related Martin Ganz's entire life history beginning with the family story of the day he was born through his teenage years, early adulthood, military service and police career. The testimony included Ganz's plans and hopes for the future, both in his personal life and his career. Jurors were given a detailed view of Martin Ganz in each role of his life, as a brother, son, friend, police officer, colleague, father figure, and fiance´. The witnesses described every aspect of his personality. The testimony included over a dozen touching anecdotes, some from Ganz's childhood, highlighting particular features of his sterling character. Augmenting this already emotional evidence were numerous exhibits

including two videotapes, more than 20 photographs, several awards and commendations and a deeply personal and sentimental Christmas card Martin Ganz gave his fiancee´ only days before his death.

This jury received an in-depth profile of the victim bearing no relationship to the "glimpse of the life" the United States Supreme Court sanctioned in *Payne v. Tennessee*. The victim character evidence presented here was prejudicial through its sheer excess. Moreover, it contained several specific forms of prejudice which other state and federal courts have recognized as improper in capital sentencing. For all of the reasons discussed below, the trial court's admission of this evidence was error according to California law and deprived Roger Brady of his state and federal constitutional rights to due process of law and a fair and reliable sentencing.

1. The Evidence And Testimony Describing Martin Ganz.

a. Martin Ganz's childhood and family background.

Officer Ganz's four sisters gave jurors a great deal of sympathetic background information about the Ganz family. Martin Ganz grew up in a family of ten people living in a small three bedroom house in Garden Grove, California. The family did not have much money. Mr. and Mrs. Ganz had eight children, seven of whom were their biological children and one, the youngest girl, who was adopted. (19 RT 4196; 4199-4200.) The children were all fairly close in age, with approximately 14 years separating

the eldest from the youngest.[48] Martin Ganz was the sixth child, and the only boy. (18 RT 4099; 4100.)

Life was especially difficult for the three youngest children, Martin and his sisters Janet and Mary. Janet (known as Janet Chase in the trial transcript) stated:

> Well, growing up we -- there's eight children in one three bedroom house, we spent a lot of time together. We were obviously from elementary through high school, we weren't very many years apart so we spent a lot of activities together.
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> ***
>
> We went to school together. My whole family, we kind of went back to back so all the teachers by the time -- because Martin and I are near the end of the children -- so we had heard all the stories, and oh, I knew your sister when we went to school.

(19 RT 4151.) The youngest sister, Mary (known at trial as Mary Pfaff), also described her childhood:

> Well, our childhood was -- I don't know if you consider normal. My husband doesn't think so. We had eight of us. And the four older had a different life than us.
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> The three younger, my little sister already had died, had a hard life. We were -- didn't have any money, and we experienced a lot of heartache when we were young.

(19 RT 4197.)

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48 The children from eldest to youngest were identified as: Radine; Anna; Clarissa "Chris"; Rachel; Janet; Martin; Mary; and the adopted sister, who died in childhood. (See 18 RT 4102-4103; 19 RT 4169, 4199.)

Jurors learned that the youngest sister died in childhood in a swimming pool accident. (19 RT 4196, 4199, 4211-4212.) The father and the second eldest sister were no longer living when Martin was killed (19 RT 4168, 4199) and their mother died approximately six months after Officer Ganz. (19 RT 4160-4161.)

Martin Ganz always occupied a special place in the family. The eldest sister, Radine (known at trial as Radine Pobuda), was twelve and a half years old when her brother was born. She began her testimony with the family story of that day.

> My mother was painting the patio roof when she got her first labor pain, and that was in the afternoon. And she laid down on the lounge on the patio. And then she said, "I'm just a little tired." And she rested. And she wanted to finish the patio.
>
> And she went, got up about half an hour later to do that and decided that she needed to go to the hospital and requested that I watch the children until Rose got back. She was my mom's best friend.
>
> And when Rose came back, my mom called her and said, "I need to get to the hospital right away. We can't wait." And she called my grandmother to come down and watch us because Rose was having company that night at her house and couldn't do it for her.
>
> And Gramma came down after her chicken dinner. And my mom had called just as Gramma was pulling in the driveway and was able to tell me I had a brother. And I said. "I think Gramma is here. I'll go and get her for you, mom." And so I ran out in the driveway and told Gramma that she had a grandson. And it's the only time in my Gramma's whole life I heard her swear.

> And it's -- in the telling it's funny, but at the time it was a total shock because knowing my Gramma, you would never expect this to come out of her. And she got on the phone and gave my mom the riot act about daring to have her son before she got there to be there with her. And it was like this for the whole family.

(18 RT 4100-4101.) Asked if Martin Ganz's status as the only male child had been significant, Radine stated:

> It was very significant when he was first born. Everyone who came to the house before they even said, "Hi" or gave any of us girls, gave any hugs said, "Take off his diaper and prove it to me."
>
> And then as he grew up, my father's set of standards for a boy were different than they were for girls.

(19 RT 4101.)

Martin and his sisters Janet and Mary were close in age and the three of them had a special bond. Janet was approximately 18 months older than Martin. (19 RT 4150-4151.) Mary was around 19 months younger than her brother. (19 RT 4150-4151, 4196.) Mary described how important Martin had been to her growing up:

> Martin and I just were always there together. He helped me through everything. And, I mean, we did fun things when we could, but we didn't have anything.
>
> And as I was growing up he was always there for me. And like at Christmas time one year he saved everything he could and bought me this radio. And that was all his money he had worked for. That's the kind of relationship I had with him.

(19 RT 4197.)

The older sisters, Radine and Rachel, testified about what a kind and responsible teenager Martin Ganz had been. Martin was in high school and living at home when his sister Rachel had her children. Rachel was a single mother for a number of years, and needed to work full time to support her children. Martin spent a lot of his free time helping their mother baby sit for Rachel's daughter, Lorine. When Rachel's son Don Ganz was born, she asked Martin to be his godfather. The jury was shown a photograph of the godparents, Martin and Radine holding Don at the christening. (19 RT 4173; People's Exhibit 163A.) [49] Martin was only 16 years old when he baptized Don. (18 RT 4107; 19 RT 4173.)

b. Childhood interest in police work and career path.

Everyone who knew Martin Ganz was aware that he had aspired to becoming a police officer from the time he was twelve years old. (See 18 RT 4103; 19 RT 4216.) The entire Ganz family encouraged him and supported his interest in police work. (18 RT 4103; 4110-4111.) In high school Martin joined the Explorer Scout program and quickly got to know many of the local police officers. (18 RT 4093-4094;19 RT 4151-4152.) His sister Janet testified about his enthusiasm for the Explorer Scout program:

> He would come home all excited. Martin had a passion for it so everyone in the family knew how much it meant to him, and he would come home and he practiced section codes and memorized them and tried to have us give him numbers with the list of what corresponded to what. He practiced how to

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The trial court overruled defense objections that the photograph was too remote and not relevant. (19 RT 4116-4117.)

> handcuff people, how to protect yourself. Anything he learned during his training he would come home and try it out on us and show me how to do it and what he learned.
>
> ***
>
> As an example, when he learned how to handcuff someone, the next thing I know he was practicing handcuffing me and having me against the wall.

(19 RT 4152.) [50]

The sisters testified about how Martin Ganz pursued his goal of becoming a police officer despite several obstacles. Radine recalled him asking her for advice about a college major. (18 RT 4103.) Martin took some college courses related to law enforcement and tried, unsuccessfully, to get a job with a police department. (19 RT 4161.) Martin then decided to enlist in the United States Marines. Janet described how he took this step to further his goal of becoming a police officer:

> He graduated from high school, started taking some police classes at the college trying to get hired on with the police department but no one would hire him because he was too young. So he figured if he went into the military, he would join the Marines, specifically, to become a military police officer because he could add that to his resume to show his department though he was young he would be dedicated.

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During Janet's testimony, the jury viewed 3 photographs marked People's Exhibits 162 A through C [for reference only]. The photographs showed Martin Ganz in the 10th grade practicing his Explorer "moves"; Martin in his Explorer Scout uniform in the 12th grade; and Martin and his sisters at his Marine graduation ceremony. (19 RT 4162-4163.) Defense counsel's objections were overruled. (19 RT 4148.)

(19 RT 4161-4162.)

In 1983 Martin Ganz graduated from Marine Boot Camp and became a military police officer. The jury was shown a photograph of Martin and his sisters taken at the graduation ceremony. (19 RT 4148; 4162-4163; People's Exh.162C.) Martin Ganz received a special commendation for bravery while in the Marines. Mary related the circumstances of the incident which occurred at Camp Pendleton in August 1984.[51] She prefaced her testimony by explaining that she had been disappointed because Marine duty prevented Martin from attending her wedding.

> He couldn't come, and he felt really bad, and, of course, I was upset. And -- but it's something he had to do.
>
> While he was there, he saved some man off the 5 freeway. He jumped the fence, ran out on the 5 freeway dodging cars, climbed up on a burning diesel, whatever those big trucks, and pulled the unconscious -- semi-unconscious man out of the car. And there was diesel fuel all over.
>
> And he brought him down all by himself. And he was bigger -- this man was bigger than him. And he saved that man's life. And then -- I mean, he didn't make no big deal out of it. He didn't even tell me until the Secretary of the Navy or somebody sent him or gave -- I don't know. They met, and they gave him -- I remember talking to my mom. And he got the certificate of -- I don't know.
>
> Whatever you get in the Navy, they gave it to him for saving this man's life. And they wrote him this letter. And it was a

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51 The prosecutor posed the following question: "Can you tell us some character -- some event or something, some incident in Martin's life that stands out in your mind as something that indicates what kind of character he had?" (19 RT 4207.)

> big to-do. And he didn't make anything of it. And I didn't even know.
>
> And it's like he would risk his life for anyone. And that's the kind of person he was.

(19 RT 4207-4208.)

Later in her testimony Mary explained that she had been completely unaware of the incident for several years afterwards: "I was visiting my mom, and she told me. And [Martin] was there, made it like it was no big deal, that he wasn't a hero." (19 RT 4217.) Mary stated that their mother had the certificate and the letter mounted on wall plaques and displayed them in her home. (*Id.*) [52]

Martin Ganz began his law enforcement career in a civilian position. In the 1980's Martin met some officers of the Manhattan Beach Police Department ("MBPD") through his work with the Explorer Scout Program. (19 RT 4224.) In May of 1988 the Department hired him to work as a "Police Services Officer." The MBPD had received a "seat belt grant" from the Office of Traffic Safety, and Ganz's assignment was to work on increasing public awareness about using automobile seat belts and child restraints. (19 RT 4126-4127.) MBPD Officer Neal O'Gilvy described how they came to be friends during this time because Martin spoke to him

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At the prosecutor's request, Mary retrieved the certificate and the letter from a scrapbook she had brought with her to court. (19 RT 4208-4209.) The documents were circulated to the jurors over defense objections. (19 RT 4209-4211; People's Exh. 166 [for reference].)

on a daily basis looking for "crash cars" to display around the city to remind people to wear seat belts. (19 RT 4224.)

It was Martin's Ganz's idea to create a children's coloring book and use the "Woody Woodpecker" cartoon character to encourage children to wear their seat belts. (19 RT 4127; 4155-4156; 4198-4199.) Martin wrote the text and then contacted the Hanna Barberra artist who drew Woody Woodpecker and convinced him to draw the pictures. (19 RT 4198-4199; 4224-4225.) The coloring book was displayed for the jury and admitted into evidence. (People's Exh.159 I.) His sister Mary explained why Martin Ganz chose to use the coloring book as part of his seat belt safety campaign: "Back then [wearing seat belts] wasn't cool and parents didn't do it, so they were trying to push it to the children to wear seat belts." (19 RT 4199.)

In May of 1989, the MBPD hired Martin Ganz as a police recruit. (19 RT 4127.) He attended the Los Angeles County Sheriff's Academy for training from May to September of 1989. (19 RT 4128-4129.) MBPD Chief Ted Mertens was present for Officer Ganz's graduation from the Academy. During his penalty phase testimony Chief Mertens explained for the jury several different photographs taken at the graduation ceremony. (19 RT 4128-4129; People's Exhs.161 A - D.)

c. Martin Ganz's police career.

After graduation, Martin Ganz was sworn in as a probationary police officer. (19 RT 4129.) He worked for some time as a motorcycle officer. MBPD Sergeant Nilsson identified a photograph of Martin Ganz at this time: "As a young motorcycle officer there where his hair was a lot shorter than he liked it, but it made the helmet comfortable. I remember telling him how I wouldn't go to his funeral, that no traffic ticket was worth dying on a

motorcycle. How I worried about him on that thing." (18 RT 4092; People's Exh.159 .) Officer Neal O'Gilvy related how much Martin Ganz enjoyed his motorcycle duty: "He -- he loved his job. This was his -- this was his cup of tea. He got to eat his cake and enjoyed every minute of it and got to ride a fast police motorcycle up and down the street all day long." (19 RT 4226.)

Upon joining the force, Officer Ganz volunteered to participate in several special programs. D.A.R.E. is a program in which police officers hold a series of classes for school children, typically in the fifth and sixth grades, to educate them about the dangers of drug abuse. (19 RT 4139-4140.) Officer O'Gilvy explained why he encouraged Martin Ganz to get involved in D.A.R.E.

> [T]hat's why I encouraged him to go into D.A.R.E. for that reason. And he was so -- had such strong feelings about people driving under the influence, kids under the influence, kids consuming drugs and alcohol that after lengthy conversations we had about it, he went into the D.A.R.E. program.
>
> It's not an easy program to be involved in. It's a lot of training. It's a lot of time with kids that are -- you know, don't want to listen. And he understood that when he got into it, and that's how the rapport carries on.
>
> And then, you know, we hit them again high school, junior high, and hopefully we'll have an effect on their lives when it comes to drugs and alcohol.

(19 RT 4241-4242.)

Several witnesses testified that Martin Ganz loved children and had a natural rapport with them. Officer O'Gilvy spoke about how much Ganz enjoyed working with sixth graders as a D.A.R.E. officer:

> And he started teaching the schools. And I gave him one of my schools which turned out to be Pacific, which to me was the easiest school to teach.
>
> And I gave him the school, and he went crazy over there with the kids playing basketball in his uniform and just really mixing it up with the kids.
>
> And then when their graduation was coming along, he'd make a real big deal about it, get them pizza and cokes.

(19 RT 4227.) O'Gilvy also described Ganz's compassion for children in other situations.

> And there was other times when he was real serious with kids. I remember one time we arrested a mother that was under the influence of drugs. And I was kidding Marty about, you know, being a father image and stuff. And I saw him go to -- go to the station with little kids because there was no parents to pick them up. And I saw him take off his gun belt, and he was wearing his big motor boots, and he's laying on the carpet with the kids playing with them until somebody could come down and pick them up.

(19 RT 4227.)

Chief Mertens testified that Martin Ganz was an extraordinarily effective D.A.R.E. officer.

> He was involved as a D.A.R.E. instructor in local elementary schools, and he was very well respected in that regard. As I say, the children -- my children having gone to the same schools, the children would come up and recognize me and talk to me about their D.A.R.E. Officer, Officer Ganz.

(19 RT 4132.) Over defense objections,[53] Chief Mertens related a specific example of Ganz's success in the D.A.R.E. program:

> The most significant thing that I can recall, and I remember this because an individual approached me about it, was that Officer Ganz took the time to listen to an individual who was having some very difficult time at home with mother-father kinds of issues and some things that were going on. That individual, that child, if you will, a couple of years later approached me and told me that because of Officer Ganz he had been able to work through those difficulties in his home life, and he felt very comfortable, and he was very, very glad that he had had the opportunity to have that interaction with Officer Ganz.

(19 RT 4146.)

Martin Ganz had very strong feelings about people driving under the influence of drugs or alcohol. (19 RT 4241.) He volunteered to work on a regional DUI task force. (19 RT 4134.) Task Force members were officers from 20 city police departments who would team up to work through the night arresting drunk drivers. (19 RT 4228.) Officer Ganz always wanted to stay late and work extra hours. (19 RT 4225-4226.) His supervisor, Sergeant Karl Nilsson, stated: "I'd see Martin a lot of nights working overtime assignments, particularly during the holidays when there were drunk drivers. He'd play a part of the regional task force that would go out through the South Bay and bring in drunk drivers." (18 RT 4086-4087.) Officer Ogilvy also testified about Martin Ganz's zeal for this project. He described a typical conversation with his friend:

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53 The trial court overruled defense counsel's hearsay objection. (18 RT 4144-4145.)

And this picture is taken right before they went to the game in my apartment.

Q. Are they wearing Marlins uniforms?

A. Yes. Martin wanted them to have the Marlins hat, matching hats, and the shirts, and so he stopped at one of those outlet stores that Florida has because, of course, it's a big thing the Marlins being a new Florida team, so he wanted to be all in dress for their first baseball team together. And of course, it was Martin's favorite team they were playing too.

(19 RT 4173-4174; People's Exh.163 C.)

Pam Hamm's testimony reflected how deeply Martin Ganz felt his responsibility for Don. Pam related a telephone conversation with Martin on December 27, 1993 in the last hours of his life:

He called me just before he left for work on December the 27th. And I begged him to take the evening off. I said, "Take the night off. I know things are going to be slow at work. We'll spend the evening together. Your family is here from out of town. We'll spend time with them, and we'll just be together." And his words to me were, "Well, this is my nephew Don's last night here in town, the last night that he would be able to go on a ride along with me, and I need to teach Don right from wrong."

(19 RT 4185-4186.)

A few hours later Martin called Pam to tell her how the ride along was going and just "to say I love you." That was the last time they spoke. (19 RT 4186.)

The eldest sister, Radine, related a story demonstrating her brother's ongoing concern for his sisters. In 1993 Radine met Martin for dinner to

celebrate his twenty-ninth birthday. She testified about part of their conversation:

> And at that dinner we talked about a lot of things. He was very concerned about all of us getting along in our various lives including his getting along with us.
>
> And he also had a new idea that he was sharing with me to see where he could take it in order to help both the police force he worked for and his family. And being his sister, it was very important to me.
>
> But at the same time I told him that he didn't have to worry about me, that I had been out in the world a long, long time. But with this idea that he wanted to do for the police force, he wanted to have a hand-held -- like a calculator that would give the policemen an opportunity to immediately know what piece of code they needed to go to to take care of their traffic reports.
>
> And this started out as an idea because everyone on -- well, not everyone, but a majority of his fellow officers on his force were always asking him to quote the regs for them because it was easier to get it from Martin than it was to go and find it in the code.
>
> ***
>
> And we also talked about where it would go if it was successful. And he was more concerned if the patent was successful in order to support the rest of his sisters so none of them would have to struggle than he was about being in charge of a company or CEO, which is a very noble thing.

(18 RT 4104-4105.)

e. Martin Ganz's enjoyment of his family and his career.

When asked to describe Martin Ganz, nearly every witness spoke of his love for police work. His sister Rachel testified about his love for his family and his work:

> Martin liked to have fun, he loved children, even though he didn't have any children of his own, he always wanted children, and he was very much into the family. He cared about his sisters and all the nieces and nephews, and he loved his job. His job was like the number 1 thing that meant a lot to him. A lot of people just go to work, and they don't have a good time. And even if it was a rough day, he still liked it.
>
> And every time he came out to Florida, the street that I live on is -- it dead ends, but the police officers in the city I live in they patrol a lot. Martin would go out and each time he would see that it was a new police officer he would stop their car, give them his police card, and talk to them because it meant a lot to him that everybody knew that he really liked his job. So all the cops that came in my neighborhood knew him before he left each time he came out.

(19 RT 4174-4175.) Janet testified:

> His happiest days was when he went to the police academy and when he was hired on with the Manhattan Beach Police Department. That was his life long goal since we were children, and he was just happy for a long time after.

(19 RT 4161.)

Martin Ganz also enjoyed his personal life and spending time with his family. The Ganz family gathered to celebrate birthdays, holidays and other family events. (19 RT 4111.) The jury saw photographs of Martin and other relatives at graduations (19 RT 4199-4200; People's Exhs.160C; 160E.) In one photo, Martin Ganz is shown at his sister's Halloween party

dressed as the Disney character "Goofy." (19 RT 4200; People's Exh.160.) Several pictures showed Martin with his brothers-in-law Steve and Randy, and with his sisters and niece at Radine's Christmas parties. (19 RT 4199; People's Exhs. 160B, 160D; 160E.)

The four Ganz sisters described their brother's enjoyment of Christmas and the family holiday traditions. Radine gave a Christmas party for the family each year on the Sunday before the holiday. (18 RT 4107; 19 RT 4169; 19 RT 4199.) Martin attended in 1993 although he had to work later in the evening, and this was the last time Radine saw him alive. (18 RT 4107.) Every year he spent Christmas Day with Mary, her husband Steve, and their young children. (19 RT 4201.) Martin always volunteered to work on Christmas Eve so that the married officers could be with their families. (19 RT 4200; 4202.) Mary described their holiday tradition:

> He didn't live with me, but he would come at 4:00 o'clock in the morning. He had his own key. And he would come and sleep on the couch to spend Christmas with my husband and I and the kids.

(19 RT 4201-4202.) The jury saw a portion of videotape taken on Christmas morning 1993 at Mary's house. (19 RT 4201; People's Exh.165.) Martin Ganz is seen passing out gifts to various nieces, nephews and other family members. A woman is heard commenting on his generosity, exclaiming "Oh Martin, I can't believe you did this." (*Id.*) Children are heard expressing delight in gifts they received from their Uncle Martin. (*Ibid.*)

Pam also testified about Martin Ganz's generosity and how they enjoyed Christmas day of 1993, the last time she saw him alive:

> It was Christmas morning. And -- well, Christmas afternoon I guess. He spent the morning with his family, then he had to work late in the afternoon. So he came to my house in between, and he and my mother and I sat in the living room and opened our gifts and laughed and drank hot chocolate and just had a wonderful time.
>
> ***
>
> Christmas morning, like I said, when we were all at my house opening gifts and he was like Santa Claus when he walked through the door. He had -- his arms were full. We didn't even know who was at the door when we opened it. You couldn't see him. He was just piled with gifts for me and my mom. He came upstairs. And amongst the other things, one thing he gave me was a Christmas card that I absolutely treasure.

(19 RT 4187.) Over defense objections, Pam read the card aloud and explained its meaning:

> On the cover it says, "For the one I love at Christmas." Then on the inside printed it says, "At Christmas as we celebrate bright blessings from above, I thank the Lord for giving me the wonder of your love. No other blessing could provide the happiness I feel inside. Merry Christmas, with love." And then in Martin's writing it says, "Pam, this card says it all. The picture shows it all. I love you. Merry Christmas. Love you always, Martin, 1993."
>
> The picture reference that he makes in here is not the picture on the card. It's -- one of the gifts that he gave me was a picture of a little boy and a little girl, and she's got long blonde hair, and he looks a lot like Martin. And he's handing her a rose. And it's actually a poster, and it was framed. And it was beautiful, and it's also something that I cherish.

(19 RT 4189.) [54]

f. Martin Ganz's future plans and aspirations.

The witnesses spoke about Martin Ganz's future in addition to describing his past. The jurors heard testimony relating Ganz's plans for his career and his personal life. At the time of his death Martin Ganz was engaged to marry Pam Hamm.[55] (19 RT 4178.) Pam met Martin Ganz while she was working as a judicial assistant in the Torrance courthouse. She testified at length about their courtship:

> It was a little over eight years ago. It was right here in this building exactly in the courtroom exactly two floors below here. And my desk was situated somewhere over where the clock is in this courtroom.
>
> And I was sitting there doing my computer entries. It was a Wednesday, and the courtroom was very crowded. It was a trial day. We had officers. We had an audience full of people, quite a few attorneys in the courtroom.
>
> And I usually lost myself in my work making my computer entries. And I remember all of a sudden out of the corner of my eye in through the front door of the courtroom walked a man wearing a suit and a Mickey Mouse tie. And I knew the instant that I saw him that he was going to be a part of my life. I had no idea how or when or to what degree, but I knew he was -- there was a connection. There was an absolute connection.

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54 The Christmas card was passed to the jurors over defense objections. (19 RT 4188-4189; People's Exh.164 [by reference].)

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(19 RT 4179.)

Over the three years that followed, Pam and Martin became friends. They chatted whenever Martin came to her courtroom. (19 RT 4179-4180.) Pam was subsequently transferred to another courthouse, but Martin located her about eight months before he died. He asked her to lunch, and when she returned to work that afternoon a dozen red roses were on her desk with a card from Martin thanking her for the lunch. (19 RT 4180.) From then on, Pam and Martin were "inseparable." (19 RT 4181.)

Pam testified about the plans she and Martin Ganz had made for their future:

> We had all kinds of plans. We were going to get married, going to have a family. When all of this happened, he was in the process of remodeling the kitchen at the home he bought from his mom, and he was basically customizing it for me because he knew how much I loved to bake. So he had planned to put double ovens in there. And his reasoning for that was the quicker I got done with the cookies the more time I could spend with him.
>
> So everything that he did he did with me in mind.

(19 RT 4185.)

All of the witnesses knew that Martin Ganz loved being a police officer. The three police department witnesses testified about Ganz's career aspirations and the plans he was unable to fulfill. Officer O'Gilvy stated:

> He wanted to do everything in the Department. He wanted it all today. He wanted to be a D.A.R.E. officer. He wanted to be on S.W.A.T. He wanted to be a motor officer. He wanted to be in the Marine Corps. He wanted to do it all.

> And I kind of kept reminding him he had to slow down a little bit. He had 30 years. He had plenty of time to do a lot of these things.

(19 RT 4226.) Combined with Pam's testimony about their plans to marry and have a family, the mentions of Martin Ganz's remodeling of the family home, the pathos of this testimony is unmistakable.

2. The Victim Character Evidence Was Excessive, Largely Irrelevant And Overwhelmingly Prejudicial, and Vastly Exceeded Any Case Previously Considered by the California Supreme Court.

Victim impact evidence (including victim character) is relevant and admissible under California law as a "circumstance of the crime." (*People v. Robinson supra,* 37 Cal.4th 592, 651; *People v. Edwards, supra,* 54 Cal.3d 787.) The California Supreme Court has not, however, indicated where the outer limits of victim character evidence may be found. The Court has rejected requests to confine evidence of the victim's characteristics to matters which the defendant knew or might have observed. (See, e.g., *People v. Roldan, supra*, 35 Cal.4th 646; *People v. Pollock, supra,* 32 Cal.4th 1153.) This state's capital decisions to date have not required the Court to make this determination because, unlike the present case, those cases did not involve extensive or detailed victim character evidence.

Capital defendants have typically raised challenges to the relevance and/or prejudicial nature of only *one or two* items of victim character information. In *People v. Pollock, supra,* 32 Cal.4th 1153, the prosecution

presented victim impact/victim character testimony about the two elderly victims, Mr. and Mrs. Garcia. Mrs. Garcia was described as "a very generous and kind person, and a devoted wife and mother." Mr. Garcia was said to be "hardworking and enthusiastic, with a great sense of humor." (*Id.* at p. 361.) On appeal the defendant challenged only one aspect of the victim character evidence claiming that it constituted an improper appeal to the jurors' religious sentiments. A family friend testified that she met Mrs. Garcia twenty years earlier when the latter taught Sunday school, and that more recently she and Mrs. Garcia participated in a weekly Bible study group. The California Supreme Court found that the characterizations of the victims had been relevant and appropriate. The brief reference to Mrs. Garcia's interest in Bible study was not an improper appeal to religious feeling. This information was not unduly prejudicial and was relevant to explain the origin of the witness's acquaintance with the victims and to show that they shared activities. The California Supreme Court recently rejected a claim of undue prejudice based on testimony describing the victim, his family life and his character. (*People v. Roldan, supra,* 35 Cal.4th 646.) While the *Roldan* case involved more victim character information than *Pollock*, the evidence was nowhere near as voluminous or as inflammatory as the victim character evidence pertaining to Officer Ganz. In *Roldan*, the victim's widow testified about their life together, explaining how he worked three jobs to support the family of nine children, volunteered in the community and preached the Bible to juveniles in custody. This Court found that the evidence was "not so inflammatory that it would tend to divert the jury's attention from the task at hand." (*Roldan, supra,* at p. 732, citing *People v. Zapien, supra,* 4 Cal.4th at p. 992.) *Roldan*

is particularly relevant when the factors supporting its holding are compared to the circumstances of this penalty phase. The California Supreme Court, in explaining that the widow's testimony in *Roldan* had not been unduly prejudicial, stated:

> [Her] time on the stand was relatively short and subdued, and no other family member testified. The trial court properly exercised its discretion by excluding the many plaques and certificates bestowed on the victim for community work and individual heroism. . . . Evidence from a surviving spouse, though no doubt possessing a strong emotional impact, was not overly inflammatory.

(*Id.* at pp. 732-733.) A videotape prepared by the victim's widow was also excluded, and the *Roldan* jurors saw only one photograph of the victim with his nine children. (*Id.* at p. 732.)

The differences between *Roldan* and the victim impact/victim character presentation in Roger Brady's case are readily apparent, and the California Supreme Court's opinion suggests that those distinctions may be outcome determinative. In *Roldan*, this Court considered the quantity of victim character testimony and the overall size and scope of the victim impact presentation. A single witness testified in *Roldan*, and the jury saw only one photograph of the victim and his children. Jurors in Roger Brady's case heard from eight witnesses and viewed over twenty photographs. In *Roldan* the trial court *excluded* a videotape and several of the victim's plaques and civic awards, whereas this jury saw two videotapes and a variety of awards and certificates.

This Court's remarks in the *Roldan* also indicate that the tenor of the testimony is an important factor in the assessment of prejudice. The *Roldan* opinion notes that the widow's time on the stand was "relatively short and

subdued." [56] (*Id.* at pp. 732-733.) Roger Brady's case is distinguishable on this basis as well. The eight witnesses who testified about Martin Ganz spoke at length, and their testimony was anything but subdued. (See, e.g., Section H, *infra*.) The dramatic value of much of the victim impact/victim character testimony is obvious even when read from a "cold record," and several witnesses became visibly upset while testifying.

The victim character evidence pertaining to Officer Ganz was unique in several respects. In addition to the overwhelming quantity of material, the content of the testimony was more prejudicial than in any case previously considered by this Court. As discussed in greater detail below, the victim character evidence admitted here contains multiple forms of prejudice which other courts have found to be improper in capital sentencing. For all of these reasons, this is the "extreme case" justifying reversal under California law. (*People v. Smith, supra,* 35 Cal.4th 334, 365.)

3. Limits on victim character imposed by other jurisdictions.

Following *Payne v. Tennessee,* the challenge for lower courts has been to allow enough information to provide the victim with some identity while excluding evidence likely to interject an arbitrary factor into the sentencing decision by provoking an overly emotional response from the jurors. Several appellate courts have adopted standards for determining the appropriate quantity and content of evidence about the victim's character, background and life history. Courts in these jurisdictions uniformly

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The respondent's brief on file in *People v. Roldan* indicates that the widow's testimony covered approximately 20 transcript pages. (See Brief of Respondent, *People v. Roldan* S030644, at p. 121.)

disfavor detailed descriptions of the victim's background and character traits. Anecdotes are generally viewed as unduly prejudicial, as are certain topics of testimony such as remembrances of the victim's childhood and discussions of the victim's future plans or family members' hopes and aspirations. As discussed below, the evidence and testimony regarding Martin Ganz's character and life history was excessive and highly prejudicial according to every one of these standards.

a. Descriptions should be brief and generally stated.

Shortly after the United States Supreme Court's decision in *Payne v. Tennessee*, the Louisiana Supreme Court issued an opinion to guide trial courts in this area. In *State v. Bernard* (1992) 608 So.2d 966, the Louisiana high court warned trial courts of the prejudice resulting from in-depth evidence of the victim's character.

> Informing the jury that the victim had some identity or left some survivors merely states what any person would reasonably expect and can hardly be viewed as injecting an arbitrary factor into a sentencing hearing. But the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence to the circumstances of the crime or the character and propensities of the defendant. And the more marginal the relevance of the victim impact evidence, the greater is the risk that an arbitrary factor will be injected into the jury's sentencing deliberations.
>
> [I]ntroduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal

> because of the influence of arbitrary factors on the jury's sentencing decision.

(*Id.* at pp. 971-972.)

The New Jersey Supreme Court restricts victim character information to "[a] general factual profile of the victim, including information about the victim's family, employment, education and interests." (*New Jersey v. Muhammad* (1996) 145 N.J. 23 [678 A.2d 164,180].) The court in *Muhammad* further cautioned that "testimony should be factual, not emotional, and should be free of inflammatory comments or references." (*Id.*) The Tennessee Supreme Court also disfavors detailed or extensive victim character evidence. "Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed." (*State v. Nesbit* (1998) 978 S.W.2d 872, 891. See also *United States v. Glover* (D. Kan. 1999) 43 F.Supp.2d 1217, 1235-1236 [prosecution witnesses limited to presenting a "'quick glimpse of the victim's life . . .'" including "a general factual profile of the victim [and] information about the victim's family, employment, education and interests . . . ;" it must be "factual, not emotional, and free of inflammatory comments or references"] .)

The Louisiana Supreme Court's decision in *State v. Taylor* (1996) 669 So.2d 364, provides a useful example of properly limited victim impact/victim character testimony. Three victim impact witnesses testified in *Taylor*: the sister, niece and fiance´ of the victim. The opinion contains the following description of the testimony:

> Lisa Reeves, the victim's younger sister, stated that illness during Ponsano's high school years prevented her from

> graduating and from bearing children. She recalled that Ponsano loved children very much, and that her infertility had a dramatic effect upon her life. According to Reeves, Ponsano was a giving person who took care of others, including Reeves' oldest daughter, Wendy, who looked upon Ponsano as a mother. As to the effect of Ponsano's death upon her life, Reeves testified that she has suffered, and that she misses her sister very much.
>
> Wendy Reeves, the victim's 13-year-old niece, stated that she was very close to Ponsano, and called her "mother." She testified that they spent almost every day together, and that she discussed her problems with Ponsano. Wendy stated that she missed her aunt very much, and that she felt like a part of her life was taken away when Ponsano died.
>
> James Shatzel, the victim's fiance, testified that Ponsano was a great person. He stated that she was the best thing he ever had, and that he would probably never have another like her. He said that Ponsano treated him lovingly, and cared deeply for his two children from a previous marriage. He stated that he loved her very much, and that he and his children miss her.
>
> Shatzel testified that he found out about the shooting while working on his job at Capital City Press. He recalled reading about the events as they came off the press, and that this was not a pleasant way to find out that his fiancee had been shot. Shatzel went to the hospital, and stayed there until Ponsano was pronounced dead two days later. Shatzel stated that if he had one more chance to talk to Ponsano he would tell her that he was sorry that their plans were "thrown out the window" and that he wishes it could have been him instead of her.

(*Id.* at p. 372.) The Louisiana Court upheld the trial court's admission of this evidence, specifically noting the absence of detailed descriptive information and illustrative anecdotes:

> [The testimony] did not contain "detailed descriptions" of Ponsano's good qualities or of the survivors' sufferings . . .

> [r]ather, each of the three witnesses simply gave general statements about Ponsano's virtuous nature, and her love of children. No specific examples were elicited, and the state did not dwell upon this topic. (*Ibid.*)

The Texas court in *Mosley v. State*, *supra*, 983 S.W.2d 249 applied a similar standard to find that no error resulted because the descriptions of the victims were stated in broad generalities. In *Mosley* three witnesses gave relatively brief testimony (the combined total of victim impact occupied only 34 transcript pages) pertaining to the four murder victims. The witnesses' descriptions were limited to the victims' basic personality traits such as kindness, friendliness and generosity. The court found that this brief and non-specific victim character material served only to humanize the victims and was not unduly prejudicial. (*Id.* at p. 265.)

b. Anecdotes and in-depth discussions of specific traits are disfavored.

The victim character evidence in this case amounted to a catalog of nearly every possible human virtue. As seen in the excerpts of testimony set forth above, the witnesses embarked upon detailed explications of Martin Ganz's numerous admirable qualities, including bravery, loyalty, perseverance, tenacity, kindness, selflessness, generosity, humility and responsibility. In several instances, more than one witness testified about the same aspect of Ganz's character, and the testimony was replete with illustrative anecdotes.

It is not unusual for the victim's family members or friends to mention some aspect of the victim's character in the course of their penalty phase testimony. Reviewing courts have not found brief or isolated references sufficiently prejudicial to require reversal. (See, e.g., *Black v.*

Collins (5th Cir. 1992) 962 F.2d 394, 408 [description of victim as "a hard-working, devoted wife and mother"]; *Wiggins v. Corcoran* (D. Md. 2001) 164 F.Supp. 2d 538, 572 [one friend testified that victim was "a very happy-go-lucky person," who was "always thinking of something interesting"]; *Roberts v. Bowersox* (E.D. Mo. 1999) 61 F.Supp.2d 896, 936 [testimony of two friends that victim was a kind person and they had a close friendship "like the Three Musketeers"] .) The victim character evidence pertaining to Martin Ganz's character did not consist of "brief or isolated references" volunteered by the witnesses.[57] Each of the witnesses in this case were asked to give the jury a description of Martin Ganz. Moreover, the prosecutor was not searching for generalized impressions. Witnesses were asked to relate anecdotes demonstrating some particularly significant aspects of the victim's character. [58] The likelihood of undue prejudice increases where victim character evidence is presented through specific examples or anecdotes. (See, e.g., *Lambert v. State* (Ind. 1996) 675 N.E.2d 1060, 1065; *Cargle v. State* (1995) 909 P.2d 806, 824-825, fn. 12.) In addition to their lengthy testimony about Ganz's life history, personality, and character, these witnesses related a number of emotionally compelling

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Compare *People v. Hardy* (1992) 2 Cal.4th 86, 200-201 [825 P.2d 781, 5 Cal.Rptr.2d 796] (fact that the victim was raising her cat's kittens when she was killed not unduly prejudicial).

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The prosecutor asked each witness a question similar to the following: "Can you tell us some character -- some event or something, some incident in Martin's life that stands out in your mind as something that indicates what kind of character he had?" (See, e.g., 19 RT 4207.)

anecdotes. The anecdotes not only corroborated their testimony about the victim but engendered tremendous sympathy for the witnesses themselves.

c. Life history evidence is irrelevant and unduly prejudicial.

The jurors in this case heard evidence about Martin Ganz's background which was literally a cradle to grave biography. Officer Ganz's entire life history was imparted through compelling testimony featuring illustrative anecdotes and charming family stories. The four Ganz sisters described the difficulties the family faced and each of them told of how their hardships were eased by their exceptionally kind and responsible brother. They and other witnesses spoke of Martin Ganz's childhood dream to become a police officer. The jurors saw photographs of Ganz as a young teenager in his Explorer Scout practice and, through testimony and photographs, followed his career as he worked to attain his childhood ambition. This evidence was completely irrelevant and, according to standards used in other jurisdictions, should not have been admitted.

Nothing in the United States Supreme Court's decision in *Payne v. Tennessee* suggests that the victim's personal history is relevant. "A 'glimpse' into the victim's life and background is not an invitation to an instant replay." (*Salazar v. State, supra*, 90 S.W.3d 330, 336.) In *Conover v. State* (1997) 933 P.2d 904, the Oklahoma Court of Criminal Appeals explained the lack of relevance and inherent prejudice of life history information:

> Comments about the victim as a baby, his growing up and his parents hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; nor do they show how the circumstances surrounding his death have financially, emotionally, psychologically, and physically impacted a member of the

> victim's family. These types of statements address only the emotional impact of the victim's death. The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a "reasoned moral response" to the question whether a defendant deserves to die; and the greater the risk the defendant will be deprived of Due Process.

(*Id.* at p. 921, quoting *California v. Brown* (1987) 479 U.S. 538, 545 [107 S.Ct. 837, 841, 93 L.Ed.2d 934].)

Another Oklahoma case notes the especially inflammatory effect produced when life history information is combined with testimony and illustrative anecdotes about the victim's exceptional character. In *Cargle v. State* (1995) 909 P.2d 806, the Oklahoma Court held that the trial court erred by admitting this type of evidence. The testimony in *Cargle* covered only twelve transcript pages, a fraction of the victim impact testimony presented here.[59] In *Cargle* a single victim impact witness (the victim's sister) read a prepared statement for the jury. The Oklahoma Court's opinion characterizes the statement as "detailing the life [of the victim] from childhood to his death." (*Id.* at p. 824.) The sister related a number of anecdotes demonstrating her brother's virtues including self-reliance, kindness and generosity, essentially "eulogizing him as a good kid and adult." (*Cargle* at pp. 824-825, fn. 12.)

Evidence of an adult victim's childhood is clearly irrelevant and is widely regarded as especially prejudicial. (*Conover v. State*, *supra*, 933 P.2d 904, 921; *Salazar v. State*, *supra*, 90 S.W.3d 330.) The testimony

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The witness' entire testimony in *Cargle* covered approximately 12 transcript pages. *Each* of the eight witnesses who testified about Officer Ganz and the impact of his death testified for at least 12 pages of the record.

about Martin Ganz as a child was a particularly inappropriate aspect of the life history testimony. Officer Ganz was 29 years old at the time of his death. Information about his childhood was completely unrelated to any circumstances "materially, morally or logically surround[ing] the crime." (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.)

3. The Abundant, Hagiographic Testimony Was Unduly Prejudicial.

The glowing descriptions of Officer Ganz along with the numerous family stories, photographs and assorted memorabilia made for an impressive presentation which would have been appropriate for a memorial service. This is not, however, the purpose of the penalty phase in a capital case. As the Kentucky Court stated in *Bowling v. Commonwealth* (1997) 942 S.W.2d 293, "Just as the jury visually observed the appellant in the courtroom, the jury may receive an adequate word description of the victim *as long as the victim is not glorified or enlarged.*" (*Id.* at pp. 302-303 [emphasis added].) The anecdotes and detailed discussions of Martin Ganz's character transformed the overall tone of the testimony into an extended eulogy which had no place in the sentencing phase of a capital trial. (See *Salazar v. State, supra*, 90 S.W.3d 330, 335-336; *State v. Dennis* (1997) 79 Ohio.St.3d 421, 432-433 [683 N.E.2d 1096] [victim's mother's statement at sentencing was improper but harmless as the jury had already determined the sentence].)

In *Salazar v. State* (a case the California Supreme Court recently called an "extreme example of such a due process infirmity") [60] the

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(continued...)

defendant's sentence was reversed [61] based on the admission of emotionally charged victim character and life history evidence. Jurors in *Salazar* saw a 17-minute video montage of approximately 140 still photographs of the 20 year-old victim. The photographs (roughly half of which were taken when he was a young child) showed the victim in a number of charming and sentimental poses, and the videotaped montage was accompanied by a musical soundtrack. (*Id.*, at p. 333.) The Texas Court of Criminal Appeals observed 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 pp. 335-336.)

The victim character evidence in this case was far more plentiful than the evidence in *Salazar* and even more powerful. The *Salazar* jurors spent 17 minutes viewing a collection of endearing still photographs accompanied by sentimental popular music. This display was certainly unduly prejudicial and inappropriate for all of the reasons cited by the

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[60](...continued)

People v. Robinson (2005) 37 Cal.4th 592, 656-657 [724 P.3d 363, 36 Cal.Rptr.3d 760].

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The defendant in *Salazar* was 16 years old when helped an adult co-defendant to kill the victim after a dispute arose in connection with a drug deal. Although charged with capital murder and tried as an adult, the defendant was found guilty of a lesser included, non-capital, murder charge. (*Salazar, supra*, at p. 332 fn.2.) The *Salazar* court noted that, according to Texas law, "victim impact evidence may be admissible at the punishment stage of a [non-capital] criminal trial when that evidence has some bearing on the defendant's guilt." (*Id.*, at p. 335, citing *Mosley v. State*, *supra*, 983 S.W.2d 249, 261-262. See also *id.* at p. 335, fn.5, and cases cited therein].)

Texas high court. It was, however, mercifully short when compared to the flood of victim impact that washed over the jurors in this trial. The jurors in Roger Brady's penalty phase spent a full day and a half immersed in a victim impact/victim character presentation that more closely resembled a wake than a legal proceeding. The witnesses told stories about the victim, related anecdotes and remembrances of their family and the victim's childhood. Jurors heard about how the victim overcame adversity to pursue his dream of becoming a police officer, and learned of his plans for the future which would never be realized. The exhibits that accompanied this testimony were at least as emotionally charged as the *Salazar* video montage and arguably more so. Jurors in this case saw approximately twenty photographs; several of them showing the victim as a child and as a young adult. There were two different videotapes (with a combined total time of just over eight minutes), each with its own emotional force. The professionally filmed funeral tape was filled with evocative, patriotic images including the American flag, the bag piper, and the rifle salute. The Christmas videotape, showing Martin Ganz opening gifts with his family only two days before he died, made a powerful appeal to sentimental associations with family and holidays. (See People's Exhs. 165 and 167.)

By no stretch of language or logic can the victim impact and character evidence in this case be characterized as a "glimpse of the life." It is fantastic to think that any juror could set aside the emotions triggered by this display and render a verdict based on reasoned moral judgment. The trial court's failure to limit this evidence and testimony was a denial of Roger Brady's rights to due process of law, fundamental fairness and reliable determination of the penalty. Reversal is, therefore, required.

G. The Impact of the Crime On The Ganz Family.

There were a few areas in which the evidence of the impact felt by Officer Ganz's family were unusually prejudicial and irrelevant. Over repeated defense objections, two of Officer Ganz's sisters told jurors that the crime also killed their mother.[62] Mary gave poignant testimony about calling her mother with the terrible news of Martin's death in the early hours of the morning on December 28, 1993. (19 RT 4207.) Jurors heard about how their mother was too distraught to leave the limousine for either the church services or the enormous graveside ceremonies. (19 RT 4213-4214.) On the funeral videotape, Pam Hamm is seen leaning into the car window to speak with Mrs. Ganz, and later Mary is seen walking over to the car to present her mother with the flag that had covered the casket. (*Id.*; People's Exh. 167.)

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At a pre-trial hearing in August of 1998 (well before trial started) defense counsel expressed concern about this specific area of testimony. In a discussion of the prosecution's duty to provide discovery concerning victim impact evidence, defense counsel mentioned having learned from the prosecutor that one or more of the Ganz sisters felt that the homicide contributed to cause their mother's early death. (2 RT 265-266.) The prosecutor represented that she would not elicit this information if the case reached a penalty phase, stating:

> I will indicate that since [defense counsel] has some concern about the impact on the mother I'm not going to go so far as to say that. There is no medical evidence or anything to that effect. I would certainly on that particular issue inquire of Officer Ganz's sister to see what her feelings are based on and provide that information and have a report prepared on that issue.

(2 RT 268-269.)

During Janet's testimony, the prosecutor asked whether there had been other deaths in the family. Defense counsel objected and the court heard from both attorneys at side bar. The judge clearly advised the prosecutor not to inquire further in this area. (See 19 RT 4157-4158.) In open court the prosecutor asked Janet if the fact that Martin's death was caused by murder had particularly affected her. (19 RT 4158.) Janet spoke about her reactions (see 19 RT 4158-4160) before returning to the subject of their mother, stating: "But during this time period then my mother kind of gave up on life, and she died, and I was there in the end. I spent the last three days with her, and she basically told me and my sister that – " (19 RT 4160.) The prosecutor then elicited the information that Mrs. Ganz had been alive and living in Santa Barbara at the time of Martin Ganz's death, but died six months afterward. Over further defense objections, the prosecutor asked Janet about the cause of their mother's death. Janet stated:

> She told me that she gave up on life because she thought she was older, she had emphysema, and she knew she was going to die. She was older and she could not believe that her son was murdered, and she basically stopped taking care of herself. And I did spend the last three days of her life in the hospital with her at her side, and she said she could not cope, and she couldn't even tell us -- and that was really hard for me, but that's a different story.
>
> But at the same time my mother was in the hospital, she lived with my aunt in Santa Barbara, they were best friends. My aunt brought her to the hospital and went home, and she had a heart attack.[63] So it was very devastating on our family.

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[63] It is not clear from the record whether the heart attack was fatal.

(19 RT 4161.) The testimony attributing the elderly Mrs. Ganz's death to the homicide was purely speculative. The prosecution offered no independent evidence of a causal connection between the two events, and the witnesses who made this claim were not objective.

The allegation that Martin Ganz's shooting led to his mother's early death was certainly very prejudicial. Jurors in any capital case are bound to feel sympathy for the victim's family. In this case the jurors' emotions were already overcome by the plethora of testimony about Martin Ganz, his role in the family and the devastating effects of his death. Hearing that the family matriarch died as a direct result of the capital crime was a significant contribution to an already inflammatory body of victim impact evidence. (Compare *Young v. State* (Okla. 1999) 992 P.2d 332, 341-342 [inclusion in otherwise 'succinct" victim impact statement of information that the aunt of the two victims had a fatal heart attack upon hearing of their bludgeoning deaths did not violate due process where defendant had opportunity to cross-examine the presenter and did not object to the victim impact statement at trial.]; and *Copeland v. State* (2001) 343 Ark. 327, 334 [37 S.W.3d 567, 572] [defendant's failure to object waived claim based on portion of the victim impact statement stating that the victim's mother "gave up" and succumbed to diabetes following the murder].)

A similar situation arose in regard to testimony about the crime's impact on Don Ganz. Don was a prosecution witness in the guilt phase of trial, and was scheduled to return to testify in the penalty phase. On the morning he was scheduled to appear in the penalty phase, the prosecutor informed the court and counsel that Don would not be testifying. (18 RT 3932.) The prosecutor proposed that Don's mother, Rachel, testify about

the crime's impact on her son. (18 RT 4071-4072; 4073.) Defense counsel objected and the trial court expressly held that Rachel could not testify about Don, and that her testimony should be confined to describing her own responses to her brother's death. (*Ibid.*) In spite of the trial judge's ruling and over further defense objections, the prosecutor questioned Rachel about the crime's impact on Don. Rachel finished her testimony about the night of the crime by describing how she had to wait some time at the police station before she could take her son home. The prosecutor then posed the following question:

> Q. Where is your son today?
>
> A. He was supposed to be here in the courtroom, but he got on the plane and couldn't get --

(19 RT 4171.) Defense counsel's objection was overruled and, instructed by the trial judge to continue, Rachel testified:

> He was to be here in court to testify today, and went to the airport and checked in to get on the plane, and he just couldn't do it. So he's in Florida right now.
>
> Q. By Ms. Turner: I take it this has been hard for Don as well as yourself.
>
> A. Yes. I come from a big family and we have had members of our family pass away, but with Martin it never left Don alone since Martin's gone, and I'm taking my family to counseling. And when we first came home he wouldn't sleep at night, he would come in the bedroom because he had nightmares screaming, coming up and touching me to where I couldn't --

(19 RT 4172.) The trial court sustained the defense objection at this point and granted the motion to strike. (19 RT 4172.) At the conclusion of her testimony, the prosecutor asked Rachel what she would say to Martin if she could speak with him now. Once again, the response pertained to Don's emotional reactions to the crime. Rachel stated, "I'd tell him I love him and that even though Don couldn't be here today he tried his hardest." (19 RT 4175.) In her closing argument, the prosecutor played the tape of Don's radio call for help after the shooting. (21 RT 4766-4767; People's Exh. 7.)

It was clearly improper for these witnesses to testify about Don Ganz's reactions to the crime and their mother's death. Defense counsel had no way to cross-examine the subjects of this testimony and no means to test the accuracy of the witnesses' statements. The California Supreme Court recently found that the defendant had not been unduly prejudiced where two family members mentioned the crime's impact on the victim's brother. (*People v. Panah* (2005) 35 Cal.4th 395 [107 P.3d 790, 25 Cal.Rptr.3d 672].) That case, however, is distinguishable. In *Panah*, jurors heard victim impact testimony from the eight-year-old victim's immediate family, both parents and her three older brothers. Two witnesses, the father and eldest brother, stated their suspicion that the victim's 16-year-old brother had begun using drugs and alcohol because of her murder. (*Panah, supra*, 35 Cal.Rptr.4th at pp. 754-755.) This Court found that the testimony had not been unduly prejudicial. The California Supreme Court noted two circumstances: the brevity of the prejudicial testimony, and the fact that "the jury was specifically instructed that in assessing victim impact evidence it could 'consider only such harm as was directly caused by defendant's act.'"

(*Ibid.*) [64] Neither of those circumstances were present here. As demonstrated by the excerpts of record set forth above, the testimony about Don and Mrs. Ganz was more lengthy and more prejudicial. In contrast to *Panah*, the jury instructions in this case failed to ameliorate the prejudice. In Roger Brady's case the jury was instructed:

> It is proper to consider evidence of the impact of the murder on the victim's family as a circumstance of the offense. The weight, if any, to be given to such evidence is for each juror to determine.

(22 RT 4707; 33 CT 9432.) Unlike the jurors in *Panah*, the jurors in this case were free to consider these speculative harms without first finding a causal connection between the harms and the homicide.

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Although not discussed in connection with the California Supreme Court's holding, the *Panah* opinion indicates that the 16-year-old brother who was the subject of the testimony did testify in the penalty phase. (See *People v. Panah, supra*, at p. 690.) Defense counsel in *Panah*, therefore, had an opportunity to cross-examine the witness in contrast to Roger Brady's case where this was an impossibility.

H. The Impact on the Manhattan Beach Police Department and the Greater Law Enforcement Community.

1. The Penalty Phase Testimony.

In addition to describing their personal responses to Officer Ganz's death, Officers Nilsson and O'Gilvy and Police Chief Mertens testified at length about the far ranging impact felt by their department, the entire Southern California law enforcement community, and also the public. The witnesses began by relating their immediate reactions on the evening of December 27, 1993. Nilsson testified about the challenge of performing his duties as a supervisor in the midst of the grief and shock, and his efforts to help other officers. (See 18 RT 4088-4089.) Chief Mertens described the many steps he had taken to ensure public safety while arranging for his officers to have some time to grieve. (18 RT 4133-4134.)

Asked to describe his officers' immediate reactions to the news, Chief Mertens stated:

> The reaction that night -- and please understand that word of an event like this spread rather rapidly. We had better than I would think about half of the department responded just off duty to come down to be in a place where there was mutual support for one another. Emotions ran the gamut from anger to frustration to bewilderment to utter disbelief. I think that you could see in everybody the different emotions running throughout the organization.

(19 RT 4136.) Counseling services were made available to MBPD personnel on Chief Mertens' orders. (19 RT 4135.) Mertens explained for the jury the importance of police officers having access to psychologists and other professionals trained to deal with post-traumatic stress. (19 RT 4135-4136.)

Chief Mertens and Officer Nilsson also testified about the response from outside the MBPD. Nilsson described the rapid outpouring of support from other law enforcement agencies and from the public.

> We literally had dozens, if not hundreds, of officers from all over the South Bay and Los Angeles County to respond and help us set up a scene. And Sergeant Milligan and I maintained that scene until the very early morning hours of that night.
>
> I remember forgetting that I still had his blood on my hands that day and then returning to the station in which, at that hour, 5:00, 6:00 o' clock in the morning, should have been barren, and it was standing room only. Many of the people I didn't know.
>
> And that was the scene in our community, in our station for a long time to come, more support, more people than we could possibly imagine.

(18 RT 4088-4089.) Chief Mertens testified that staff and officers from five other Southern California law enforcement agencies volunteered to stay on duty to handle some of the calls in Manhattan Beach. (19 RT 4134.)

Officers Nilsson and O'Gilvy each described how badly Martin Ganz's death had affected their personal lives and their job performances. (See Section I, *infra*.) Chief Mertens explained the immediate, detrimental effect on all of the MBPD officers. "I think there was a sense of understanding that we don't live in a castle above Manhattan Beach and these things can happen. It made officers a little bit more cautious." (19 RT 4136-4137.) Chief Mertens also testified about the continuing impact of Martin Ganz's death on the Manhattan Beach Police Department:

> To this day, there are still several officers who I think relive on a daily basis the events of that evening. I think that probably about a year or so -- about a year ago the Department really began the healing process. That was a long time in coming, it took a little longer than even I thought it might. I think there were some reasons for that, but once the arrest had been made and we believed that the person responsible had been identified, I think the officers began to talk among themselves and the healing process really began. And about a year ago is when you could really sense that we were beginning to move forward and put this event behind us.

(19 RT 4138.) Despite the trial court having advised the prosecutor not to have her witnesses testify about post-humus tributes or memorials, Chief Mertens noted that there have been candlelight marches and other events in honor of Officer Ganz. (*Id.*)

2. Relevant Victim Impact Evidence Does Not Include The Effects Felt By The Victim's Professional Community.

The California Supreme Court has not expanded the range of admissible victim impact evidence to include descriptions of the effects upon the victim's professional community.[65] Courts in other states have found that the impact of a police officer's death on the entire department is irrelevant, and highly improper in capital sentencing. In *State v. McKinney* (Tenn. 2002) 74 S.W.3d 291, the Tennessee Supreme Court considered the extent to which victim impact testimony could relate information about the

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65 It appears that the Court has not considered a case presenting this type of victim impact evidence. In another case where the victim was a police officer the testimony did not extend to descriptions of department wide or law enforcement community impact. (See *People v. Brown (John George), supra,* 33 Cal.4th 382.)

victim police officer's career. Two witnesses testified about the victim in the penalty phase: his wife and a fellow officer. The Tennessee Supreme Court upheld the admission of the fellow officer's testimony *precisely because* the testimony made no mention of department wide impact or the personal reactions of individual officers. The Tennessee Supreme Court observed:

> In this case, Officer Clark related factual information about the victim's career as a police officer, including his duties, functions, and type of work. Clark described the victim's role as a police officer as a "mediator." Clark's testimony was limited to factual background -- **he did not testify about the effect of the victim's death on himself, other officers, society, or the Memphis Police Department.**

(*Id.* at pp. 309-310 [emphasis added].)

The Supreme Court of Indiana found prejudicial error based on the combined effects of two forms of victim impact testimony present here. In *Lambert v. State* (Ind. 1996) 675 N.E.2d 1060, jurors heard a total of 29 pages of testimony from three witnesses: the officer's widow, his chief of police, and his brother who was also a police officer. The Police Chief testified about his own reactions to the crime and the effect on his department. The testimony in *Lambert* was neither as extensive nor as emotional as the testimony given by Chief Mertens, Officer O'Gilvy and Sergeant Nilsson. The Indiana Supreme Court stated:

> At [the victim's] funeral over twenty different police agencies were represented, and that the Department had received cards and letters from police departments all over the country. . . . [the Chief of Police] and other members of the department had sought psychological counseling to cope with [the victim's] death, and that after the shooting, because he was unable to function as he felt a Chief of Police should, he contacted his physician for prescription medication.

***

> [The victim's brother] testified . . . that the victim loved being a policeman, and that his brother's death had adversely affected [his] job performance and attitude toward his job. [The victim's brother] testified about his other brothers' employment, his father's place of employment, and his mother's place of employment.

(*Id.* at p. 1062.)

The *Lambert* Court found that the testimony about the victim's role as a police officer was largely irrelevant as it went "far beyond" the charged aggravator that the victim was a police officer killed in the line of duty. (*Id.* at p.1064.) The Indiana Supreme Court commented on two additional factors also present in this case: the length of the victim impact testimony, and the absence of a limiting instruction. The Court in *Lambert* stated:

> The situation presented by the victim impact evidence in this case differs markedly from our previous cases. The trial court did not give a limiting instruction. The testimony was not brief; it numbers in pages not lines (close to twenty-nine pages in the record). The trial court did not edit the testimony. The testimony went well beyond [the victim's] status in life, and for that matter well beyond the status in life of his immediate family.

(*Lambert, supra,* at p. 1065.)

Counsel has discovered no reported case containing such extensive testimony about the effects of the victim's death on the police department or law enforcement agency. (Compare *United States v. Battle* (11th Cir. 1999) 173 F.3d 1343, 1348, fn. 6 ["short, matter-of-fact" testimony from three fellow prison guards that prisoners had been "emboldened" subsequent to murder of prison guard to increase harassment of prison staff; not improper

victim impact where witnesses' testimony was "neither inflammatory nor emotionally charged."]; *Hyde v. State* (Ala. 1998) 778 So.2d 199, 213-215 [comment by the victim's brother that he, the victim, and their father all worked in law enforcement and that the defendant deserved a death sentence "on behalf of every law enforcement officer" did not require reversal where: (1) the jury recommended a life sentence which the trial court overrode to impose death; and (2) there was no suggestion that this single comment influenced the judge's decision].)

Neither the immediate impact nor the long terms effects of Officer Ganz's death on the Manhattan beach Police Department were relevant to any issue in the penalty phase of this case. Together with the prosecutor's tribute to law enforcement in her closing argument, this evidence encouraged the jury to impose a death sentence based in part on the impact to the MBPD and for the benefit of all law enforcement officers. This is clearly not the individualized sentencing the Eighth Amendment and federal due process requires.

I. The Victim Impact Testimony of Three Witnesses Described Severe Psychological Disturbances.

All eight witnesses who testified about Martin Ganz and the impact of his death described their feelings in lengthier and far more detailed terms than in any case considered by the California Supreme Court. Many of the witnesses described strong emotions and reactions. The testimony of three witnesses, Sergeant Karl Nilsson, Officer Neal O'Gilvy and Pam Hamm, went far beyond relating "understandable human reactions" following a homicide. These witnesses described serious psychiatric problems, which

they attributed to the crime. Among other things, one witness spoke of her belief in supernatural contacts from beyond the grave. Another testified that the crime caused his alcoholism, created problems in his career at the MBPD, and led to a break-up with the woman he planned to marry. This testimony was clearly inflammatory and likely to provoke strong emotional responses from the jurors. The connection between the death of Officer Ganz and these witnesses' problems was not independently established, making it doubtful that this evidence was relevant as a circumstance of the crime. The prosecution did not need this testimony to give the jury a sense of the impact resulting from Martin Ganz's death.

1. The Testimony of Pam Hamm and Officers O'Gilvy and Nilsson.

Martin Ganz's fiancee´, Pam Hamm, testified extensively in the penalty phase. (See 19 RT 4178-4195.) Pam related how she learned of Ganz's death and described her immediate feelings and reactions to the loss. (19 RT 4182-4183.) After explaining that she had been especially upset that Martin Ganz died as a result of murder, Pam spoke about the lasting effects of his death. Her testimony in this area was particularly disturbing. In spite of the trial court's ruling excluding evidence of memorials or tributes to Officer Ganz following the funeral, the prosecutor asked, "What kinds of things have you done for yourself to try to keep Martin's name alive?" (19 RT 4192.) Pam's response conveyed the extent of her ongoing emotional problems.

> On a very personal level in my car with me all the time there's always a picture of Martin on his police motorcycle. I keep that on my visor so that he's -- I have my own personal motor cop with me all the time.

For my wedding when I had the garter that I would be wearing, I had my seamstress put a bow on it from a piece of one of Martin's uniforms because I wanted him to be able to go down the aisle with me also.

A lot of little things. He's never far away from me. He's -- there's always something of Martin with me.

(19 RT 4192.)

The prosecutor then asked Pam to testify about an even stranger manifestation of her grief:

Q. Do you -- despite his death, do you feel ongoing contact or contact with him?

A. Oh of course. Absolutely. Even as recently as the day after Thanksgiving.

Martin and I, our little thing was Disneyland. We loved Disneyland, going there together. For my birthday in 1993 he bought me an annual passport so we would go to Disneyland often. From his house you could see the fireworks at Disneyland. So that was very special to us.

But the day after Thanksgiving the Disney stores had a one-day-only very limited edition beanie, like a beanie baby, that they were giving away. And I wanted one.

So I dragged my mom out of the house at 6:00 o'clock in the morning, and we went to the Disney store at Del Amo Mall. And they only had 200 of them in the store.

So when we got there at 6:30, there was a line of people down the hallway and practically out the back door of the mall. And I said, "Well, let's wait anyway."

So about 7:15 one of the employees from the Disney store came out and started handing out numbers to people so

> that anyone beyond the 200 could go ahead and leave. They handed me the number 187, which is the penal code for murder.
>
> I thought that was a little unusual but kind of had a feeling that maybe Martin saw to it that I get one of the beanies as well. And that was one of the ways of knowing he was there.

(19 RT 4192-4193.)

MBPD Officers Karl Nilsson and Neal O'Gilvy testified at length in the penalty phase. As discussed previously, O'Gilvy testified in a lengthy and emotionally charged narrative describing how he found Martin Ganz at the crime scene, rode with him in the ambulance, and held his friend's hand while he died.[66] Nilsson also gave a detailed account of that night's events and the Police Department's reactions in the immediate aftermath of the crime. It was unmistakable from the overall tone of their testimony that both O'Gilvy and Nilsson were close friends of Martin Ganz and were very upset by his death. However, these witnesses also blamed the crime for the development of serious psychological problems.

After describing the events of December 27, 1993, O'Gilvy testified about the long term impact of Ganz's death. He continues to feel guilty for not being there with Martin Ganz at the traffic stop. (19 RT 4238-4239.)

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Officer O'Gilvy's narrative describing the crime scene, transporting Ganz to the hospital and events there was cumulative and unduly prejudicial. (See Section D, *supra*.) O'Gilvy's account of Martin Ganz looking up and speaking to him just before he died is also dubious in light of the evidence given by both prosecution and defense medical experts opining that Ganz would have been unconscious within a matter of minutes after the face wound.

O'Gilvy acknowledged that, although he now knows that there is no rational reason for him to feel that his presence might have prevented the tragedy, he struggles with these emotions. Asked to describe the effects on his job performance, O'Gilvy stated:

> The first couple years since he was killed I didn't really do a lot of work at work. I just came and did my ten hours and went home. I hated coming to work. I didn't like -- I didn't want to get involved with anybody. I didn't want to make contacts with the public.
>
> There was times when I thought I'd do or say something that I would regret. And I just thought that if I just didn't do anything it would make it easier on me.
>
> And counseling, crying at work like in the patrol car and just grabbing onto the steering wheel and crying in the parking lot because I didn't want to -- I just didn't want to be there.

(19 RT 4238.)

Karl Nilsson in his testimony described was even more drastic problems which he attributed to the shooting and Martin Ganz's death. Nilsson testified that he found himself not able to relate to the other officers following the shooting; and spoke of how his inability to cope with Martin Ganz's death nearly ruined his life.

> I couldn't understand the reaction of those young officers not going to him. But I've since come to learn that that was how people deal with things. Some people deal with things differently, and they just knew they couldn't deal with that.
>
> It was my job to deal with it, and I did. As I was holding him and as he was losing his life, I remember

equating that back to when I told you all about the defensive tactics class.

Martin wouldn't give up. He wouldn't die. And I remember thinking, I maybe even said, "Let go, Martin. Go ahead and go. It's okay." But he wouldn't. He just kept fighting for air and fighting to live, and I knew he wouldn't make it.

But it took me back to that time. And on a personal level I didn't realize what damage it was doing to me. Sergeant Milligan and I rebuffed counseling. It was offered to us that morning, and I never sought it since.

But on a personal level I know I suffered greatly. I didn't sleep. I didn't eat for days and weeks. I turned to alcohol to try to numb the pain and to try to make myself sleep. And I've since learned that alcohol is a depressant, just makes it worse.

I suffered mood changes. I was in a loving relationship that I had hoped would lead to marriage, but this changed me too bad. She ended up leaving me.

I became different at work, more protective of my people, more strict, more disciplined, more moody. That cost me my stripes. I'm no longer a sergeant.

(18 RT 4089-4091.)

2. The Severe Psychological Problems Of These Witnesses Were Irrelevant As Circumstances Of The Crime, And The Testimony Was Unduly Prejudicial.

The California Supreme Court has allowed witnesses to testify about "manifestations of the psychological impact" they have experienced as a result of the murder. (*People v. Brown (John G.)*, *supra*, 33 Cal.4th 382, 397-398.) The testimony in those cases, however, differs in several

critical respects. In California cases, the testimony of the victim's survivors has been relatively brief and general, and has described less dramatic symptoms of psychic distress, and emotional reactions proportionate to the witness's relationship to the victim and the specific facts of the crime. In *People v. Brown (Andrew L.), supra*, 31 Cal.4th 518 the California Supreme Court rejected defense claims of undue prejudice where two victim impact witnesses testified that they were still scared to go outside at night, more than three years after the crime. The Court observed: "It is common sense that surviving families would suffer repercussions from a young woman's senseless and seemingly random murder long after the crime is over." (*Id.* at pp. 573-574.) Recently in *People v. Wilson*, *supra*, 36 Cal.4th 309, the victim's sister's testified that she could not understand why someone whom the victim had befriended and whom he trusted would kill him, and that when detectives told her "it was for money" she "was angry that someone would kill for that." This Court found that the sister expressed merely an "'understandable human reaction.'" (*Id.* at p. 357, quoting *People v. Brown, supra*, 33 Cal.4th 382, 397-398.) (See also *People v. Pollock, supra,* 32 Cal.4th 1153 [normal for friends of elderly victims to be shocked to learn of the brutal murders].)

The California Supreme Court recently considered the relevance and admissibility of victim impact testimony related to the murder of a police officer killed in the line of duty in *People v.Brown (John G.)* (2004) 33 Cal.4th 382 [93 P.3d 244, 15 Cal.Rptr.3d 624].) There, the officer's father testified that he had not gone fishing (an activity he shared with the victim) since his son's death. The officer's brother testified about his custom of saluting the victim's grave every time he drives past the cemetery. This

Court found nothing surprising or prejudicial in either the degree of sadness the witnesses described or the behaviors they manifested as a result of their grief. Referring to the father and brother's testimony, the Court in *Brown* stated:

> We consider these simply manifestations of the psychological impact experienced by the victims, in no way inconsistent with our prior decisions nor "fundamentally unfair" within the meaning of *Payne v. Tennessee* [citation]. Each in its own respect, these responses are understandable human reactions, particularly [the brother's] given the circumstances of the crime -- a police officer deliberately killed in the line of duty.

(*Id.* at pp. 397-398.) The testimony given by Officers O'Gilvy and Nilsson is a different matter. These witnesses described not only enduring grief and sadness but the near disintegration of two lives. O'Gilvy had been barely able to function for more than a year following Ganz's death. His emotions were out of control and he described symptoms of severe clinical depression. Nilsson became an alcoholic, lost his sergeant's position in the MBPD and ruined his relationship with a woman he planned to marry all as a direct result of Martin Ganz's death. These witnesses did not describe "understandable human reactions" following the loss of a friend and colleague but, rather, revealed severe maladjustment and psycho-pathological states.

Stronger emotional responses may be expected, and therefore are not as likely to be unduly prejudicial, where the witness and the victim have an especially close or intimate relationship. (See *People v. Stitley* (2005) 35 Cal.4th 514, 564-565 [108 P.3d 182, 26 Cal.Rptr.3d 1] [statement by victim's husband that she was his "whole life"].) The way in which the victim was killed is another factor in assessing the degree to which a victim

impact witness's reaction is an "understandable" response to the crime. In *People v. Smith, supra*, 35 Cal.4th 334, the mother of a young boy who was sexually assaulted and killed testified: "I don't think the pain will ever go away . . . I think the worst part of it is, is what goes on in my mind what happened to him. What he went through is -- is just very difficult." This Court held that the testimony was not inflammatory under the circumstances of the case, commenting: "The mother's testimony here is what one would expect in any case involving the murder of a child." (*Id.* at p. 365.) (See also *People v. Benavides* (2005) 35 Cal.4th 69, 107 [105 P.3d 1099, 24 Cal.Rptr.3d 507] [in the rape and murder of a 21-month-old girl her aunt's statement that "the family wants justice to be done" was not so inflammatory as to encourage jurors toward an irrational response untethered to the facts of the case.].)

Some of the strongest victim impact testimony permitted to date was given by the son of an elderly couple who were brutally murdered in the family home. In *People v. Pollock, supra,* 32 Cal.4th 1153, the defendant killed a husband and wife by slitting their throats. The opinion contains the following description of the testimony given by the victims' adult son.

> Donald Stephen Garcia, the victim's son, testified that he had cleaned the bloodstains from his parents' house and that he had decided to sell the property because "it was such a savage act, I just couldn't have the memory of their murder that close to me." He also testified that he had been forced to suppress his memories of his parents. He gave this explanation: "If I think about them I'm miserable, so if I don't think about them I'm not miserable. So it's kind of like my childhood was taken away from me and any memory of my parents was taken from me because -- the major problem I have is the savageness of this murder" because he knew his parents must have suffered greatly in the last 15 minutes of their lives.

(*People v. Pollock, supra*, at p. 371.)

The testimony Roger Brady's jury heard was both more extensive and more prejudicial than the testimony in *Pollock* or in any of the reported cases discussed above. Jurors in this case heard detailed accounts of not merely one or two but several extreme psychological and emotional responses. Officers O'Gilvy and Nilsson had more drastic reactions to Ganz's death than the officer's family members in *Brown*. Pam Hamm's descriptions of grief and sorrow in the wake of the shooting were emotional but perhaps not unexpected given the nature of her relationship with the victim. However, her testimony about the on-going impact of Martin Ganz's death was peculiar and disturbing, especially the lengthy account of how Martin Ganz has contacted her after his death.

Clearly these three witnesses loved Officer Ganz and were profoundly affected by his death. Their testimony was heartfelt and the emotions they expressed in court were undoubtedly sincere. Theirs were not, however, understandable responses to the death of a colleague, friend or fiancé. This testimony described pathological reactions demonstrating varying degrees of mental illness. This is precisely the sort of testimony capable of diverting the jury from its task or provoking an improper emotional response.

Conclusion.

The evidence in this case was not a glimpse of the victim's life, it was a memorial service. A legal proceeding is not the proper forum for such a tribute. Where a jury is being asked to choose life or death for a defendant, the impropriety is also unconstitutional.

VIII.

THE ADMISSION OF "VICTIM IMPACT" EVIDENCE AND ARGUMENT CONCERNING CRIMES ALLEGED PURSUANT TO PENAL CODE SECTION 190.3(b) WAS ERROR UNDER CALIFORNIA LAW AND DENIED ROGER BRADY HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction And Overview Of Argument.

The prosecution presented a total of 64 witnesses in the penalty phase. Fifty-five of these witnesses testified about 21 past crimes or instances of conduct alleged in aggravation pursuant to Penal Code section 190.3(b). Of these 55 witnesses, 40 were civilians who had been percipient witnesses to crimes supposedly carried out by Roger Brady. The 40 "factor b" witnesses testified about the facts and circumstances underlying those incidents. Many of them also provided testimony which was in essence "victim impact"; describing not only their immediate responses but also the lasting effects of their experiences. Several factor b witnesses gave their opinions characterizing the defendant and the crime, topics which the United States Supreme Court has specifically excluded from the realm of permissible victim impact. (*Payne v. Tennessee, supra,* 501 U.S. 808; *Booth v. Maryland, supra,* 482 U.S. 496.)

This testimony should have been much more strictly limited for several reasons. California law allows victim impact testimony concerning sustained emotional trauma and psychic injury attributed to the circumstances of the capital murder. (Pen. Code §190.3(a); *People v. Edwards, supra*, 54 Cal.3d 787, 835.) In the cases in which factor b witnesses have given this type of testimony, they were injured in the course of the capital offense. (See *People v. Brown (John G.), supra,* 33 Cal.4th

382, 397; *People v. Taylor, supra,* 26 Cal.4th 1155.) This range of permissible testimony has not been extended to crimes *un*related to the capital offense. Assuming, arguendo, that victim impact testimony pertaining to factor b crimes is relevant and admissible, this evidence should have been excluded or substantially limited because its probative value was outweighed by its tendency to be misleading, cumulative and unduly prejudicial. (Evid. Code §352; *People v. Smith (Gregory S.), supra,* 35 Cal.4th 334; *People v. Box, supra*, 23 Cal. 4th 1153, 1200-1201; *People v. Michaels* (2002) 28 Cal. 4th 486 [49 P.3d 1032, 122 Cal.Rptr.2d 285].) The prejudicial effect of the factor b victim impact was exacerbated by the prosecutor's use of objectionable and misleading exhibits and an inflammatory closing argument. The balance of prejudice against probative value was tipped clearly in favor of excluding the testimony of factor b witnesses to unadjudicated crimes.

The trial court's failure to exclude this irrelevant and prejudicial evidence was an abuse of its discretion under California law. (Evid. Code §352.) The erroneous admission of this evidence deprived Roger Brady of his constitutional rights to due process of law, to a fair trial and a reliable determination of the penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal.Const., Art. I, §§ 7, 15 and 17; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Ford v. Wainwright*, *supra*, 447 U.S. 399.) The trial court arbitrarily and capriciously applied California's death penalty statute by admitting victim impact evidence which did not concern the circumstances of the crime thereby denying Roger Brady a state created liberty interest as well as his state and federal the constitutional rights to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346; *Lambright v. Stewart*, *supra*, 167 F.3d 477.) For all of

the reasons discussed below, this Court must reverse the judgment of death.

B. Standard of Review.

The California Supreme Court typically reviews a trial court's evidentiary rulings for abuse of discretion. (See *People v. Burgener, supra*, 41 Cal.3d 505; Evid. Code §§ 350, 352.) However, Roger Brady contends that heightened scrutiny is appropriate and necessary because these claims involve constitutional error in the context of a capital case. (*Gardner v. Florida, supra*, 430 U.S. 349, 357-58. This Court should independently examine the record to determine whether the trial court's erroneous admission of this prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24.)

C. Background And Proceedings In The Trial Court.

1. The Defense Motion In Limine.

The prosecutor did not file a Notice Of Evidence In Aggravation until shortly before the start of trial. Based on informal conversations with the prosecutor and information obtained in discovery, defense counsel anticipated that the state would allege a a substantial number of incidents in aggravation, including a number of unadjudicated robberies. (9 CT 2401.) On July 28, 1998 (several weeks before jury selection had begun in the guilt phase) defense counsel filed a Motion in Limine to Bar the Prosecution from Introducing "Victim Impact" Evidence Pursuant to Any Factor Other Than Penal Code Section 190.3(a). (9 CT 2399-2424.) While reserving objections to other "factor b" evidence the prosecution was expected to offer, the primary purpose of the defense motion was to limit victim impact evidence and testimony related to the Oregon homicide case. (*Id.*) The trial court granted the defense motion. Although the discussion at the motion

hearing had been primarily concerned with victim impact from the Correa homicide, the judge's ruling was stated more broadly. (See 2 RT 292-295.) The trial court expressly held that *only* victim impact evidence directly resulting from Officer Ganz' death would be admitted. In announcing its ruling, the court stated:

> The court's ruling would be that the motion in limine to bar the prosecution from introducing victim impact evidence relating to Ms. Correa's survivors will be granted, and there will be no such testimony. And it is not proper, this court does not feel, again, based upon everything that I have read, the cases and law review articles and everything. *Victim impact statements which are a new, special type of evidence in these cases should relate only to the victim of the crime for which the defendant is charged and is on trial for, that it should not be expanded to victims of previous crimes* in the context again of not as to the special circumstance issue, but as to the penalty phase and what we're calling, if you will, the victim impact statement. I think it's clear.
>
> And that's not just because there isn't a case out there yet. I just think again that the language that I quoted to you is that its just another factor that should be considered by the jury, and *it's got to relate to Ganz,* it just cannot relate to the previous crime.

(2 RT 304-305 [emphasis supplied].)

The prosecutor violated the trial court's ruling at the very start of the penalty phase. In her opening remarks, the prosecutor argued that Roger Brady deserved to die because his crimes had affected so many people. The jurors were expressly told to consider *not only* the victim impact resulting from the Ganz homicide, but the effects suffered by the victims of Roger Brady's other crimes:

> So as I indicated, you will be hearing evidence again at this point besides all the other crimes the defendant's committed, hearing from all the other victims who he's terrorized and put

in states of fears [sic] even years later half [sic] the crimes.

(12 RT 2623.) The prosecutor continued, discussing how the jury was to weigh the evidence in mitigation against the evidence in aggravation. Here again, the jurors were told to consider the impact on the victims of the other alleged crimes.

> Another point that the court alluded to in the beginning of his comments to you when he had said that there were things different between this portion of the trial and the previous guilt portion is that in order to return a judgment of death you, as jurors, are to do a weighing process, that's not beyond a reasonable doubt standard, but it's a different process, and that you are to weigh the mitigating evidence – I anticipate you'll hear in the defense sympathy about his childhood or upbringing, that sort of thing – weigh that against the aggravating evidence, the evidence the law says you, as jurors, are to consider, the evidence that shows he's terrified other people, victimized other people, murdered not only Officer Ganz and victimized his family and friends by way of that murder, but also murdered Catalina Correa in Oregon.

(12 RT 2623-2624.)

This opening statement was an unmistakable warning that the prosecutor planned to present victim impact testimony from witnesses to the Section 190.3(b) crimes. Defense counsel promptly objected (outside the jury's presence), pointing out that the prosecutor's planned use of factor b victim impact was contrary to the court's ruling on the defense motion. (12 RT 2640.) Defense counsel also objected on discovery grounds, noting that the prosecution had disclosed almost no victim impact material. There was no discovery more recent than 1989 concerning the witnesses to Roger Brady's alleged bank robberies. The same was true for the Oregon homicide, where the most recent discovery for those witnesses was from the Oregon trial in 1995. (*Id.*) Defense counsel requested that the prosecutor

disclose any recent interviews or statements pertaining to the factor b witnesses. (12 RT 2640-2641.)

The prosecutor represented that there was no recent discovery because the factor b witnesses had not been interviewed. (12 RT 2645-2646.) According to the prosecutor, her only contacts with the bank robbery witnesses occurred earlier that day when she met briefly with the witnesses over the noon hour to review their prior testimony. (12 RT 2646.) In spite of the prosecutor's admitted failure to provide discovery, the trial court found no violation of either Section 1054 or Penal Code Section 190.3. (12 RT 2646-2647.)[67]

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Defense counsel concluded by re-stating her objections and summarizing the prejudice caused by the prosecutor's repeated failures to adhere to the letter and the spirit of reciprocal discovery. Defense counsel remarked:

> And with respect to the victim impact witnesses or statements, I can only offer this. It seems to me that lawyers that don't prepare their cases are rewarded when they call a witness who they have not prepared and have not taken a statement from. Counsel would be very upset with me if I had indicated I intended to call, for example, the defendant's mother and then reported to the court and to counsel I've never interviewed her, I've never taken a statement, I'll just bring her in here, put her on the stand, see what happens.
>
> To the contrary, I've given Ms. Turner detailed statements of my interviews of Mrs. Brady and the other witnesses that I intend to call because I believe that's my duty to prepare my case and to turn that discovery over to the prosecution, and I've done that. I believe that's my duty under the law.
> It just seems to me that the court is put in a position of almost rewarding somewhat faulty preparation, if you will. And I

(continued...)

2. The Penalty Phase Testimony.

The prosecutor elicited victim impact testimony from factor b witnesses; specifically questioning them not only about their reactions in the moment but, also, the lasting emotional and psychological effects of their experience.

a. Witnesses to the 1989 bank robberies.

The prosecution began its case in aggravation with three full court days of testimony from witnesses to the crimes underlying Roger Brady's 1990 federal bank robbery convictions. Fourteen former bank employees related their experiences of the six robberies. Over defense objections, the bank witnesses testified about the effects of the crimes. Most of these witnesses reported having been scared during the robbery. (See, e.g., 12 RT 2727 [testimony of Lory Kelley]; 12 RT 2790 [testimony of Aldo Fontela].) Others had a delayed reaction where it did not "hit" them until hours or days later. (See, e.g.,12 RT 2741 [testimony of Kimberly Corley].)

In response to questions from the prosecutor, several witnesses described responses *other* than fear in the moment. One bank teller characterized the defendant and the crime, stating that Roger's eyes were "cold and dead like a shark's," and explained that he had been very frightened because he knew that Roger "meant business." (12 RT 2808-

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[67](...continued)
don't mean that in a negative way. It seems to me somewhat spotty preparation, if you will, in the sense that counsel is able to relate to the court I have not interviewed these witnesses, I don't know what they're going to say, so I'm not under any obligation to turn it over.

(12 RT 2647-2648.)

2809.) Several of the bank witnesses testified about permanent traumatic effects which they attributed to their robbery experiences. One woman stated that she has been afraid to work in banks ever since. (12 RT 2674.) Another remains apprehensive anytime she is inside a bank. (12 RT 2703.) The teller in the August 14, 1989 robbery stated that it was "extremely difficult" for him to testify at the Ganz trial some 9 years later. (12 RT 2691.)

Two women who worked for Home Federal Savings on October 12, 1989, were allowed to give detailed testimony about the "life altering" effects of the robbery. (13 RT 2867.) Jane Rieder sought counseling to deal with the "frightful experience." (13 RT 2866.) She does more on-line banking, and is generally more cautious and vigilant about what is happening around her. (13 RT 2868.) Jeannie Murray sought counseling after the robbery. She was "numb, shocked and very scared," and needed to take time off from work. (13 RT 2880.)

b. 1993 Series of Unadjudicated Supermarket Robberies.

Seven witnesses testified concerning five armed robberies of Los Angeles area Ralph's supermarkets in the fall of 1993. All of these witnesses had been fearful during the robbery.[68] In response to the prosecutor's questioning, several of them testified to various degrees of lasting trauma. Assistant store manager Robert Beauchamp described how

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See, 13 RT 2973-2974; 2983 [testimony of Robert Beauchamp]; 13 RT 3003-3025 [testimony of Delsa Hernandez Thompson]; 13 RT 3099-3127 [testimony of Ricardo Gutierrez]; 14 RT 3128-3161 [testimony of Lana Lee]; 14 RT 3198-3209 [testimony of Patty Foster]; 14 RT 3255-3282 [testimony of Suzanne Mc Garvey]; 15 RT 3402-3423 [testimony of William Johnson].

he relived the fear almost two years later upon viewing a live line-up of suspects in Oregon in August of 1995. Beauchamp stated: "my heart started pounding about a hundred miles an hour. When I saw the person who had robbed me, I got very nervous." (13 RT 2998; 3001.) Bookkeeper Delsa Hernandez Thompson was present for the October 3, 1993, robbery. (13 RT 3003-3004.) Ever since then Ms. Thompson has difficulty performing her job. In response to the prosecutor's question about how she feels about the robbery now, Ms. Thompson stated "I'm always afraid because it is my responsibility to count the money and every time I hear sounds or anything it's -- I'm thinking it's just like you're being suspicious of everything." (13 RT 3016.) Ralph's supermarket manager Ricardo Gutierrez recalled the "evil look" on the suspect's face and in his eyes. (14 RT 3108.) Gutierrez felt "butterflies" in his stomach and "that instinct when your hair stands up." (*Id.*) Almost two years later at the Oregon line up Gutierrez had been scared and fearful of retaliation. (14 RT 3113; 3125-26; 3127.) After Mr. Gutierrez identified Roger Brady as the robber, the prosecutor posed the following question: "As you sit here today now five years later, do you still have any fears or concerns or worries?" Gutierrez stated: "Yes, I do. I still -- after that incident I am still -- I am more concerned about my family, I have family now, and that affected my life. And even though I am still in the grocery business, I am always looking out for possibilities that it can happen again." (14 RT 3114.)

c. The 1994 Safeway robberies.

Eleven witnesses testified concerning six robberies of Safeway supermarkets in Washington and Oregon in the spring and summer of

1994.[69] Several of these witnesses testified that they had been fearful during the crime. (See, e.g., 15 RT 3579 [testimony of Julie Cates]; 15 RT 3642 [testimony of Wendy Strand].) A few of them, however, described longer lasting effects from the experience including recurring nightmares and other symptoms of anxiety. (See 14 RT 3162-3178 [testimony of Jo Lynn Ames]; 15 RT 3511-3522 [testimony of Cindy Ettestad].)

d. The Medicine Shoppe Pharmacy Robbery.

The most dramatic victim impact testimony pertaining to an incident other than the Ganz homicide came from two witnesses to an armed robbery of the Medicine Shoppe Pharmacy in Vancouver, Washington, on the afternoon of May 26, 1994. Pharmacist Richard Kim and the technician, Kay Heinzman, were alone in the store when the suspect entered. He pulled out a gun and announced "This is a robbery." (14 RT 3284-3285.) The suspect demanded a number of specific drugs (primarily narcotics) and cash. (14 RT 3288; 3294-3295.) When he was ready to leave, he told Kim and Heinzman to go into the restroom at the back of the store. The suspect warned them that they would be shot if they tried to come after him. (14 RT 3290.) [70]

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April 4, 1994, witness Jeff Weitzel (15 RT 3482-3497); April 10, 1994, witnesses Gary Wall (15 RT 3498-3509), and Cindy Ettestad (15 RT 3511-3525); June 1, 1994, witness Wendy Strand (16 RT 3635-3646); June 15, 1994, witnesses Doris Sybouts (15 RT 3530-3543), and Vincent Kelly (15 RT 3543-3554); July 16, 1994, witnesses Jo Lynn Ames (14 RT 3162-3183), and Tara Thompson (14 RT 3212-3229); July 26, 1994, witnesses Jennifer Asher (15 RT 3461-3482), William Kerr (15 RT 3555-3571), and Julie Cates (15 RT 3572-3591.)

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It is worth noting that there was only weak evidence that Roger

(continued...)

Both Kim and Heinzman were afraid and upset at the time of the robbery. (14 RT 3286; 3315.) They also described lasting effects from the traumatic experience. (14 RT 3287; 3322-3323.) Mr. Kim quit working immediately after the robbery. (14 RT 3287.) Ms. Heinzman testified that she lost a year of her life and was unable to work following the robbery. (14 RT 3322-3323.) She told the prosecutor that it would be too stressful for her to testify in the Ganz case. (14 RT 3332.) Ms. Heinzman acknowledged signing the letter Mr. Kim sent to the prosecutor stating that neither of them could identify the suspect. She denied this in her testimony, and claimed not to have read the letter carefully. (14 RT 3324-3325.)

The robbery's continuing impact upon Ms. Heinzman was readily apparent to the jury as they observed her testimony. Heinzman was visibly upset and tearful to the extent that defense counsel suggested taking a recess only a few minutes after the prosecutor began her direct examination. (14 RT 3304-3305.) It became necessary to take a five minute recess shortly thereafter when the witness became so upset that she nearly refused to identify Roger Brady. (14 RT 3316-3317.) At one point the judge directed the court reporter to read back a series of questions and answers for

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[70](...continued)
Brady in fact committed this robbery. The pharmacist, Richard Kim, was unable to identify Roger Brady. (14 RT 3292.) He believed that the suspect was Caucasian. (14 RT 3293.) The pharmacy technician, Kay Heinzman, identified Roger Brady as the suspect only after seeing him on television in custody following the Correa robbery/homicide. (14 RT 3315-3317.) At the time of the robbery Heinzman said that the suspect was Caucasian, blue-eyed and had gray streaks in his hair. (14 RT 3321-3322; 3347.) F.B.I. analyses of some unused cartridges found on the pharmacy's floor could not be conclusively matched to Roger Brady's gun. (14 RT 3350-3351.) Fingerprints taken inside the pharmacy were not matched to Roger Brady. (14 RT 3333.)

the jury because the witness's responses were nearly inaudible. (14 RT 3318.)

e. The August 3, 1994 Safeway robbery.

Witness Arden Schoenborn was the Safeway checker allegedly robbed by Roger Brady on August 3, 1994, in the incident culminating with the Correa homicide. (17 RT 3743; 3751.) In the Oregon trial, Mr. Schoenborn had an emotional outburst during his testimony wherein he addressed Roger Brady directly. The prosecutor represented that she had advised Mr. Schoenborn to maintain his composure. (17 RT 3743-3744.) The trial judge specifically asked the prosecutor to remind the witness to limit his responses to the specific questions posed by counsel. (17 RT 3744.) Schoenborn related the events of the robbery in his direct examination. (See 17 RT 3752-3776.) However, the witness elaborated on his answers several times to reveal the effects of the crime. Schoenborn stated that during the robbery he thought was going to die, and felt as if he was " eye to eye with the person and looking at death." (17 RT 3763.) Elsewhere he stated that the suspect's eyes were "cold, empty and looked like death." (17 RT 3775.) Over defense objections, the prosecutor asked how the robbery has affected his life. Schoenborn testified that he worked for Safeway for a short time afterwards and then had to quit because he could not handle the pressure and the stress. (17 RT 3777.)

3. The Exhibits And The Prosecutor's Closing Argument.

Two particular exhibits amplified the prejudice from the victim impact testimony given by the factor b witnesses. People's Exhibit No. 125 was a large poster board covered with an enlarged copy of the "Thomas Guide" map of Los Angeles. (15 RT 3390.) Symbols on the map purported

to depict the locations of Roger Brady's various crimes. (*Id.*) The site of each alleged crime was marked on the map, with lines drawn out to the margins connecting the locations to photographs of the victim/witnesses to the factor b crimes. (15 RT 3390-3391.) A large (6 x 8) portrait of Officer Ganz in uniform was prominently featured, with a caption stating "12-27-93 Officer Martin Ganz Killed, Manhattan Beach." (15 RT 3390-3391; Exh. 125.) A similar exhibit depicted the Washington and Oregon area crimes. The photographs of the victim/witnesses were positioned in the margins. This exhibit featured a large (8x10) color photograph of Ms. Correa in life. (17 RT 3776-3777; Exh.154.)[71]

The impact of Roger Brady's alleged crimes on the factor b witnesses was a significant theme in the prosecutor's closing argument. (See 21 RT 4751; 4752; 4756; 4757; 4758; 4769.) According to the prosecutor, Roger Brady behaved violently at every possible opportunity. Referring to his release from federal custody, the prosecutor stated:

> But what path does he take at that point? What does he choose? The Ralph's supermarket robberies again. You heard witnesses who I believed proved beyond a reasonable doubt five different Ralph's supermarket robberies. His Ralph's rampage culminated with the murder of Martin Ganz, the Manhattan Beach Police Officer, on December 27th, 1993. And if you recall, there was a Ralph's supermarket just across the parking lot from where Officer Ganz was murdered.

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The trial court overruled the defense objections to both exhibits based on relevance and undue prejudice. (See 15 RT 3392-3396; 17 RT 3879.) Counsel objected to the use of Ms. Correa's photograph in People's Exh. 154 based on the court's pretrial ruling to preclude victim impact evidence from the Oregon case. (17 RT 3879.) All of the defense objections were overruled. (*Id.*)

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> His parents moved up to Washington so he went up there with them and once up there he began his rampage of the states of Oregon and Washington. How many victims and witnesses did we hear from up there? How many witnesses starting with Aida Bitar on the very first bank robbery up in 1989 became emotional just remembering what had happened nine years ago to her? And how many of the people from Oregon and Washington feel compelled either by testifying or just based on the scars that are in their souls and minds now have to relive and go through the fear and terror that this defendant has caused them?

(21 RT 4751-4752.)

According to the prosecutor, 21 incidents were alleged pursuant to factor b. The prosecutor reviewed this list for the jury (21 RT 4756-4758), and then reminded jurors that the factor b incidents were evidence in aggravation which "you as jurors took an oath to weigh." (21 RT 4758.) Near the end of her closing speech, the prosecutor again told the jurors that they were to return a death sentence based on the cumulative impact felt by all of the crime victims.

> If ever a case cries out for the death penalty ladies and gentlemen, this is the case. You've heard from so many victims and so many witnesses and so many people all hurt and all saddened, and you haven't heard from Martin Ganz and you haven't heard from Catalina Correa because the defendant, Mr. Brady, took care of that so you couldn't hear from them. You heard from Andrew Dickson who was only inches away from being a possible third victim, deceased victim, that you wouldn't hear from. How many does it take? When do we say stop?

(21 RT 4769.)

D. Improper Characterizations Of The Defendant.

The United States Supreme Court in *Payne v. Tennessee* clearly held that victim impact witnesses may not express opinions about the crime, the defendant or the appropriate sentence. (*Payne v. Tennessee, supra,* at p. 830, fn.2.) Several of the factor b witnesses dramatized their testimony with characterizations of the suspect and the crime. Bank teller Mark Pearson stated that Brady's eyes had been "cold and dead like a shark." (12 RT 2808-2809.) Supermarket checker Arden Schoenborn gave similar testimony, stating that Roger Brady's eyes were "cold, empty and looked like death." (17 RT 3775.) Schoenborn testified that during the robbery he thought he was going to die, and felt as though he was "eye to eye with the person and looking at death." (17 RT 3763.) Ralph's supermarket manager Gutierrez testified that the suspect had an "evil look," and made he him feel "butterflies" in his stomach. (14 RT 3108.) Even assuming, arguendo, that victim impact testimony was admissible for factor b crimes, these types of comments are forbidden under state law and federal constitutional standards. (See *Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2; see also *People v. Robinson, supra*, 37 Cal.4th 592, 656-657 (conc. opn. Moreno, J.).)

E. Section 190.3(b) Does Not Allow For Victim Impact Testimony.

The California Supreme Court has held that a defendant's conduct on previous occasions may be relevant to the penalty decision. Accordingly, witnesses to crimes alleged in aggravation pursuant to Penal Code section 190.3(b) may testify about the circumstances surrounding those incidents. (*People v. Smith (Gregory C.)* (2003) 30 Cal.4th 581, 625-

626 [68 P.3d 302, 134 Cal.Rptr.2d 1]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 111 [793 P.2d 23, 270 Cal.Rptr. 817]; *People v. Carrera* (1989) 49 Cal.3d 291, 336-337 [777 P.2d 121, 261 Cal.Rptr. 348]; *People v. Karis* (1988) 46 Cal.3d 612, 640-641 [758 P.2d 1189, 250 Cal.Rptr. 659].) The Court has not, however, determined that the prosecutor may elicit testimony from witnesses to factor b crimes about the psychological or emotional impact (or other lasting effects) of their experiences.[72] As a practical matter, the jury may gather that some factor b victim/witness have suffered lasting ill effects based on the facts of the crime. The testimony of a factor b witness is not subject to exclusion simply "because the impact of the crime on the victim might be apparent to the jury." (*People v. Karis, supra,* 46 Cal.3d 612, 641 [the prosecution does not have to stipulate to facts but could present testimony of rape victim elicit the facts and circumstances of that offense]; *People v. Stankewitz, supra,* at p. 111.) Similarly, reversal has not been found to be necessary where a factor b witness revealed some upset or injury in the course of testifying. (*Id.*) The present case, however, is distinguishable because the prosecutor actively sought out the testimony.

The prosecutor deliberately elicited victim impact testimony from the factor b witnesses, directly violating the trial court's ruling on the defense motion in limine. The prosecutor questioned the factor b witnesses about

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The result is different from the where testifying witness was injured in the course of the capital offense. (Compare *People v. Brown (John G.), supra,* 33 Cal.4th 382, 397 [surviving witnesses injured in the capital crime were permitted to testify about the enduring effects of the assault], citing *People v. Mitcham* (1992) 1 Cal.4th 1027, 1062-1063 [824 P.2d 1277, 5 Cal.Rptr.2d 280]; see also *People v. Taylor, supra,* 26 Cal.4th 1155 [surviving victim of capital crime so severely injured that he became a quadriplegic].)

the extent and duration of any ill effects resulting from the crime. (See 13 RT 2868; 2880.) For the most part, the testimony of the factor b witnesses did not indicate that they had been unduly upset at the time, or hint at sustained after effects from the experiences.[73] Most of these people had been, understandably, fearful during the robbery and upset immediately thereafter. However, the testimony for the most part did not imply that the witnesses sustained lasting trauma.[74]

The factor b witnesses who *did* testify about sustained anxiety or trauma did not volunteer this information. Rather, the prosecutor specifically questioned them about the extent and duration of the effects of the crime. [75]

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The most notable exception being Ms. Heinzman who was visibly distraught while testifying about the pharmacy robbery that occurred in May of 1994.

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When asked if she were scared during the robbery, market checker Tara Thompson testified "At the time I don't think I was really scared, but afterwards because it happened so fast – but afterwards is when it really hit." (14 RT 3220-3221.) An employee involved in another market robbery stated "[it's] not something I want to remember. I put it in the back of my head." (14 RT 3202 [testimony of Patty Foster].)

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For example, at the end of the witness's direct examination, the prosecutor posed the following question to bank teller Shawn Sadler: "And Mr. Sadler, was it difficult or uncomfortable for you to come into court today and testify to your having been robbed over nine years ago?" (12 RT 2691.) Witness Lory Kelley was asked, "Now, you indicated, Ms. Kelley, that you were scared at that point in time. Has the fear that you experienced from that event lasted since that date or affected you in any way that you can think of ?" (12 RT 2703.) Referring to his experience of a bank robbery, the prosecutor asked Allen Minassian, "Is this an event that you've

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tried to or have you been able to get it out of your mind? Have you forgotten about it?" (12 RT 2737.) The prosecutor's questions were more pointed in some instances. Bank employee Jane Rieder was asked, "Now, Ms. Rieder, you've testified again that this was frightening. Has your life--or have you altered your life in any way in light of what occurred over nine years ago?" (13 RT 2867.)

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Neither *Payne* nor *Edwards* authorizes the use of victim impact crimes other than the capital offense. Under California law, the valid purpose of victim impact is "reminding the jury 'that the victim is an individual whose death represents a unique loss to society and in particular his family.'" (*People v. Robinson, supra,* 37 Cal.4th 592, 656-657 (conc. opn. Moreno, J.) quoting *Payne v. Tennessee, supra*, at p. 830, fn. 2.) This purpose is not advanced by admitting victim impact testimony concerning noncapital crimes. This evidence merely increases the risks of improper prejudice noted in both the *Payne* and *Edwards* opinions. Victim impact is typically emotional evidence and argument which may "divert the jury's attention from its proper role or invites an irrational, purely subjective response." (*Edwards, supra,* at p. 836.) Sufficiently prejudicial victim impact evidence undermines the reliability the Eighth Amendment requires for capital sentencing, and violates the Due Process Clause of the federal constitution by creating a "fundamentally unfair" sentencing proceeding. (*Payne*, at p. 825.)

F. Evidence Code Section 352.

Evidence Code section 352 applies to penalty phase proceedings, and allows trial judges to exclude evidence "by which the prosecution seeks to demonstrate either the circumstances of the crime, (factor (a)), or violent criminal activity (factor (b)), in a 'manner' that is misleading, cumulative, or unduly inflammatory." (*People v. Smith (Gregory S.), supra,* 35 Cal.4th 334; *People v. Box, supra*, 23 Cal. 4th 1153, 1200-1201; *People v. Michaels, supra*, 28 Cal. 4th 486; *People v. Karis, supra*, 46 Cal.3d 612, 641 fn. 21.)

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The evidence at issue here fit all of these criteria for exclusion.

Another reason to exclude this testimony was the sufficiency of the evidence establishing the factor b crimes. The majority of the factor b witnesses testified to robberies which were never adjudicated. The California Supreme Court has advised caution in assessing the potential prejudice from unadjudicated crimes. In *People v. Box*, the Court stated:

> T]he question of whether evidence is unduly inflammatory is closer under factor (b) than factor (a) to the extent the penalty jury must decide whether the factor (b) crime actually occurred beyond a reasonable doubt as well as assess its moral weight for purposes of sentencing. (See *People v. Robertson* (1982) 33 Cal.3d 21, 53-55 [655 P.2d 279, 188 Cal.Rptr. 77].) The factor (b) evidence, even if it fairly depicts the moral blameworthiness of the defendant, may nonetheless be excludable under Evidence Code section 352 insofar as it unfairly persuades jurors to find the defendant guilty of the crime's commission.

(*Id.* at p. 1201.) The majority of the factor b testimony and evidence in Roger Brady's case concerned unadjudicated robberies. Significantly, the most prejudicial and emotionally compelling of the factor b victim impact testimony came from the Medicine Shoppe Pharmacy robbery, the crime with the weakest evidence implicating Roger Brady.

Several factors contributed to making this factor b evidence unduly prejudicial. The testimony of the factor b witnesses was unquestionably cumulative. Forty witnesses testified about 21 factor b incidents. The testimony occupied several court days, and much of it was repetitive, with multiple witnesses testifying to the same event. The sheer volume of the factor b evidence magnified its importance for the jurors. The large poster board exhibits made it appear that Roger Brady was responsible for a wave

of terror that had landed on the west coast with the force of a hurricane. Placing photographs of all of the alleged victims around the margins of the poster boards heightened the prejudicial effect. The length of time from the past crimes also added to the prejudicial effect of the testimony. The bank robbery witnesses testified to events from 1989 - nine years before trial in this case. The fact that these witnesses were still upset after this length of time made the lasting impact of those crimes appear even more serious.

The prosecutor's strategy was to make the factor b witnesses appear as "damaged" as possible in order to make Roger Brady appear frightening and evil. The prosecutor's closing argument capitalized on the testimony about the lasting impact of factor b crimes to further this theme. In closing argument the prosecutor repeatedly reminded the jury to consider the lasting trauma caused to factor b witnesses. (See, e.g., 21 RT 4763-4765.) The jurors were told that a death sentence was the only proper penalty for Roger Brady based not only on his past conduct but due to the suffering of all of the victims. (See 21 RT 4751-4769.)

G. Conclusion.

For all of the reasons discussed above, the trial court erred by allowing factor b witnesses to testify about lasting impact of the alleged robberies. This testimony was not relevant as victim impact evidence under California law because it did not pertain to the circumstances of the capital crime. The testimony was similarly irrelevant under Penal Code section 190.3(b) because it did not describe any of the circumstances of those incidents. Finally, the balance of prejudice against probative value clearly tipped against the admission of this testimony. Particularly when combined with the prosecutor's closing argument, this testimony was the type of evidence which "uniquely tends to evoke an emotional bias against the

defendant as an individual and which has very little effect on the issues." (*People v. Karis, supra,* 46 Cal.3d 612, 638.) The admission of this evidence and testimony requires that Roger Brady's sentence be reversed.

justify reversal of the penalty determination. Reversal is certainly required based on the combined prejudicial effect of this pervasive misconduct. (See *People v. Hill, supra,* 17 Cal.4th 800, 822.)

C. Related Appeals To Passion And Prejudice.

The dual purposes of the prosecutor's closing argument were clear: to arouse the jurors' fears of crime and violence and to impress upon them their dependence on police for protection, while at the same time appealing to their loyalty to government institutions and their gratitude to the police for assuming, in the prosecutor's view, their essential role as society's protectors against evil.[76] After inflaming the

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The trial court allowed the prosecutor to use a chart, purporting to show the statutory factors in aggravation and the factors in mitigation, as a demonstrative aid in her closing speech. (See 21 RT 4692.) Defense counsel had an opportunity to view the chart in advance at the instruction conference and raised several objections. (See 21 RT 4691-4700.) The chart was divided into two columns, titled "Aggravation" and "Mitigation." (See 4693-4694.) A number of items were listed in each column. An entry in the Aggravation column stated that the Martin Ganz was a police officer, and went on to read "One of our protectors." (21 RT 4696.) The trial court overruled the defense objection to this appeal to emotion, finding that there was no impropriety provided that the jury was told that all demonstrative aids were considered part of counsels' arguments and were not to be taken as instructions on the law. (21 RT 4696-4697.)

(continued...)

jurors sentiments in this fashion, the prosecutor made several specific points capitalizing on this basic theme. Jurors were encouraged to personally identify with the families of police officers, to align themselves with the police and with the prosecutor, and to view themselves and all of society as victims and survivors of the defendant's crimes. These arguments were made for no other purpose than to incite the jurors to the point that their emotions would overwhelm their reasoned moral judgment concerning the appropriate sentence for Roger Brady.

1. Appeals to Fear, Gratitude and Loyalty.

Throughout her closing argument, the prosecutor exploited the jurors' fears of crime, lawlessness and violence. The arguments were personalized, and encouraged the jurors to identify with crime victims and to see themselves as threatened and needing protection. According to the prosecutor, the police provide society's only hope.

> Police officers are our protectors, they insulate us from things that are out in our society that we're hoping we don't have to come in contact with. And if any of us are so unfortunate that we have to come in contact with those types of things as these numerous victims and witnesses went through, those series of crimes, we're grateful when that police officer comes. If you get home and see that your home has been burglarized, what do you do? You call the police.

(21 RT 4759-4760.)

After the trial judge overruled defense counsel's objections (21 RT 4760), the prosecutor continued in even more dramatic terms.

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> The police officers arrive, they don't know you at all, but they're putting themselves in harm's way to protect you. And if there's a potential suspect in your home because you came home, saw the door open, maybe hear noise in there, when you go to your neighbor's to call the police, it's police officers who come and go into your home to protect you.

(21 RT 4760.)

As the police are increasingly glorified, those who break the law grow steadily more menacing. In the first hypothetical situation, jurors are invited to imagine returning home to discover that a burglary has already occurred. In the next, jurors are asked to envision a dangerous intruder lurking inside the house until the police arrive to "put themselves in harm's way to protect you." The prosecutor increased the drama still further, portraying police as essential to the survival of humanity:

> Police officers are -- if you think of the human body or even think of society as a form of life, and we all think of our skin as enclosing all of us and our tissue and our bones being the things that insulate us from infection inside, the police officers are like that, they're that last stop. Our immune system in our body is what protects us from the most microscopic virus, and the police officers protect us in that way also.

(21 RT 4760-4761.)

At this point in the argument, another theme emerges: the criminal defendant (personified by Roger Brady sitting before the jurors) is no longer human. He is a non-sentient "virus;" part of a plague seeking only to destroy "us." In *Collier v. State* (1987) 103 Nev. 563 [747 P.2d 225] the Nevada Supreme Court found it improper for the prosecutor to equate the defendant with dogs, disease, plague or pestilence. The argument here was

even more damaging because it not only denigrated the defendant but simultaneously elevated the status of the victim. The clear message was that the jurors, like the prosecutor, are among the vulnerable human race and, therefore, dependent upon the police.

Expounding on this theme, the prosecutor announced that she would read part of a "very moving" speech given by local newscaster Stan Chambers at the dedication of a monument to officers killed in the line of duty; "because I think it helps point out what police officers -- what they do for us and how important they are." (21 RT 4761.) Over further defense objections (*id.*), the prosecutor delivered the speech, gesturing toward the police officers sitting in the courtroom audience as she spoke.[77]

> "Each name is inscribed on solitary bronze blocks that records [sic] the lives of these gallant men. Together they form the symbolic wall that marks that fragile line between civilization and anarchy. In the middle ages the rugged stone walls and wide moats protected the townspeople from the marauders, they knew they were secure behind their gates. They rested at night knowing that sentries were on duty and the soldiers were inside awaiting for any call.
>
> "Ours is a different time, a different society. The marauders and the enemies are inside, they strike at any time and any place, they live among us only to destroy. More than ever that wall must be manned daily. It must be enforced daily. Civilization must be protected daily. And as all of us here know, it is done at a deadly price.

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The trial judge acknowledged that the prosecutor had in fact gestured toward the officers when defense counsel objected to this, and other misconduct during argument, outside the presence of the jury. The court refused the defense requests for an admonition and a curative instruction. (21 RT 4770-4771.)

"What a strange world we have created for ourselves, what strange people live in our world. Those who would rip it apart are out there slashing the very fabric of what made this country great. But the wall must be manned and those who violate it must be punished. No matter what we do, the vicious, the violent, and the criminal mind is just a wall away from a ruthless, inhuman, and cruel rampage that will not stop until it is stopped.

"And that is what these men and women of law enforcement do daily, that's what these valiant men and women do to the very end, and the wall still stands tall because of it. It's often a lonely watch out there, many feel very much alone as they protected the castle wall. But you know and you must remember how much everyone appreciates what you are all doing. You've given us the opportunity to raise our children, to go to our jobs, to conduct our businesses, to live a happy life, and take advantage of the wonderful challenges that are here for everyone. You've given us the chance of life. It's ever so precious, and it is just a step away from those who would take everything we have away.

"No matter what you hear, no matter what is said, just know the people out there know what you are trying to do, and they respect you, and they appreciate what you have done to keep their lives free from fear and violence and, yes, even death.

"But looking at the wall we all feel the deep emotion that stirs within, the wall is there because of the men and women who died, it is our memorial to them, we must pay homage to those who gave their all that we might be here today remembering that we owe them such an infinite death [sic]."

Ladies and gentlemen, Martin Ganz was one of the men manning that wall.

(21 RT 4764.)

This argument evokes two powerful sets of emotions: the jurors' fears of crime, anarchy and violence, and their gratitude and loyalty to government institutions and law enforcement. Prosecutorial appeals combining fear, loyalty or patriotism, and dependence or gratitude for the government's are overwhelmingly inflammatory. In *Viereck v. United States* (1943) 318 U.S. 236, 247 [87 L.Ed. 734, 63 S.Ct. 561] the prosecutor commented on the war effort and the bravery of the country's troops in battle who were fighting the enemy:

> There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.¶ This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen, for their protection against this sort of crime . . . As a representative of your Government I am calling upon every one of you to do your duty.

The United States Supreme Court reversed the defendant's conviction. The Court found that the prosecutor's argument was wholly irrelevant, and its purpose and effect could only have been to arouse passion and prejudice. (*Id.* at pp. 247-248; see also *Taglianetti v. United States* (1st Cir. 1968) 398 F.2d 558, 566 [highly improper for the assistant United States Attorney in tax prosecution to refer to federal agents as "laboring 'for the United States Government in order to protect the taxpayers from people who are cheating on their income tax, to get the dollars and cents we need in the till to fight Communism, to fight the war in Viet Nam.'"].)

Courts have recognized the emotional power of various appeals to police loyalty. (See, e.g., *United States v. Koon* (9th Cir. 1994) 34 F.3d

1416, 1445-1446 [prosecutor's argument]; *State v. Ancona* (Conn. 2004) 270 Conn. 568, 602 [854 A.2d 718] [prosecutor's reference to a Washington D.C. monument dedicated to fallen police officers was irrelevant and an improper appeal to the jurors' emotions, passions and prejudices]; *People v. Blue* (2000) 189 Ill.2d 99, 126 [724 N.E.2d 920, 934] [remarking that the "clothes of a police officer [ ] are uniquely charged with emotion"], quoting *People v. Burrell* (1992) 228 Ill.App.3d 133, 143-144 [592 N.E.2d 453.].)

It is difficult to imagine a more flagrant appeal to passion and prejudice (in the form of loyalty to police) than the extended excerpt of Stan Chambers' speech. From the outset, the speech encouraged jurors to see the world in terms of their fears and prejudices. The medieval town analogy divides the world into three groups: the anxious citizenry desperately needing protection; their "gallant" defenders the police; and, the "marauders and the enemies," who lurk beyond the stone walls on the other side of the moat waiting for a chance to prey on the townspeople. (21 RT 4762, 4763.) No juror could fail to understand where they, Officer Ganz, and Roger Brady fit into this taxonomy. According to this tripartite world view, the "valiant men and women" of the police force (21 RT 4763) are virtual deities. Law enforcement officers form "the symbolic wall that marks that fragile line between civilization and anarchy." (21 RT 4761.) The citizenry would be defenseless and unable to function without law enforcement's protection. Members of the public owe their happiness, their safety, and their very lives to the police. Law breakers are demonized as thoroughly as police are venerated. These "strange people" are "ruthless, inhuman, and cruel." (21 RT 4762.) They are bent on "slashing the very

fabric of what made this country great." No matter what the cost, society must stop "the vicious, the violent, the criminal mind." (*Id.*)

This material can only have been chosen for its emotional impact as it was irrelevant to any legitimate sentencing issues. The prosecutor admitted as much, stating that she planned to read part of the "very moving" speech, "because I think it helps point out what police officers -- what they do for us and how important they are." (21 RT 4760.) There was no need to persuade the jury of the importance of law enforcement. Society's concern with protecting police officers and law enforcement officials is reflected in Penal Code section 190.2(a)(7), making the killing of a police officer punishable by death. The jury had already convicted Roger Brady of first degree murder and found "true" the special circumstances. Neither the prosecutor's ideas nor Stan Chambers' views about law enforcement's societal role were proper considerations in choosing the penalty for Roger Brady.

2. The Victim Impact Evidence Compounded The Prejudice.

Where, as in this case, the victim impact evidence is intertwined with appeals to jurors' fears of crime and reverence of police undue prejudice is inevitable. In *People v. Blue, supra,* 189 Ill.2d 99 [724 N.E.2d 920], the Illinois Supreme Court reversed the defendant's conviction and death sentence in the murder of a Chicago police officer. There, the Illinois high court found that the conflation of victim impact and appeals to jurors solidarity with law enforcement in the prosecutor's argument was overwhelmingly prejudicial. *People v. Blue* involved far less victim impact evidence than the jury received in this case, and the prosecutor's argument

pales in comparison to this prosecutor's unrelenting emotional assault on the jurors' emotions.

In *People v. Blue*, the officer's father testified briefly - his entire testimony covering nine transcript pages. The jury learned that the victim's father was 71-years-old and that he and the victim's mother had been married for 51 years. The parents lived on another floor of the same apartment building where the victim and his daughter had lived. (*Id.* at p. 130-131 [936-937].) The officer's father described the last time he saw the victim, identified him in a photograph, and related the events on the evening of the crime. (*Ibid.*) After the defense case in mitigation, the prosecution had the mother read three victim impact statements; one from her husband, one from the officer's daughter, and her own comments. (*Id.* at p. 118.) In closing argument, the prosecutor combined the victim impact testimony with an appeal on behalf of law enforcement: [78]

> You heard from [the victim's father]. He needs to hear something from you. He and [the victim's mother] need to hear from you that even though they suffered the worst possible nightmare a parent could suffer, that they had to bury their child, they need to hear from you that they will get justice. [The victim's daughter] needs to hear from you that daddy didn't die in vain. [The officer's partner injured in the same incident] needs to hear it from you, artificial hip and all,

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In contrast to this case, there was very little testimony in *Blue* from police witnesses and *no* evidence about the impact to the police department. The Chicago Police Department's Commander of the Training Division testified briefly, describing the ceremony and oath taken by the victim upon joining the Chicago Police Department and stating that the victim's badge had been retired and was on display in the "honored star case" at headquarters. (*Blue*, *supra*, 189 Ill.2d at p. 133 [724 N.E.2d at p. 938]; see Section H, *supra*.)

> that his heroics, his courage, his honor, and his duty didn't go in vain. Every Chicago police officer --
>
> ***
>
> From the superintendent down to the newest rookie and every police officer in this state needs to hear from you right now.
>
> ***
>
> That while they serve and protect us we will serve and protect them. They need to hear from you that no gun-toting drug dealer is going to get away with shooting one of them.

(*Blue*, *supra*, 189 Ill.2d at p. 128 [724 N.E.2d at p. 935].) The Illinois Supreme Court found this argument to be "little more than a transparent play to the jury's sympathy and loyalty to law enforcement." (*People v. Blue, supra*, 189 Ill.2d at p. 132 [724 N.E.2d at p. 937].) When combined with the comparatively slight and unremarkable victim impact testimony, the result was a deprivation of the defendant's constitutional rights. The Illinois Supreme Court observed, "[t]he nakedly prejudicial nature of the arguments was intensified by parallel evidence which, perhaps by design, reinforced the tragedy of the loss suffered in this case by the police force and by the family of [the victim]. (*Blue*, *supra*, 189 Ill.2d at p. 134 [724 N.E.2d at p. 938].)

The argument in *People v. Blue* pales in comparison to this prosecutor's hyperbolic tribute to law enforcement. Moreover, the abundant victim impact evidence and testimony in this case allowed the prosecutor to make a direct connection Martin Ganz to the image of the ideal police officer. At the start of her lengthy sermon on the value of law enforcement, the prosecutor identifies Martin Ganz as a member of this elite group, reminding the jury:

> [O]ne of the strongest features about Martin Ganz was that he was a police officer, we know it was something he wanted to do from the time he was a young boy, I believe, 12-years-old, went to Explorer Scouts, did everything he could to reach that goal despite obstacles and setbacks in his personal life, he persevered. He was too young to apply to be an officer so what does he do? Joins the military just to go into the military police so it would look good on his resume to become an officer.

(21 RT 4759.)

Jurors were then advised "to look very closely at the type of murder and the type of murderer it takes to kill, to murder, a uniformed police officer." (21 RT 4759.) The prosecutor posed the rhetorical question, "And what does a murder like this one tell officers?" (*Id.*) After inviting the jurors to identify also with the families of police, the prosecutor lectured the jury about the vital role of police in a free society concluding with the Stan Chambers speech. Immediately thereafter, Martin Ganz was held up as the shining example of the ideal police officer as the prosecutor reviewed for the jury "what we know about the kind of man he was." Jurors were reminded of Ganz's close family relationships, his devotion to his nephew Don, his engagement and his partners and fellow officers. Before calling the jurors' attention to a photo-board displaying pictures of Officer Ganz in life, the prosecutor commented on the value of Martin Ganz's life to the entire community. "He was a D.A.R.E. officer and a role model to tens of hundreds of children. He was one of those people manning the wall." (21 RT 4764.) The prosecutor exhorted the jurors that "we are all scarred by it" when an officer is killed; and that Ganz died while "patrolling Manhattan Beach and acting to serve and protect all of us." (21 RT 4765.) Nearing

the conclusion of her argument, the prosecutor again connected Ganz with the idealized vision of police. Referring to a large poster which she placed before the jury, the prosecutor stated:

> [J]ust last night I was looking at something that Martin Ganz gave us, and that was this Woody Woodpecker comic book that he wrote and had prepared for children on safety. And on one of the last pages which I've blown up, this is what Martin Ganz tells us. "Firemen and police officers are your friends. If you need help, just ask them."

(21 RT 4769.) As she ended her closing argument, the prosecutor twice exhorted the jury that this case "cries out for the death penalty," and that "death is the only just and appropriate penalty for the defendant in this case." (21 RT 4769-4770.)

3. Appeals To The Jurors' Oaths And Society's Expectations.

The jurors were bombarded with the message that society demanded a death sentence and that they were duty bound to return that verdict. As discussed above, the prosecutor relentlessly appealed to the jurors passions and prejudices with her diatribe about society's vital need for police and the collective duty to support them in their battle against the evil that would destroy "us all." While the implications of that message for this case were clear, the prosecution supplemented the general theme with other, more specific, advisements. Throughout the prosecutor's argument, a sign displayed the following quotation attributed to Edmund Burke: "ABOUT THE ONLY THING NECESSARY FOR EVIL TO TRIUMPH IS FOR GOOD MEN TO DO NOTHING." [79] It could not have been

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(continued...)

clearer what the prosecution expected of these jurors. The prosecutor personally requested a death sentence for Roger Brady and told jurors that death was the only verdict which would satisfy their duty to society.

The prosecutor took every conceivable opportunity to remind the jurors of their oath, and that they had claimed on voir dire to be capable of returning a death verdict. (21 RT 4739, 4740.) Jurors were also reminded that during voir dire each of them had agreed that a death sentence was justified for killing a police officer. (21 RT 4742.) All throughout the closing speech, the prosecutor invoked the jurors' oath, characterizing it as a duty to weigh the evidence in aggravation. (See 21 RT 4740; 4742-4743; 4755; 4758; 4768.) Nearing the end of her closing speech, the prosecutor expressly told the jury to return a death verdict on behalf of society. Referring to the death penalty, she stated, "And it is justice because society needs to be able to make sense of these horrible things that occur." (21 RT 4768.) Shortly thereafter, the jurors were told that nothing but a death verdict would fulfill their civic duty.

> Ladies and gentlemen, as was said in the -- in fact, defense at the end of the guilt phase, "If you follow the law you cannot go wrong." **This is a case where society cries out for the death penalty. As jurors, you are the judges and you are the conscience of society. And the law cries out for it** because in this case the aggravating evidence so outweighs the mitigating that the only just sentence is the death penalty.
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> * * *

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[79](...continued)

Defense counsel learned that the prosecutor planned to display the sign and objected outside the jurors' presence before closing argument began. The trial court held that the quotation was proper argument and allowed the prosecutor to display the sign while she addressed the jurors. (See 21 RT 4691, 4699-4700.)

> The defendant deserves the death penalty, he has earned it, and **I think as jurors that that is your duty. The death penalty is the only just and appropriate penalty for the defendant in this case.** Thank you very much.

(21 RT 4769-4770 [emphasis added].)

The due process and jury trial clauses of the federal constitution are violated when a prosecutor urges a jury to return a verdict based on perceived community feeling. (See, e.g., *Viereck v. United States, supra,* 318 U.S. 236, 247 [improper for the prosecutor to tell jurors, "The American people are relying on you"]; *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, 1151, 1155 [prejudicial appeal to jury to act as the community's conscience and to send a message of zero tolerance for drugs]; *United States v. Johnson* (8th Cir. 1992) 968 F.2d 768-770 [exhorting jurors to "stand as a bulwark" against the proliferation of drugs]; *United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1441 [prosecutor may not urge jurors to convict a criminal defendant in order to protect the community's values].)

The jury in a criminal trial is presumed to be representative of the community, but is not to act as the community's representative. (See S. Kraus, *Representing The Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing* (1989) 64 Ind.L.J. 617, 651.) Capital sentencing decisions (essentially normative judgments) are not supposed to be an expression of the community's will. Rather, jurors are to make a "personal moral judgment regarding which penalty is the appropriate one to be imposed." (*People v. Edelbacher, supra,* 47 Cal.3d 983, 1035; *People v. Allen* (1986) 42 Cal.3d 1222, 1227 [729 P.2d 115, 232

Cal.Rptr. 849]; *People v. Brown (Albert)* (1985) 40 Cal.3d 512, 541 [726 P.2d 516, 230 Cal.Rptr. 834].)

In this case, the prosecutor amplified the prejudicial effect of these comments by combining them with other types of impropriety. The prosecutor is clearly conveying her personal belief that death is "the only just verdict." It is settled law that the prosecutor should not offer a personal opinion as to the defendant's guilt or the appropriateness of capital punishment. (*United States v. Young* (1985) 470 U.S. 1, 18-19 [105 S.Ct. 1038, 84 L.Ed.2d 1].) It is equally improper for the prosecutor to tell the jurors that their duty is to return the verdict the prosecution is seeking. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214; *United States v. Polizzi* (9th Cir. 1986) 801 F.2d 1543, 1558 [improper for prosecutor to tell jury it had any obligation other than weighing evidence].)

The closing argument in this case cannot be interpreted as a "temperate speech concerning the function of the jury and the rule of law." (*People v. Cornwell* (2005) 37 Cal.4th 50, 92-93 [117 P.3d 622, 33 Cal.Rptr. 1.) The jurors in Roger Brady's case were not merely lectured about the importance of the jury system, or reminded to "do your job" (*Cornwell, supra*; *United States v. Young, supra,* 470 U.S. 1, 18-19; compare *People v. Lang* (1989) 49 Cal.3d 991 [782 P.2d 627, 264 Cal.Rptr. 386] [acceptable for prosecutor to tell jurors that their jury service was an opportunity to have an effect upon the community]; *People v. Poggi* (1988) 45 Cal.3d 306 [753 P.2d 1082, 246 Cal.Rptr. 886].) While the prosecutors in the afore-mentioned cases emphasized the *process*, this prosecutor was only interested in the *result*. It was abundantly clear that, for this prosecutor, there could only be one acceptable result and *only* that outcome, a death verdict, would fulfill their oaths their civic duty.

Nothing in the larger context of the prosecutor's argument ameliorates this message. In *People v. Davenport* (1996) 11 Cal.4th 1171, 1121 [906 P.2d 1068, 47 Cal.Rptr.2d 800] the prosecutor's statement that "Sometimes the law requires a literal retribution for the taking of a life," did not improperly inform the jury that the law automatically required the death penalty where the prosecutor continued to state, "*Now, you all told us that you would render your individual verdict in this case . . . If it is life without parole, or if it is the death sentence, please work with the other jurors.*" (*Id.* at p. 1221 [emphasis added].) In this case, the prejudice actually increases when the comments concerning the jurors' societal obligations are viewed in the larger context. (Compare, *People v. Davenport, supra,* at p. 1221; *People v. Lucas* (1995) 12 Cal.4th 415, 475 [907 P.2d 373, 48 Cal.Rptr.2d 525].) These were not simply isolated remarks about community vengeance in an otherwise proper argument. (*People v. Wash, supra,* 6 Cal.4th 215, 262.) Instead, jurors were browbeaten with the message that they owed it to the victim's family, to the prosecutor herself, to the legal system, to law enforcement and to society to condemn Roger Brady to death. This form of misconduct in the closing argument is serious enough to justify reversal of the penalty decision by itself, and reversal is clearly appropriate when this instance is considered in combination with the other misconduct. (*People v. Cornwell, supra,* at pp. 92-93; *People v. Lucas, supra,* 12 Cal.4th 415, 475.)

D. Other Specific Instances of Misconduct.

The inflammatory appeals discussed above were not the only impropriety in the prosecutor's closing speech. Other forms of misconduct compounded the prejudice and demonstrate the prosecutor's complete

disregard for the boundaries of proper argument established by California law and the state and federal constitutions.

1. *Griffin* error.

Roger Brady's rights under the Fifth and Fourteenth Amendments were violated by another aspect of the prosecutor's closing argument. The prosecutor used a chart as a demonstrative aid in her closing speech. The chart purported to show the statutory factors in aggravation and the factors in mitigation which the jurors could consider in determining the penalty. (See 21 RT 4692.) The chart was divided into two columns, titled "Aggravation" and "Mitigation." (See 4693-4694.) The prosecutor listed a number of items in each column which she planned to refer to in closing argument. One item listed under aggravation read, "No. 10 Next Day Sorrow ???" and "Two months later the defendant moves to Washington." (21 RT 4693.) Defense counsel had an opportunity to view the chart in advance of its use and objected to this entry at the instruction conference. The trial court found that there was no impropriety provided that the jury was told that all demonstrative aids were considered part of counsels' arguments and were not to be taken as instructions on the law. [80] (See 21 RT 4693-4695.)

The prosecutor used the chart in closing argument, and compounded the violation of Roger Brady's rights under the Fifth and Fourteenth Amendments by stating:

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The trial court relied on the California Supreme Court's decisions in *People v. Osband* (1996) 13 Cal.4th 622, 724 [919 P.2d 640, 55 Cal.Rptr.2d 26], and *People v. Crittenden* (1994) 9 Cal.4th 83, 147 [885 P.2d 887, 36 Cal.Rptr.2d 474].

> You've seen the defendant in this environment. All of these people saw him in his environment outside. Two of them didn't live to tell about that. You know, from the -- **we have heard no evidence at all of any remorse from Mr. Brady** and yet for you to vote for life without parole you would need to find some sympathy.

(21 RT 4754 [emphasis added].)

The United States Supreme Court's decision in *Griffin v. California, supra,* 380 U.S. 609 prohibits a prosecutor from commenting on a criminal defendant's failure to testify. The California Supreme Court has long held that *Griffin* prohibits this type of argument in the penalty phase of a capital case. "[A] prosecutor may not urge that a defendant's failure to take the stand at the penalty phase, in order to confess his guilt after being found guilty, demonstrates a lack of remorse." (*People v. Boyette, supra,* 29 Cal.4th 381, 453-454; *People v. Crittenden, supra,* 9 Cal.4th at p. 846.) A prosecutor may argue that the *facts* in a particular case fail to demonstrate remorse on the defendant's part. (See, e.g., *People v. Marshall, supra,* 13 Cal.4th 799, 855.) The remarks set forth above do not fall within this exception. The prosecutor here can only be referring to Roger Brady's failure to testify. This is the plainest interpretation (and therefore the most obvious to the jurors) for the prosecutor's statement "we have *heard* no evidence at all of any remorse *from Mr. Brady*."

Defense counsel's failure to object to this instance of *Griffin* error should be overlooked. The prosecutor's argument clearly ran afoul of *Griffin*. However, the court had already denied the defense objection at the instruction conference. The trial judge had also advised both counsel of the court's desire to have objections interposed as seldom as possible during the closing arguments. Irrespective of when counsel interposed an objection, it

was certain to have been fruitless. The trial court was dismissive of all defense objections and refused to admonish the jury or to provide curative instructions. (21 RT 4750, 4760, 4761, 4770-4771.) Waiver should not apply to preclude this Court's consideration of this legal claim because even a timely objection would have been futile (*People v. Hill, supra,* 17 Cal.4th at p. 820; see also *People v. Arias*, *supra*, 13 Cal.4th at p. 159; *People v. Noguera* (1992) 4 Cal.4th 599,638 [842 P.2d 1162, 15 Cal.Rptr.2d 400.) and, even if the court had admonished the jury, an admonishment could not have cured the harm. (*People v. Hill, supra*, at p. 820; *People v. Bradford, supra,*15 Cal.4th 1229, 1333.)

2. Arguing Facts Not In Evidence.

There was no basis in the record for the prosecutor's assertion that Phillip Brady took out a second mortgage on the family home in order to travel to see his son while Roger was in federal custody. (21 RT 4750.)[81] This seemingly minor point was in fact significant in the context of this case and the prosecutor's misrepresentation of the record was prejudicial to the defense. The relationship between Roger Brady and his father was a significant aspect of the defense case in mitigation. Defense counsel presented testimony concerning Phillip Brady's drug use, his irresponsibility, and his poor treatment of his son Roger. Diep Brady blamed her husband for Roger's drug use and resulting addiction. (See 19 RT 4311-4320; 4332-4336.) The prosecutor took a different view of the testimony, arguing that Roger had enjoyed a relatively privileged life. In her closing argument, Roger's father is portrayed as strict perhaps but

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81 The trial court overruled defense counsel's objection. (*Id.*)

ultimately loving and attentive to his son's needs. (See 21 RT 4746-4750; 4753-4754.) This false impression was reinforced by the unsupported claim that Phillip Brady obtained a second mortgage for his son's benefit.

The California Supreme Court has made it abundantly clear that the prosecutor commits misconduct by arguing facts not in evidence.[82] With no support in the record, the prosecutor argued that the "evidence" of Phillip Brady's taking out a second mortgage in order to benefit his son Roger refuted the defense case in mitigation, i.e., that Roger Brady was deserving of sympathy because he grew up being singled out for harsh treatment by a temperamental, drug abusing father. The prosecutor thus invited the jury to base a death verdict on "evidence" which was never presented at trial. The prosecutor also became her own unsworn witness, clearly not subject to cross-examination, thus denying Roger Brady his Sixth Amendment rights. (*Dutton v. Evans* (1970) 400 U.S. 74 [91 S.Ct. 210, 27 L.Ed.2d 213] (conc. opn. of Harlan, J.); see also *California v. Green* (1970) 399 U.S. 149, 158-159 [90 S.Ct. 1930, 26 L.Ed.2d 489]; *Bruton v. United States*, *supra*, 391 U.S. at p. 136.)

3. Argument Based On Speculation.

The prosecutor argued that Roger Brady would pose an ongoing threat to prison personnel if allowed to live.

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The Court's opinion in *People v. Hill, supra,* 17 Cal.4th 800, confirms this legal principle and notes its substantial and longstanding support in California law. (*Id.* at pp. 827-828, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [824 P.2d 571, 4 Cal.Rptr.2d 765]; *People v. Bolton* (1979) 23 Cal.3d 208, 213 [589 P.2d 396, 152 Cal.Rptr. 141]; *People v. Benson*, *supra*, 52 Cal.3d at p. 794, *People v. Miranda, supra*, 44 Cal.3d 57, 108; *People v. Kirkes* (1952) 39 Cal.2d 719, 724, [249 P.2d 1].)

> We know from one of the tests administered by Dr. Humphrey that Mr. Brady is a dangerous person subject to explosive behavior. And I think one of the issues to consider is how safe he would be in a prison. We know he'll kill a police officer. How safe would a prison guard be?

(21 RT 4754.)

Continuing after the trial court overruled the defense objection, the prosecutor argued:

> How safe would a prison guard be with Mr. Brady as an inmate? He's already murdered someone that represents that line for us all between safety and danger so what's to stop him just because he'd be locked up in prison? Is that a reason that anyone there would feel safe?

(21 RT 4755.)

The California Supreme Court has allowed prosecutors to argue that capital defendants would, if given a life sentence, pose a risk to prison guards and other inmates. (See, e.g., *People v. Stitely, supra,* 35 Cal.4th 514, 571.) Prosecutorial comment in this area typically refers to the defendant's history as a sexual predator (*Id.*; see also *People v. Welch* (1999) 20 Cal.4th 701, 761 [976 P.2d 754, 85 Cal.Rptr.2d 203]), but may also derive from a history of assaultive conduct. (*People v. Millwee, supra,* 18 Cal.4th 96, 153; *People v. Bradford, supra,*15 Cal.4th 1229; *People v. Clark (Richard), supra*, 5 Cal.4th 950; *People v. Clark (Douglas)* (1992) 3 Cal.4th 41 [833 P.2d 561, 10 Cal.Rptr.2d 554].)

In the present case, the prosecutor referred to the defense mitigation evidence provided by Roger Brady's own expert, neuro-psychologist Lorie Humphrey, to argue that Brady would be a threat to guards and other prisoners. This contention effectively transformed evidence offered in

mitigation into aggravating evidence. (See *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604.) It is acknowledged that the California Supreme Court has rejected similar claims. (See *People v. Davis,supra,* 10 Cal.4th 463.) However, this case is distinguishable and the claim here warrants consideration. In *People v. Davis*, the prosecutor's comment on the defendant's future dangerousness was proper rebuttal because the expert in that case had predicted that the defendant would do well in the prison system. In the present case, Doctor Humphrey did not testify regarding Roger Brady's expected adjustment to prison if given a life sentence. Moreover, unlike defense counsel in *Davis*, Roger Brady's counsel made a contemporaneous objection. (21 RT 4754.)

4. Appeals To Vengeance.

Several times during the course of her closing argument the prosecutor told the jurors that they should return a death verdict for Roger Brady to avenge the two homicide victims: Officer Ganz and Catalina Correa. Here again, the prosecutor clearly states her personal views: "I suggest that you show him the same sympathy that he showed to Martin Ganz and the same sympathy that he showed to Catalina Correa." (21 RT 4754.) Reviewing the process of weighing aggravating and mitigating evidence, the prosecutor argued that, although legally permitted to consider sympathy for the defendant, "there is no sympathy for any human so great to outweigh the aggravating factors in this case." (21 RT 4755-4758.) The prosecutor subsequently stated that Roger Brady did not deserve mercy in the form of a life sentence because he had not been equally merciful in his treatment of victims Ganz and Correa.[83] Nearing the end of her closing

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(continued...)

argument, the prosecutor once again urged that Roger Brady did not deserve mercy or sympathy because the victims no longer had any opportunity for life and the survivors' lives had been forever changed by the loss. (21 RT 4768.)

This type of "show the same sympathy" argument is an improper appeal to passion and prejudice which encourages jurors to ignore the guided discretion of California's statute in favor of a decision based on emotion rather than the "reasoned moral response" mandated by the Eighth and Fourteenth Amendments. (*Penry v. Lynaugh, supra,* 492 U.S. 302, 328.) The California Supreme Court has rejected a number of defense challenges to these arguments on both constitutional and state law grounds. (See *People v. Young* (2005) 34 Cal.4th 1149 [105 P.3d 487, 24 Cal.Rptr.3d 112]; *People v. Kennedy* (2005) 36 Cal.4th 595 [115 P.3d 472, 31 Cal.Rptr.3d 160]; *People v. Benavides, supra,* 35 Cal.4th 69; *People v. Viera* (2005) 35 Cal.4th 264, [106 P.3d 990, 25 Cal.Rptr.3d 337]; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465 [966 P.2d 442, 79 Cal.Rptr.2d 408].) There are, however, reasons for this Court to reconsider its previous decisions in this area.

Other jurisdictions have not looked favorably on prosecutorial arguments to "show the defendant the same mercy or sympathy." The Florida Supreme Court considers these arguments inflammatory appeals to passion and prejudice. Florida's high court has repeatedly held that "asking a jury to show as much mercy to a defendant as he showed the victim is a

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[83](...continued)

The prosecutor stated: "And he's asking you to spare his life and give him a sentence of life without parole. I will tell you two people who would like a sentence of life in prison without parole, Catalina Correa and Martin Ganz, but they were denied even that quality of life." (21 RT 4765.)

clear example of prosecutorial misconduct, which constitutes error and will not be tolerated." (*Thomas v. State* (Fla. 1999) 748 So.2d 970, 985, fn. 10, citing, *Urbin v. State* (Fla. 1998) 714 So.2d 411; *Richardson v. State* (Fla. 1992) 604 So.2d 1107; *Rhodes v. State* (Fla. 1989) 547 So.2d 1201.) The Tennessee Supreme Court has also found such arguments to be improper appeals to vengeance which "[encourage] the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812.) At least two federal circuits have reached the same conclusion, finding these arguments to be improper appeals to passion and prejudice. (See *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, 1540-1541; *Duvall v. Reynolds* (10th Cir. 1998) 139 F.3d 768, 795.)

Barring this type of argument would be consistent with other California decisions setting boundaries for prosecutorial argument. The California Supreme Court has held that urging the jury to apply extra-judicial principles instead of the court's instructions constitutes misconduct. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1107 [839 P.2d 1020, 13 Cal.Rptr.2d 511]; *People v. Hill, supra,* 17 Cal.4th 800, 830 [prosecutor's misstatement of applicable law].) Appeals to religious principles are also misconduct under California law. (*People v. Wash, supra,* 6 Cal.4th 215, 258-261; *People v. Sandoval,* supra, 4 Cal.4th 155, 193-194.) By arguing that the defendant deserves the "same sympathy" as the victims were shown a prosecutor clearly states that justice lies in "the crude proportionality of 'an eye for an eye'." [84] (See *Tison v. Arizona* (1987) 481 U.S. 137, 180-

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The impression that the prosecutor's "same sympathy" argument was an appeal to religious doctrine was strengthened by its placement in the (continued...)

181[107 S.Ct. 1676, 95 L.Ed.2d 127] (dis. opn. of Brennan, J.)) This Biblical precept is in direct conflict with California law which requires capital sentencing to be based on guided discretion. (See *Jones v. Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559-1560.)

5. Appeal to Religion.

The prosecutor directly invoked religion in support of a death verdict. Roger Brady's prior murder conviction was charged as a special circumstance and was also urged as another factor supporting a death sentence in this case. In the course of discussing the Oregon case, the prosecutor made the following observation about the victim, Ms. Correa.

> And what I thought was particularly telling, she died wearing her cross. And there was not one thing she did to deserve her life ending in that manner. And there's not one reason you should show any sympathy for this defendant for that crime.

(21 RT 4758.)

The statement was both an improper religious reference and an expression of the prosecutor's personal views. (See *People v. Hill, supra,* 17 Cal.4th at p. 836; *People v. Wash, supra,* 6 Cal.4th at pp. 258-261; *People v. Sandoval, supra,* 4 Cal.4th at pp. 193-194.) Religious references and imagery are widely recognized as potentially inflammatory. Several cases specifically address crucifixes, holding that these images should typically be redacted from evidence shown to jurors in murder cases. (See *United States v. Sampson, supra*, 335 F.Supp.2d 166, 183 [proper to redact from photograph crucifix hanging on bathroom wall near victim's body in order

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[84](...continued)
closing speech. The prosecutor directly referred to religion in her next point while discussing the Oregon homicide of Ms. Correa. (See sub-section 5, *infra*.)

to avoid "providing religious overtones to the murder"]; *Taylor v. State* (Fla.Dist.Ct.App. 1994) 640 So.2d 1127, 1135 [videotape of victim's home which included panning shots of crucifix on the wall improperly "invite[d] an emotional response"]; *Commonwealth v. Chambers* (Pa. 1991) 528 Pa. 558 [599 A.2d 630, 644] [establishing a per se rule against religious invocations in prosecutorial arguments in capital cases.].)

The prosecutor referred to Christianity again at the end of her closing speech. "I ask you to let this Christmas and two days after on the 27th , which will be the fifth year anniversary of his death, that those who knew him and loved him can finally have a sense that some justice has occurred." (21 RT 4769-4770) "'Holiday arguments' are meant only to appeal to jurors' emotions and arouse their passions." (*Holloway v. State* (2000) 116 Nev. 732 [6 P.3d 987] [reversing defendant's death sentence based in part on prosecutor's comment in closing argument that the victim's family would have no more holidays with the daughter and their sister]. See also *Larson v. Meyer* (N.D. 1965) 135 N.W.2d 145 [unduly prejudicial to introduce family Christmas card with decedent's photograph].) The comments here were particularly prejudicial because the comments were stated as a personal request from the prosecutor. Jurors in this case were told that *in the prosecutor's opinion* their *duty* was to give the family justice, in the form of a death verdict, as a Christmas gift to Officer Ganz's family and friends.[85]

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The propriety of observing Christmas by condemning someone to state execution is certainly questionable. (See Blume & Johnson, *Don't Take His Eye, Don't Take His Tooth, And Don't Cast The First Stone: Limiting Religious Arguments In Capital Cases* (2000) 9 Wm. & Mary Bill Rts. J. 61.)

6. The "Bengal Tiger" metaphor.

In the course of her closing argument the prosecutor made use of a well-worn allegory to persuade jurors that Roger Brady was irredeemably dangerous and untrustworthy.

> You've only had an opportunity to view Mr. Brady here in the courtroom, and while I don't want to go into the full story, but there's a story that's used a lot of times to communicate or convey an example about the Bengal tiger where some people go to the London Zoo and see this huge tiger, and it's beautiful to look at and he's sitting in the cage in the zoo calmly licking his paws and just laying there looking very content and calm. And there's a gentleman there remarking he is so calm looking, that's a beautiful Bengal tiger. And a man comes up from behind him in kind of a safari khaki outfit attire and says, "That's not a Bengal tiger."
>
> The man looking into the cage, onlooker says, "Well, it says Bengal tiger." He said, "That's not a Bengal tiger, I'll show you a Bengal tiger."
>
> So they decide to take a trip into India where Bengal tigers roam in their natural environment, and they took the long boat trip around the coast and Cape Horn in India,[86] and they're walking through the jungles and swamps, and so forth. And at one point suddenly they hear a huge roar, and they look to where the roar sound comes from, and it's an enormous tiger with its huge claws out, mouth open, teeth displayed. And the man in the safari suit says, "That's a Bengal tiger."

(21 RT 4753-4754.) Returning to Roger Brady, the prosecutor continued:

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86 Cape Horn is actually an island located at the southernmost point of South America. It is in the Tierra del Fuego archipelago, and in Chilean territorial waters.

"You've seen the defendant in this environment. All of these people saw him in his environment outside. Two of them didn't live to tell about that." (21 RT 4754.)

Fifteen years ago the California Supreme Court declined to overturn a capital case where the prosecutor told a milder version of the Bengal tiger story (*People v. Duncan* (1991) 53 Cal.3d 955, 960-961 [810 P.2d 131, 281 Cal.Rptr. 273].) The Court determined that the jury in *People v. Duncan* was not likely to view the story as an improper allusion to the defendant's race.[87] Jurors in this case, however, were quite likely to make this connection. Roger Brady's Amer-Asian heritage was a significant feature of the defense case in mitigation. The jurors learned that Roger's mother was Vietnamese and his father American. (19 RT 4281-4284) His mother, Diep Brady, testified extensively about the experience of living through the Viet Nam war. (See 19 RT 4281-4307.) Diep described the difficulties of Roger's early childhood when she and Roger lived in a remote army compound hidden deep in the jungles of Viet Nam. (19 RT 4289-4301.) In the context of this case, the story comparing Roger Brady to a ruthless jungle predator was particularly inappropriate.

It is time to retire the Bengal tiger from the repertoire of prosecutorial fables. In the 15 years since this Court decided *People v. Duncan* society has grown less tolerant of even seemingly benign uses of racial or ethnic stereotypes. Perhaps in recognition of this shift in public

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Two federal decisions hold that similar versions of the story did not constitute prosecutorial misconduct. (See *Williams v. Calderon* (C.D.Cal. 1998) 48 F.Supp. 979. See also, *McDowell v. Calderon* (9th Cir. 1997) 107 F.3d 1351, 1365, overruled on other grounds, 130 F.3d 833 (9th Cir. 1997) (en banc) [story comparing defendant to a lion].)

attitudes, the Bengal tiger has not been as well received in recent years. Courts in other states have questioned its propriety. (See, e.g., *Carruthers v. State* (2000) 272 Ga. 306, 311-312 [528 S.E.2d 217].) Other courts have been more forceful in insisting that prosecutors avoid metaphors which are susceptible to interpretation as racial insults or ethnic slurs. (See *State v. Blanks* (Iowa Ct.App. 1991) 479 N.W.2d 601 [prosecutor's reference to film "Gorillas in the Mist" was improper in the criminal trial of an African-American defendant].)

As this Court has observed, the credibility of the entire justice system rests not only on the actuality but the appearance of fairness and equal justice before the law. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946 [75 P.3d 53, 4 Cal.Rptr.3d 131].) The prosecutor is the state's representative and this role requires him or her to take the moral high ground even while vigorously pursuing a conviction in a criminal case. (See *People v. Hill, supra*, 17 Cal.4th 800, 820; *People v. Kelley* (1977) 75 Cal.App.3d 672, 690 [142 Cal.Rptr. 457], citing *Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 633, 79 L.Ed. 1314].) When the prosecutor's conduct may be interpreted as disparaging members of a minority group the image of the justice system suffers. Eliminating a single anecdote from the prosecutor's arsenal seems a small sacrifice in exchange for even an incremental increase in the perceived legitimacy of the legal system.

E. Conclusion.

Roger Brady's sentence must be reversed due to the overwhelmingly prejudicial effect of these instances of misconduct. "The kind of advocacy shown by this record has no place in the administration of justice and

should neither be permitted nor rewarded . . ." (*United States v. Young*, *supra*, 470 U.S. 1, 9.) The prosecutor's closing argument was improper in numerous respects and, in particular areas (e.g., the Stan Chambers' speech and related appeals to jurors' fears and loyalties to law enforcement), exceptionally inflammatory. This argument and the improperly admitted victim impact evidence created an atmosphere of prejudice in which emotion prevailed over reason. (*Gardner v. Florida, supra,* 430 U.S. 349, 358; *Gregg v. Georgia, supra,* 428 U.S. 153.) Reversal is also required because the prosecutor's improper argument encouraged the jurors to substitute the prosecutor's opinion for their own reasoned moral judgment, and interfered with the jury's consideration of mitigating evidence thereby preventing the individualized sentencing determination the Eighth Amendment requires. (*Caldwell v. Mississippi, supra*, 472 U.S. 320; *Buchanan v. Angelone, supra,* 522 U.S. 269, 277.)

For all of the reasons discussed above, Roger Brady was denied several of his rights under the state and federal constitutions, as well as rights guaranteed to him according to California law, by the prosecutor's misconduct in closing argument. Accordingly, reversal is required unless the state can show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 381 U.S. at p.24.) On this record, the state cannot establish that the errors did not contribute to the penalty determination. (*People v. Sandoval, supra*, 4 Cal.4th 155, 194.)

IX.
THE USE OF CALJIC 17.41.1 VIOLATED ROGER BRADY'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY.

Over defense objections, the trial court instructed the jury in the penalty phase with a slightly modified version of CALJIC 17.41.1, providing:

> The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [ ] any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

(33 CT 9459.) In *People v. Engelman* (2002) 28 Cal. 4th 436, this Court disapproved CALJIC No. 17.41.1, but also concluded that its provision does not violate the federal constitution. Appellant respectfully submits that his rights under the Sixth and Fourteenth Amendments were violated by the use of the instruction in this case and, on this basis, requests that this Court reconsider its decision in *People v. Engelman.*

Private and secret deliberations are essential features of the right to jury trial guaranteed by the Sixth Amendment. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 127; *United States v. Brown* (D.C.Cir.1987) 823 F.2d 591, 596) CALJIC 17.41.1, however, pointedly tells each juror that he or she is not guaranteed privacy or secrecy. At any time, the deliberations may be interrupted and a fellow juror may repeat his or her words to the judge and allege so me impropriety, real or imagined, which the juror believe to have taken place in the jury room.

The instruction, in short, assures the jurors that their words might be used against them and that candor in the jury room may be punished. The instruction thus chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (*Attridge v. Cencorp* (2nd Cir. 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268.) Accordingly, the instruction improperly inhibits the free expression and interaction among the jurors which is so important to the deliberative process. (See, e.g., *People v. Collins* (1976) 17 Cal.3d 687, 693.) Where jurors find it necessary or advisable to conceal concerns from one another, they will not try to persuade others to accept their viewpoints. "Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086.) Long ago, Justice Cardozo noted, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (*Clark v. United States* (1933) 289 U.S. 1, 13.)

The free discourse of the jury has been found to be so important that, as a matter of policy, post-verdict inquiry into the internal deliberative process has been precluded even in the face of allegations of serious improprieties. (See, e.g., *Tanner v. United States*, *supra*, 483 U.S. 107 [inquiry into juror intoxication during deliberations not permitted]; *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 747 [no evidence permitted as to juror compromise].) Under Evidence Code section 1150, "No evidence is admissible to show the effect of [a] statement, conduct, condition, or event upon a juror either in influencing his to assent to or

dissent from the verdict or concerning the mental processes by which it was determined." These same policy considerations should bar CALJIC 17.41.1 so that it may not be allowed to chill free exchange and discourse among deliberating jurors.

The right to trial by jury, pursuant to the Sixth Amendment and the California Constitution, Article I, section 16, is a right to the verdict of a unanimous jury. (*Apodaca v. Oregon* (1972) 406 U.S. 404.) CALJIC 17.41.1 abridges that right because it coerces potential holdout jurors into agreeing with the majority. (See, e.g., *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426-1428.)

It is not a satisfactory answer to say that the matter is moot because no juror called any such problem to the court's attention. There is no way to know what thoughts or arguments were squelched by jurors who anticipated, feared and wished to avoid reprisals from the trial court. The giving of the instruction on "the integrity of a trial" amounted to a "structural defect" in the trial mechanism, much like a complete denial of a jury. (*Rose v. Clark* (1986) 478 U.S. 570, 579; *Arizona v. Fulminate* (1991) 499 U.S. 279, 309.) Automatic reversal of the penalty judgment is appropriate because where this novel and threatening jury instruction is given, "there has been no jury verdict within the meaning of the Sixth Amendment." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; *People v. Cahill*, *supra*, 5 Cal. 4th at p. 502.)

X.
THE TRIAL COURT'S DENIAL OF THE SECTION 190.4(e) MOTION FOR MODIFICATION OF THE DEATH VERDICT WAS CONTRARY TO LAW AND THE EVIDENCE.

Under Penal Code section 190.4, subdivision (e), a motion for modification of penalty is heard automatically after a death verdict. In ruling on that motion, the trial court must make an independent determination whether imposition of the death penalty is proper in light of the relevant evidence and the applicable law. (*People v. Burgener* (2003) 29 Cal.4th 833, 890 [62 P.3d 1, 129 Cal.Rptr.2d 747]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 793.) On appeal, the trial court's ruling is subject to independent review; this Court reviews "the trial court's determination after independently considering the record; we do not make a de novo determination of penalty." (*People v. Mickey* (1991) 54 Cal.3d 612, 704.)

Here, the trial court erred in denying Roger Brady's motion for modification of the death verdict because it misunderstood the mitigating scope and effect of the evidence of Roger Brady's brain damage, the cause of which may be organic; may be a result of early childhood trauma sustained as a result of exposure to acts of war in Viet Nam; may be related to Brady's own substance abuse; or may be a combination of these factors and/or others. The trial court failed to meaningfully evaluate this evidence under factor (k); erroneously rejected the mitigating force of Brady's condition under factors (d), (g), and (h); and erroneously discounted the extensive mitigating evidence by failing to engage in a proper weighing of all of the mitigating evidence versus the evidence in aggravation.

The trial court considered in this regard a substantial quantity of irrelevant and inflammatory victim impact evidence and testimony. The state did not produce sufficient evidence to support the conviction for first degree murder. The court gave undue weight to other factors, including the 12 unadjudicated crimes in which there was insufficient evidence to establish Brady's guilt beyond a reasonable doubt. In addition, the trial court improperly considered the special circumstance alleged pursuant to Penal Code section 190.2(a)(5), that the murder was committed for the purpose of avoiding or preventing a lawful arrest, which was not established by the prosecution's evidence.

The trial court's errors violated the statutory guidelines and implicated federal constitutional guarantees of due process under the Fourteenth Amendment (*Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 347) and the Eighth Amendment's requirement of a reliable penalty verdict based upon full consideration of mitigating evidence. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 114). The trial court's errors, both individually and cumulatively, require this Court to remand the case for a new determination on the motion for modification of the penalty verdict.

A. The Mitigating Effect of Roger Brady's Organic Brain Damage .

The trial court misunderstood and failed to give effect to the mitigating force of the evidence concerning Roger Brady's brain damage and its effect on his mental condition.

During the course of its ruling on the motion, the court discussed and agreed with the jury's verdict in the guilt phase, and then turned to a discussion of the factors in aggravation and mitigation of penalty. (See 20 RT 4877-4886; 33 CT 9544-9549.) As to mitigation, the court stated:

Although the defense tendered evidence of the defendant's Vietnamese upbringing and resulting emotional condition, the Court did not find this mitigation evidence to be credible as to the defendant's mental condition [P.C. 190.3(d)] in any fashion whatsoever. Dr Lorie Humphrey's feeble attempts to find the defendant Brady suffered from an alleged brain disorder was clearly never established by any supporting evidence. Perhaps her only realistic comment/opinion was that Brady "sees the world differently" – to say the least that opinion was established in this case by a tragic litany of felonious behaviors and incidents, including the two murders. The defendant's family members attempted to portray a villainous father as the responsible party for the defendant's extreme duress and/or substantial domination [P.C. 190.3(g)]. However, the evidence showed a father who supported his family financially and otherwise to the extent possible, who never abused his family, and who, most certainly, played no role in the creation of the defendant's murderous personality.

There was no evidence of extreme mental or emotional disturbance on the defendant's part at the time of these felonious acts [P.C. 190.3(d)]. In fact, the evidence throughout the trial was that Brady was extraordinarily calm during each robbery and/or murder – while each victim was in fear for their life.

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Brady knew exactly what he was doing – no mental disease, drugs or alcohol impaired his judgment [P.C. 190.3(h)]. He clearly understood the criminal wrongfulness of his conduct.

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And while the Court believes the testimony of the family members as to their opinions of the mitigating factors of the defendant's Vietnamese birth and childhood, and his relationship with his father, that evidence is clearly outweighed by the aggravating factors discussed in the above paragraphs.

(33 CT 9545-9548; see 22 RT 4881-4883.)

Contrary to the trial court's finding, there was evidence to support Dr. Humphrey's findings regarding Roger Brady's brain damage. Dr. Humphrey is a neuropsychologist with extensive training and experience in administering and interpreting a variety of instruments used to measure neuropsychological function. (20 RT 4498-4499.) She performed a full neuropsychological evaluation on Roger Brady; including four days of testing using 29 standardized tests. (20 RT 4505-4506.) A lengthy report (over 25 pages) containing the results of this testing was produced and disclosed to the prosecution. (See 20 RT 4541.) Dr. Humphrey explained her methodology and conclusions in her trial testimony and was cross-examined by the prosecutor. (20 RT 4485-4588.)

Other comments by the trial judge reveal the court's lack of understanding concerning the application of the neuropsychiatric evidence to several mitigating factors. The trial court found: "There was no evidence of extreme mental or emotional disturbance on the defendant's part at the time of these felonious acts [P.C. 190.3(d)]. In fact, the evidence throughout the trial was that *Brady was extraordinarily calm* during each robbery and/or murder . . ." (33 CT 9548 [emphasis added].) Dr. Humphrey testified about the "flat affect" and outwardly calm appearance of people who, like Roger Brady, have organic brain damage. (20 RT 4525-4527.) In this instance the trial court converted evidence in mitigation to aggravation by misinterpreting the evidence.

The court clearly did not consider the interplay of the neuropsychiatric evidence and the other evidence in mitigation, e.g., Brady's relationship with a temperamental, substance abusing, father, his

early childhood spent in a threatening environment in a war-torn country, and the cultural dislocation caused by the family's move to the United States as he began his elementary school education. The court found that "the evidence of [Roger Brady's] Vietnamese upbringing and resulting emotional condition" was "not credible as to [his] mental condition [P.C. 190.3(d)] in any fashion whatsoever." (33 CT 9547.) The court later stated "Brady knew exactly what he was doing – no mental disease, drugs or alcohol impaired his judgment [P.C. 190.3(h)]." (33 CT 9548.)

From its statements, the court appeared to believe that for factor (h) to apply, Roger Brady needed to present evidence of a "mental disease" so severe that he would lack the capacity to appreciate the criminality of his conduct. Again, that is contrary to law. Factor (h) must necessarily require a lesser degree of mental impairment than a complete lack of capacity to appreciate the criminality of one's conduct, because to hold otherwise would render that factor superfluous. Insanity relieves a defendant of criminal liability. (Pen. Code, § 1026.) Mental illness not amounting to insanity is properly considered under factor (h), and the court's rejection of this factor was error.

The trial court's findings also betray a fundamental misunderstanding of the mitigating role of a defendant's mental condition in a capital trial. Brain damage, like mental illness, can only be a factor in mitigation. (*People v. Montiel, supra,* 5 Cal.4th 877, 944; *People v. Davenport, supra,* 41 Cal.3d 247, 288-290.) It carries mitigating weight not only under factors (d), (g), and (h), but also under factor (k). (See *People v. Turner, supra,* 8 Cal.4th at p. 208; see also *People v. Ghent* (1987) 43 Cal.3d 739, 776 [739 P.2d 1250, 239 Cal.Rptr. 82] [mental conditions that mitigate offense may be considered under factor (k)].) The trial court's

findings reveal that it failed to consider the mitigating effect of Roger Brady's brain damage under any of these factors. (33 CT 9457-9458.)

The court erroneously stated that "Dr. Lorie Humphrey's feeble attempts to find the defendant Brady suffered from an alleged brain disorder was clearly never established by any supporting evidence." (33 CT 9547-9548.) The court's comments make clear that it never considered Roger Brady's brain damage and mental condition for any reason, and certainly not as its own independent mitigating force under factor (k). That was error. (*People v. Turner*, *supra,* 8 Cal.4th at p. 208; *People v. Ghent*, *supra,* 43 Cal.3d at p. 776.)

These errors by the trial court effectively deprived Roger Brady of his due process right to have the trial court consider any and all mitigating evidence under factor (k). (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [state protections implicate federal due process guarantees]; see also *Skipper v. South Carolina*, *supra,* 476 U.S. at p. 4 [sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence].) The court's misunderstanding of the evidence produced at trial and the mitigating scope of brain damage and its relationship to mental condition also undermined the heightened need for reliability in a capital case under the Eighth Amendment. (See *Woodson v. North Carolina*, *supra,* 428 U.S. at p. 305.) Remand for a new modification hearing is required.

B. Insufficient Evidence For The 190.2(a)(5) Special Circumstance.

The prosecutor urged the jury to return a finding of "True" on the section 190.2(a)(5) special circumstance for murder committed in order to avoid arrest based on inferences arising from two facts: (1) the shooting

occurred in the course of an investigatory traffic stop; and, (2) Roger Brady was on parole at the time of the crime. (11 RT 2479-2480.) The prosecutor's theory of the case was that Brady shot Officer Ganz to prevent the traffic stop from developing to the point that Ganz might discover that Brady was on parole, might search the car, the search could lead to Ganz's discovering the gun at which point Brady's arrest would be likely. If this series of events had taken place, Roger Brady would be facing a parole violation hearing in federal court and a probable return to federal custody for the gun possession. (*Id.*) This series of inferences lacked sufficient evidentiary support.

California law requires substantial evidence that the defendant's primary motivation for the homicide was avoiding arrest in order to sustain special circumstance findings pursuant to section 190.2(a)(5). The defendant in *People v. Bigelow* (1984) 37 Cal.3d 731 [691 P.2d 994, 209 Cal.Rptr. 328] had escaped from a Canadian prison less than one month before he kidnaped, robbed, and subsequently killed the victim in the capital case. The prosecution argued that the defendant committed the murder to prevent the victim from reporting the concurrent robbery as well as to avoid capture and return to prison in Canada. The California Supreme Court described the prosecution's theory as "totally speculative," and observed that, by the same logic, this special circumstance could be applied in almost every case. The Court in *Bigelow* stated: "the special circumstance of avoiding arrest should be limited to those cases in which the arrest is imminent." (*Id.* at p. 752.) In a footnote, the *Bigelow* Court acknowledged the need to restrict the use of this special circumstance to prevent overlap with the section 190.2(a)(10) special circumstance for intentionally killing a witness to prevent his or her testimony. The Court also noted that the

section 190.2(a)(5) special circumstance was susceptible to over-use: "[A]ll the prosecutor would have to do is to claim that the victim was killed to prevent him from reporting the crime to the police, and the result would be to extend the avoiding arrest special circumstance to virtually all felony murders." (*Bigelow, supra,* 37 Cal. 3d at 752, fn 13; *People v. Coleman* (1989) 48 Cal. 3d 112, 145 [768 P.2d 32, 255 Cal.Rptr. 813].)

Absent direct evidence, the necessary intent is inferred only in limited circumstances. An objective test applies to determine whether arrest was imminent. (*People v. Coleman, supra,* 48 Cal.3d 112, at pp. 145-146 [emphasis added].) [88] Even where the killing follows a confrontation with law enforcement, the inference that the defendant acted to prevent arrest does not necessarily follow. Courts in California are more likely to infer motive to avoid arrest or capture where there is a direct connection between the murder and the defendant's commission of another serious felony. In *People v. Cummings, supra,* 4 Cal.4th 1233, the two defendants shot a police officer who had stopped them for a traffic violation. The men were driving a stolen car and had been carrying out a long series of robberies in the previous months and weeks, the last of which was committed two days before the murder. The California Supreme Court found it reasonable to infer that the suspects killed the officer in order to avoid arrest. The Court in *Cummings* distinguished the *Bigelow* and *Coleman* cases, noting: "[The] defendants had been detained by the police officer victim *under circumstances which would lead them and any*

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See also, *Rivers v. State* (Fla. 1984) 458 So.2d 762 [construing similar special circumstance under Florida law, evidence insufficient defendant that shot a waitress to prevent her from alerting authorities when she turned to run down a hallway during a restaurant robbery].

objective observer to believe that an arrest was highly likely. Arrest was or appeared to be 'imminent'." (*People v. Cummings, supra*, at p. 1300 [emphasis added]; see also *People v. Robillard, supra*, 55 Cal.2d 88.) [89]

Where avoidance of arrest is inferred as a motive for murder there is typically a direct nexus between the circumstances of the stop and the defendant's fear of arrest. Roger Brady's case is distinguishable. The traffic stop preceding the Ganz homicide was not the sort of police contact likely to result in an arrest. As the trial court observed, the suspect was pulled over for a minor traffic infraction -- stopping past the limit line in the left turn lane. (See 20 RT 4878.) The state's own witnesses described this as a "routine traffic stop." [90] Don Ganz's testimony establishes that Officer Ganz approached the stop with that expectation. (See 6 RT 1461-1465, 1471-1472.) There were, therefore, no objective indications that this stop would end with the driver's arrest.

The prosecutor argued that Roger Brady's parole status gave him a motive for murder. Even where a defendant is on parole, this does not compel the inference that the crime was motivated by a desire to avoid arrest. (See *Doyle v. State, supra*, 460 So.2d 353 [where defendant molested and killed child who knew him and could identify him the evidence was insufficient to support judge's finding that murder was committed to avoid

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In jurisdictions that have inferred the motive to avoid arrest, a law enforcement official was killed by a defendant engaged in other illegal activity. (See Argument II, Section D (1), *supra*.)

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(See 6 RT 1533-1537 [testimony of David Brumley]; 6 RT 1581-1582 [testimony of David Sattler]; 6 RT 1581-1582 [testimony of Robert Doyle]; 7 RT 1612-1613 [testimony of Bruce Lee]; and, 7 RT 1770-1777 [testimony of Jennifer La Fond].)

arrest even though defendant had previously been given a five year suspended sentence to be imposed if he carried out any other crime]. See also *State v. Porter, supra,* 130 Idaho 772 [948 P.2d 127] [although victim would have been witness against defendant at proceeding regarding battery charge, nothing in record supported conclusion that defendant killed victim because of that pending misdemeanor proceeding].) there was no evidence indicating that Roger Brady was committing another felony at the time of the traffic stop.

The jury's finding on the special circumstance alleged pursuant to Section 190.2(a)(5) was unsupported under California law. The conviction was based on insufficient evidence, and the trial court erred by giving it any weight in the Section 190.4(e) analysis. The trial court's error denied Roger Brady his state and federal constitutional rights to due process of law. (*Jackson v. Virginia, supra,* 443 U.S. 307, 318; *People v. Bean* (1988) 46 Cal.3d 919, 932.) Brady's rights under the Eighth Amendment were also violated because insufficient evidence cannot meet the heightened standard of reliability applied to both the guilt and penalty phases of a capital trial. (*Beck v. Alabama, supra,* 447 U.S. 625, 627-646; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422 [115 S.Ct. 1555, 131 L.Ed.2d 490]; *Burger v. Kemp* (1987) 483 U.S. 776, 785 [107 S.Ct. 3114, 97 L.Ed.2d 683]; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 [113 S.Ct. 2112, 124 L.Ed.2d 306].) Accordingly, this Court should reverse the section 190.2(a)(5) special circumstance finding and remand for reconsideration of the motion to modify the sentence.

C. The First Degree Murder Verdict Lacked Sufficient Evidence.

As discussed in Argument II, *supra,* the evidence did not establish that the shooter acted with the premeditation and deliberation needed for a conviction of first degree murder. The trial court concurred in the jury's first degree murder verdict. The court's remarks in this regard reveal that it accepted the state's version of how the crime occurred. According to the prosecutor's theory, the first gunshot struck Ganz in the arm. He ran toward the police car, pursued by the suspect who then delivered the fatal "coup de grace" shot to the officer's face. (See 20 RT 4877-4879.) On this basis, the court characterized the shooting as "vicious," and "cruel." (See 20 RT 4878.)

The trial court further erred by adopting the most aggravating scenario for this shooting. There were significant discrepancies between the descriptions of the crime the prosecution witnesses gave police immediately afterwards and their trial testimony. Medical experts (called by the state and the defense) could not determine the order of the gunshots. It was equally possible that the first shot was the fatal face wound. (See Argument II, *supra*.)

The trial judge failed in his duty to review the finding of first degree murder, to the extent that it is implicated in the death verdict, and he failed in letting the death verdict stand when it was unsupported by a valid finding of first degree murder. The trial court's error denied Roger Brady his state and federal constitutional rights to due process of law and a fair and reliable penalty decision. (U.S. Const. Amends. V, VIII, and XIV; Cal.Const., art. I, §§ 7, 15, and 16; *Jackson v. Virginia, supra,* 443 U.S. 307, 318; *People v. Bean, supra,* 46 Cal.3d 919, 932; *Beck v. Alabama, supra,* 447 U.S. 625,

627-646; see also *Kyles v. Whitley, supra*, 514 U.S. 419, 422; *Burger v. Kemp, supra,* 483 U.S. 776, 785; *Gilmore v. Taylor, supra,* 508 U.S. 333, 342.) Accordingly, this Court should remand for reconsideration of the motion to modify the sentence.

D. The Combined Weight Of All The Mitigating Evidence Is Measured Against Only The Properly Admitted Evidence In Aggravation.

The court's statement demonstrated that it conducted a "piecemeal" evaluation of the mitigating evidence against the aggravating factors, thereby reducing the weight of the entirety of the mitigating evidence. Under Penal Code sections 190.3 and 190.4(e), the court was required to weigh the entirety of the mitigation evidence against the entirety of the evidence in aggravation. The court's failure to do so was error.

As the California Supreme Court has noted, in a capital proceeding where a defendant has been found guilty of murder with a special circumstance, it would be rare to find a defendant with mitigation that could excuse such a horrible crime. (*People v. Brown, supra,* 40 Cal.3d 512, 541, fn. 13.) Therefore, if mitigation is to outweigh aggravation, it is through consideration of sympathetic factors. The Court has stated, "It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." (*People v. Haskett, supra,* 30 Cal.3d 841, 863; see also *People v. Robertson, supra,* 33 Cal.3d 21, 57-58 [defendant constitutionally entitled to have sentencing body consider any "sympathy factor" raised by the evidence]; *People v. Easley* (1983) 34 Cal.3d 858, 876 [jury instructions must not preclude sympathy].) This principle extends to the trial court's independent

review of the aggravating and mitigating circumstances in a motion to modify the verdict.

While the court was free to accord the evidence the mitigating weight to which it was entitled (*People v. Robertson*, *supra,* 33 Cal.3d at pp. 57-58), it could not reject that evidence as a matter of law. (*Skipper v. South Carolina, supra,* 476 U.S. at p. 4; *Eddings v. Oklahoma*, *supra,* 455 U.S. at p. 114.) Here, the court's improper failure to accord any mitigating weight to Brady's evidence constituted a rejection of that evidence which was contrary to law and a denial of due process. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 347.)

If, despite its use of language, the court meant that the weight of the mitigating evidence were not sufficient to overcome the weight of the aggravating factors, then the court improperly conducted a piecemeal comparison of the evidence. The court never stated that the entirety of Brady's evidence was mitigating, but simply did not rise to a level sufficient to overcome the circumstances in aggravation. Rather, its statement indicates that it rejected each piece of mitigating evidence, and never conducted the required balancing test of all of the evidence in mitigation versus all of the evidence in aggravation. This was error, and Roger Brady is entitled to a reversal and a new modification hearing.

E. The Irrelevant And Excessive Victim Impact Evidence.

The circumstances of the crime is a proper factor in aggravation (Pen. Code, § 190.3(a)) and victim impact evidence may, with substantial limitations, be considered as a circumstance of the capital crime. (*Payne v. Tennessee, supra,* ; *People v. Edwards, supra,* 54 Cal.3d 787.) The trial

court here assigned considerable weight to evidence pertaining to victims of *other* crimes. The court stated:

> In addition, I note relative to past violent activity by the defendant [P.C. 190.3(b)] and prior felony convictions suffered by the defendant [P.C. 190.3 (c)], that Roger Brady was a veritable one-man crime wave throughout Southern California and Oregon.
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> After listening to a myriad of victim witnesses, most of whom positively identified Brady, to all of these prior violent and felonious acts by the defendant Brady, this Court notes that it was most moved by Arden Schoenborn, a checker/cashier at one of the many Safeway stores victimized in Oregon. Mr. Schoenborn related that upon having a gun pointed at his chest, while the defendant attempted to cock and load it, he looked straight into the eyes of the defendant Brady, and "saw death." Mr. Schoenborn spoke eloquently for all the victims of these robberies, both banks and supermarkets.

(33 CT 9547; 20 RT 4881.) Schoenborn's testimony (as well as the testimony of many other victim impact witnesses) was irrelevant and should not have been admitted for all of the reasons discussed in Arguments VI and VII, *supra*. The court's comments on this evidence demonstrate that it relied on an unauthorized, non-statutory aggravating factor in denying the motion to modify. This unauthorized reliance on the impact to victims of crimes alleged pursuant to Penal Code sections 190.3(b) and (c) was contrary to law and requires a reversal of the death judgment. (See *People v. Boyd*, *supra,* 38 Cal.3d at pp. 771-776.)

F. Remand Is Necessary Due To The Cumulative Impact of the Errors.

The trial court's errors in deciding the motion for modification of the verdict do not stand alone. Because of its failure to understand the mitigating scope and effect of Roger Brady's brain damage, it failed to properly evaluate and consider its proper role as mitigating evidence. The trial court not only failed to consider such evidence to mitigate the crime, but it also failed to conduct the proper weighing of the mitigating evidence. This evidence included not just the neuropsychological testing which revealed brain damage but, also, Roger Brady's chaotic home environment, his exposure to drugs and alcohol at a young age, and his father's inability or unwillingness to treat him with the normal kindness, concern and interest expected in parent/child relationships. The trial court's errors affected the modification decision, and compel this Court to remand the case for a new modification hearing. (See *People v. Holt, supra,* 37 Cal.3d 436, 459 [multiple errors in penalty decision compounded each other].)

The trial court's errors implicated constitutional protections and require reversal unless they were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.) However, even if the errors are viewed as only rising under state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable possibility" that it affected the penalty decision. (*People v. Brown, supra,* 46 Cal.3d 432, 447.) These standards are the same in substance and effect. *People v. Ashmus, supra,* 54 Cal.3d 932, 965.)

That the errors occurred in the trial court's consideration of the motion for modification, rather than the jury's deliberation, does not make any difference in this Court's standard of review. (See *People v. Kaurish,*

supra, 52 Cal.3d at p. 718 [adopting reasonable possibility test in reviewing motion for modification].) As with the original penalty decision, the motion for modification requires the trial court to make a normative decision, based upon its review of the aggravating and mitigating circumstances. (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 794.) Thus, any substantial error renders the entire decision in doubt. Such error "must be deemed to have been prejudicial." (*People v. Robertson, supra*, 33 Cal.3d 21, 54; see also *Sullivan v. Louisiana, supra* [if error vitiates findings, reviewing court cannot speculate on what hypothetical sentencer might have done]; *People v. Karis, supra,* 46 Cal. 3d 612, 652 [reversal unless error had "no impact" on trial court's decision to deny].)

The trial court's review of the verdict under Penal Code section 190.4, subdivision (e), is one of the key "checks on arbitrariness" in the California death penalty scheme. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-52 [104 S.Ct. 871, 79 L.Ed.2d 29]; see also *People v. Frierson* (1979) 25 Cal.3d 142, 179 [section 190.4 provides safeguard for assuring careful appellate review].) The Eighth Amendment standards for reliability and this Court's recognition of the need for special care in reviewing a death verdict should compel it to remand the case to the trial court for a new hearing on the motion for modification.

XI.
THE DEATH PENALTY IN CALIFORNIA IS ARBITRARILY SOUGHT AND IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS PROSECUTED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW.

Roger Brady's death sentence and confinement are unlawful and unconstitutional. They were obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 7(b) and Article IV, section 16(a) of the California Constitution, because the death penalty in California is imposed arbitrarily and capriciously depending on the county in which the case is prosecuted.

Every person in the United States is entitled to equal protection of the law under the Fourteenth Amendment. (U.S. Const., Amend. XIV.) It is true that since 1976 the Supreme Court of the United States has upheld the death penalty in general against Eighth Amendment challenges and allowed the states to vary in their statutory schemes for putting people to death. (See *Jurek v. Texas* (1976) 428 U.S. 262 [96 S.Ct. 2950, 49 L.Ed.2d 929] (plurality opn.); *Proffitt v. Florida* (1976) 428 U.S. 242 [96 S.Ct. 2960, 49 L.Ed.2d 913]; *Gregg v. Georgia, supra,* 428 U.S. 153. Cf. *McClesky v. Kemp* (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262].)

Nonetheless, on December 12, 2000, the Supreme Court of the United States recognized that when fundamental rights are at stake, uniformity among the counties within a state, in the application of processes that deprive a person of a fundamental right, is an essential component of equal protection. (*Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 530-532, 148 L Ed.2d 388].) When a statewide scheme is in effect, there must

be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Id.*, at p. 532.)

This principle must apply to the right to life as well as the right to vote. The right to life is at least as fundamental as the right to vote, and is expressly protected under the Fourteenth Amendment. The right to be free of cruel and unusual punishment, expressly guaranteed by the Eighth Amendment, only fortifies the fundamental nature of the right to life.

In California, the 58 counties, through the respective prosecutors' offices, headed by elected district attorneys, make their own rules, within the broad parameters of Penal Code sections 190.2 and 190.25, as to who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of Penal Code sections 190.2 or 190.25, the prosecutor is free to pick and choose which defendants, if any, will face a possible sentence of death and which will face a lesser punishment.

There is no uniform treatment within the state. In some California counties a life is worth more than in others, because county prosecutors use different (or no) standards in choosing whether to charge a defendant with capital murder. If different and standardless procedures for counting votes among counties violates equal protection, as in the *Bush* case, then certainly different and standardless procedures for charging and prosecuting capital murder must violate the right to equal protection of the law as well.

This is not merely a matter of abstract interest. If Roger Brady had been tried and convicted for the same crime not in the County of Los Angeles, but in the County of San Francisco, he almost certainly would not have faced the death penalty. The district attorney at the time Brady was

tried in 1998 was an outspoken opponent of capital punishment. Indeed, San Francisco has not sent any prisoner to death row since 1991.[91]

The likelihood of a capital prosecution and sentence of death should not depend on county-by-county differences in administration of the law by local officials. Yet in California, it indisputably does.

This Court should, therefore, in light of *Bush v. Gore*, reexamine its prior precedents which hold that prosecutorial discretion as to which defendants will be charged with capital murder does not offend principles of due process, equal protection or cruel and unusual punishment. (See, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 601-602; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Keenan* (1988) 46 Cal.3d 478, 505 [758 P.2d. 1081, 250 Cal.Rptr. 550].) Unequal treatment among the California counties violates the Fourteenth Amendment Equal Protection Clause, *Bush v. Gore, supra*, and Article I, section 7(b) and Article IV, section 16(a) of the California Constitution. Accordingly, Roger Brady's sentence of death must be reversed.

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[72] See Egelko, *Top Court Oks Death Sentence*, San Francisco Chronicle (December 6, 2002) page A24 (available on LEXIS) (noting that the San Francisco District Attorney, elected in 1995, "has promised not to seek the death penalty in any case his office prosecutes."); see also Stannard, *D.A. won't pursue death in cop slaying*, San Francisco Chronicle (April 14, 2004) page B1 (current District Attorney has "pledge[d] not to seek capital punishment.").

XII.

ROGER BRADY'S EQUAL PROTECTION AND DUE PROCESS RIGHTS ON APPEAL HAVE BEEN PREJUDICIALLY VIOLATED BECAUSE HE HAS BEEN FORCED TO WAIT AN INORDINATE AMOUNT OF TIME – OVER THREE AND ONE-HALF YEARS – FOR THE APPOINTMENT OF APPELLATE COUNSEL.

A. Introduction.

A judgment of death was entered against Roger Brady on March 16, 1999. (33 CT 9550.) His appeal is automatic, and required by California law. Because he is indigent, Brady has a right to appointed counsel on appeal. Yet he was compelled to wait on Death Row for nearly four years before counsel was appointed to represent him on this appeal. This delay of almost three years between the pronouncement of a death sentence and the provision of a lawyer was without any constitutionally adequate excuse or justification, and violated Brady's federal constitutional rights to equal protection and due process of law, requiring reversal of the judgment.

B. Equal Protection and Due Process Principles.

This issue involves the right to counsel on appeal, and the right to a speedy appeal. While there is no federal constitutional right to an appeal, when an appeal as of right is provided, as it is in California, the state is forbidden to discriminate between appellants with the money to hire an attorney and appellants without it. As the California Supreme Court explained in *In re Barnett* (2003) 31 Cal.4th 466, 472-473 [73 P.3d 1106, 3 Cal.Rptr.3d 108]:

> The Fourteenth Amendment and its due process and equal protection guarantees . . . prohibit discrimination against convicted indigent inmates; consequently, an indigent inmate

> has a constitutional right to counsel appointed at the state's expense where, as here, the state confers a criminal appeal as of right. (*Douglas v. California* (1963) 372 U.S. 353, 356-357 [9 L.Ed.2d 811, 83 S.Ct. 814].) Consistent with these constitutional principles, California provides a statutory right to appointed counsel for both capital and noncapital criminal appeals. (Pen. Code, §§1239, 1240, 1240.1.)

A speedy trial, guaranteed to all criminal defendants by the Sixth Amendment, is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. (*Barker v. Wingo* (1972) 407 U.S. 514, 515 [92 S.Ct. 2182, 33 L.Ed.2d 101].) An appeal that "is inordinately delayed is as much a 'meaningless ritual,' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." (*Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1558, quoting *Douglas v. California* (1963) 372 U.S. 353, 358 [83 S.Ct. 814, 9 L.Ed.2d 811].)[92]

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[73] Numerous federal appellate courts have found that the right to a speedy criminal appeal is compelled by the United States Supreme Court's due process jurisprudence, thereby ruling that unreasonable appellate delay violates the Fourteenth Amendment's due process clause. Among the federal courts of appeal, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have recognized the right to a speedy appeal. (See *United States v. Pratt* (lst Cir. 1981) 645 F.2d 89, 91; *Elcock v. Henderson* (2d Cir. 1991) 947 F.2d 1004, 1007; *Cody v. Henderson* (2d Cir. 1991) 936 F.2d 715, 718-719; *Burkett v. Fulcomer* (3d Cir. 1991) 951 F.2d 1431, 1445-1446; *Burkett v. Cunningham* (3d Cir. 1987) 826 F.2d 1208, 1221-1222; *United States v. Johnson* (4th Cir. 1984) 732 F.2d 379, 381-382; *United States v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1568-1569; *Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 302-304; *United States v. Smith* (6th Cir. 1996) 94 F.3d 204, 206-208; *Dozie v. Cady* (7th Cir. 1970) 430 F.2d 637, 638; *United States v. Hawkins* (8th Cir. 1996) 78 F.3d 348, 350-351; *Coe v. Thurman* (9th Cir. 1991) 922 F.2d 528, 530-533; *United States v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1382; *Harris v. Champion, supra*, 15 F.3d at pp. 1546-1547.)

In ruling on speedy appeal claims, courts often borrow from the four-pronged balancing test deployed in *Barker v. Wingo, supra,* 407 U.S. 514, to evaluate speedy trial claims. Applying *Barker* in the appellate context, courts "examine the length of the delay, the reason for the delay, whether the petitioner asserted his or her right to a timely appeal, and whether the petitioner experienced any prejudice as a result of excessive delay." (*Harris v. Champion, supra,* 15 F.3d at pp. 1546-1547; see *United States v. Tucker* (9th Cir. 1993) 8 F.3d 673, 676 (en banc); *United States v. Antoine, supra,* 906 F.2d at p. 1382.)

An examination of these factors shows that the more than five-year delay in appointing counsel for Roger Brady violated his federal constitutional rights to equal protection and due process.

C. The Length of the Delay.

In the absence of inordinate delay, no due process claim can be made. Short delays are unlikely to raise due process concerns. (See *United States v. Pratt, supra*, 645 F.2d at p. 91 [nine-month appellate delay]; *United States ex rel. Harris v. Reed* (N.D. Ill. 1985) 608 F.Supp. 1369, 1376 [seven-and-one-half-month delay processing motion for post-conviction relief]; *Doescher v. Estelle* (N.D. Tex. 1978) 454 F.Supp. 943, 952 [one-year appellate delay].) However, longer delays have been found to raise due process concerns.

In *Harris v. Champion, supra*, 15 F.3d 1538, the Tenth Circuit concluded that the passage of two years created "a presumption of inordinate delay on appeal." (*Id.*, at p. 1561.) Indeed, the court found that "delay substantially beyond two years, at least in a case that does not warrant a lengthier appellate process, will reduce the burden of proof on the other three factors necessary to establish a due process violation." (*Id.* at p.

1562.) Other courts have found that delays of this length raise due process concerns. (*Dozie v. Cady, supra*, 430 F.2d 637, 638 [seventeen-month delay]; *Burkett v. Fulcomer, supra*, 951 F.2d at p. 1445 [eighteen-month delay]; *Snyder v. Kelly* (W.D.N.Y. 1991) 769 F.Supp. 108, 111 [three-year delay], *aff'd.,* 972 F.2d 1328 (2d Cir. 1992); *United States ex rel. Hankins v. Wicker* (W.D. Pa. 1984) 582 F.Supp. 180, 185 [two-year delay].)

The delay of nearly three years for just the appointment of counsel exceeded the two-year time period identified by *Harris* as the maximum time allowed for timely resolution of an appeal in its entirety.

D. The Reason for the Delay.

Roger Brady is indigent. Because of his indigency he has had to wait years to obtain a lawyer. If Brady had been able to pay six-figure attorney fees he would not have had to wait. He could have hired an appellate attorney immediately upon entry of judgment against him (if not sooner).

The responsibility for the timely appointment of appellate counsel for the indigent rests with the state. (*In re Barnett, supra,* 31 Cal.4th 466, 472-473.) There is no constitutionally supportable justification for delay in appointing appellate counsel for a person sentenced to death.

The California Supreme Court has been unable to appoint counsel for every person sentenced to death at the time of sentence or shortly thereafter. But there are many more lawyers in California than there are Death Row inmates, and the problem is far from intrinsically insoluble; if the Legislature wished to assure that every person sentenced to death had prompt assistance of counsel, it could certainly do so.

The Legislature could choose to fund a public agency or quasi-public agency, such as the State Public Defender's Office or the California

Appellate Project, so that those offices could hire and train attorneys to directly represent persons sentenced to death. And sufficient compensation, more closely resembling actual market rates for attorneys skilled in complex appellate litigation, could be instituted to attract qualified private counsel to undertake representation of inmates on appeal in greater numbers. This is simply a matter of supply and demand.

Instead, the Legislature has chosen not to take those steps necessary to insure that every capital appellant has an appeals lawyer shortly after sentence is passed. This policy must finally rest on considerations of financial impact – considerations which are insufficient to justify the failure to promptly appoint counsel for indigents on Death Row. (See *Douglas v. California, supra,* 372 U.S. 353, 358.)

E. Roger Brady's Assertion of His Right to a Timely Appeal.

The *Harris* court concluded that "absent evidence that a petitioner affirmatively sought or caused delay in the adjudication of his or her appeal, this third factor should weigh in favor of finding a due process violation." (*Harris, supra*, 15 F.3d at p. 1563.) In the present case, Roger Brady was entitled to an automatic appeal pursuant to state statute. (Pen. Code §1239, subdivision (b).) He took no action to delay the appointment of counsel.

F. Roger Brady Was Prejudiced as a Result of the Delay.

Prejudice from appellate delay may result from, inter alia, "oppressive incarceration pending appeal" or "constitutionally cognizable anxiety awaiting resolution of the appeal." (*Harris v. Champion, supra*, 15 F.3d at p. 1563; see *United States v. Wilson* (9th Cir. 1994) 16 F.3d 1027, 1030.) Prejudice based upon oppressive incarceration "depends upon the outcome of his appeal on the merits, or subsequent retrial, if any." (*United States v.*

Antoine, supra, 906 F.2d at p. 1382.) Thus, if an appellant is properly convicted, "there has been no oppressive confinement: he has merely been serving his sentence as mandated by law." (*Id.*) As discussed elsewhere in this brief, Roger Brady's appeal is meritorious and, therefore, his excessive incarceration pending appointment of counsel has been oppressive.

In order for prejudice arising from anxiety to be cognizable, "the anxiety must relate to the period of time that the appeal was excessively delayed." (*Harris v. Champion, supra*, 15 F.3d at p. 1564.) The Ninth Circuit Court of Appeals requires a showing of "particular anxiety that would distinguish his case from that of any other prisoner awaiting the outcome of an appeal." (*United States v. Antoine, supra*, 906 F.2d at p. 1383.)

A death sentence is the state's ultimate punishment. Its imposition demands legal representation, as California law recognizes. Enforced isolation from legal representation by a qualified lawyer while on Death Row for nearly three years cannot be justified. The psychological dimensions of a death sentence are unique. They alone distinguish a death sentence from any other. Excessive time served without legal representation on Death Row induces anxiety different from that otherwise associated with prison life. Particularly under these circumstances, deprivation of counsel is necessarily and intrinsically harmful.

G. All Four Factors Lead to the Conclusion that Brady's Equal Protection and Due Process Rights Have Been Violated.

All four factors support the same conclusion: Roger Brady's speedy appeal rights have been violated and his conviction and sentence must be set aside. Independently, the delay in appointing appellate counsel for a condemned inmate establishes the constitutional violation. The delay not

only compromised Brady's speedy appeal rights but also sacrificed his federal constitutional rights to assistance of counsel and meaningful appellate review.

The California Supreme Court has not acknowledged the well-established federal right to a speedy appeal, and has summarily rejected speedy appeal claims in other cases. (See, e.g., *People v. Holt, supra,* 15 Cal.4th 619.) Moreover, rather than carefully applying the four-part balancing test of *Barker*, or articulating an alternative test, the California Supreme Court appears to have created a capital-case exception to the right to a speedy appeal. (*Id.*, at p. 709.)

The unique nature of capital litigation must be taken into account when applying the *Barker* criteria. Indeed, Roger Brady has not challenged the reasonably necessary time for record review, record correction, briefing, and court consideration in capital cases. He contends that no justification exists for inordinate delay in appointing appellate counsel. Nothing in the general nature of capital litigation justifies suspending the appellate process for more almost three years. Indeed, the delays inherent in capital post-conviction litigation only accentuate the need for prompt appointment of appellate counsel.

> The systemic delays in appointing counsel undermine the equitable and reasonable operation of the capital appeals process and likewise offend basic notions of constitutional fairness. Observing in 1997 that 156 of 480 death row inmates did not have lawyers, the San Francisco Chronicle editorialized that "[j]ustice is the casualty of California's inability to provide adequate legal representation for death row inmates." (*Inmates on Death Row Have Right to Lawyers*, San Francisco Chronicle (Aug. 25, 1997) p. A20.) It is a problem that has plagued the court system for many

years. (See Hager, *Counsel for the Condemned* (Dec. 1993) Cal. Law., at pp. 33, 34.)

Indeed, the Chief Justice acknowledged in his 1996 State of the Judiciary address that the delay of processing death-penalty appeals "causes confusion and frustration among Californians and is unfair to everyone - victims and their families, defendants, and the public at large." (Chief Justice Ronald M. George, 1996 State of the Judiciary Address to a Joint Session of the California Legislature (May 15, 1996) p. 20.)

Once a state "has created appellate courts as 'an integral part of the. . . system for finally adjudicating the guilt or innocence of a defendant,'the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." (*Evitts v. Lucey* (1985) 469 U.S. 387, 393 [105 S.Ct. 830, 83 L.Ed.2d 821], quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 18 [76 S.Ct. 585, 100 L. Ed. 891].) California's procedures do not comport with these constitutional demands. Accordingly, the judgment must be reversed.

XIII.
EXECUTION FOLLOWING LENGTHY CONFINEMENT UNDER SENTENCE OF DEATH WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ROGER BRADY'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND INTERNATIONAL LAW.

A. Introduction.

Executing Roger Brady following his lengthy confinement under sentence of death (now nearing seven years) would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, sections 1, 7, 15, 16, and 17 of the California Constitution; and international law, covenants, treaties and norms. Roger Brady was sentenced to death on March 16, 1999. (33 CT 9550.) At the present time, he has already been continuously confined since his arrest in 1994, for almost twelve years and under sentence of death for more than seven years. His automatic appeal has been pending continuously during that time. Roger Brady's excessive confinement on death row has been through no doing of his own. The appeal from a judgment of death is automatic (Pen. Code §1239, subdivision (b)), and there is "no authority to allow [the] defendant to waive the [automatic] appeal." (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1139.) Of course, full, fair and meaningful review of the trial court proceedings, required under the state and federal constitutions and state law, necessitates a complete record (*Chessman v. Teets* (1957) 354 U.S. 156 [77 S.Ct. 1127, 1 L.Ed.2d 1253]; Penal Code § 190.7; Cal. Rules of Court, rule 39.5) and effective appellate representation (see *People v. Barton* (1978) 21 Cal.3d 513, 518; U.S. Const. amends. VI, VIII, XIV).

The delays in Brady's appeal have been caused by factors over which he has exercised no discretion or control whatsoever, and are overwhelmingly attributable to the system that is in place, established by state and federal law, which necessitates extremely time-consuming and exhaustive litigation. The delays have nothing to do with the exercise of any discretion on appellant's part. (Cf. *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466-1467 [claim rejected because delay caused by prisoner "avail[ing] himself of procedures" for post-conviction review, implying volitional choice by the prisoner], *adopted en banc*, 57 F.3d 1493.) The delays here have been caused by "negligence or deliberate action by the State." (*Lackey v. Texas, supra,* 514 U.S. 1045 (mem. of Stevens, J., joined by Breyer, J., respecting the denial of certiorari).)

The condemned prisoner's non-waivable right to prosecute the automatic appeal remedy provided by law in this state does not negate the cruel and degrading character of long-term confinement under judgment of death. Execution of appellant following confinement under sentence of death for this lengthy a period of time would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (*Lackey v. Texas, supra*, 514 U.S. 1045 (Stevens, J., joined by Breyer, J., respecting the denial of certiorari). See *Knight v. Florida* (1998) 528 U.S. 990 [120 S.Ct. 459, 145 L.Ed.2d 370] (Breyer, J., respecting the denial of certiorari); *Ceja v. Stewart* (9th Cir. 1998) 97 F.3d 1246 (Fletcher, J., dissenting from order denying stay of execution).) If Roger Brady is executed, his sentence will be more than seven years of solitary confinement in a tiny cell in San Quentin prison – Death Row– followed by execution.

B. Cruel and Unusual Punishment.

Carrying out the death sentence after this extraordinary delay is violative of the Eighth Amendment's Cruel and Unusual Punishments Clause in at least two respects: first, it constitutes cruel and unusual punishment to confine an individual on death row for this extremely prolonged period of time. (See, e.g., *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461; *Ceja v. Stewart, supra*, (Fletcher, J., dissenting from order denying stay of execution). Second, after the passage of such a period of time since his conviction and judgment of death, the imposition of a sentence of death upon Brady would violate the Eighth Amendment because the State's ability to exact retribution and to deter other murders by actually carrying out such a sentence is drastically diminished. (*Id.*)

Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions inherent in life on death row. Accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." (*In re Medley* (1890) 134 U.S. 160, 172 [10 S.Ct. 384, 33 L.Ed. 835].) In *Medley*, the period of uncertainty was just four weeks. As recognized by Justice Stevens, *Medley*'s description should apply with even greater force in a case such as this involving a delay that has lasted over thirteen years. (*Lackey v. Texas,*

supra, (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).)

The California Supreme Court reached a similar conclusion in *People v. Anderson* (1972) 6 Cal.3d 628, 649:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

The penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. (*Ceja v. Stewart, supra*, (Fletcher, J., dissenting from order denying stay of execution); see also *Furman v. Georgia, supra,* 408 U.S. at p. 312 (White, J., concurring).) The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (*Furman v. Georgia, supra,* (White, J., concurring); see also *Gregg v. Georgia, supra*, 428 U.S. at p. 183 ["The sanction imposed cannot be so totally without penological

justification that it results in the gratuitous infliction of suffering."].) In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not otherwise be accomplished.

The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." (*Gregg v. Georgia, supra,* at p. 183.) Retribution, as defined by the United States Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." (*Id.*) The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of Roger Brady's conviction and judgment of death.

> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death . . . . [A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . . [T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

(*Lackey v. Texas, supra,* (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); see also *Coleman v. Balkcom* (1981) 451 U.S. 949, 952 [101 S.Ct. 2031, 68 L.Ed.2d 334] (Stevens, J., respecting denial of certiorari) ["the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"].)

Because it would serve no legitimate penological interest to execute

Roger Brady after this passage of time and because his confinement on death row for nearly seven years, in and of itself, constitutes cruel and unusual punishment, the execution of Roger Brady is prohibited by the Eighth Amendment's Cruel and Unusual Punishments Clause.

C. International Law.

The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. (*Pratt v. Attorney General for Jamaica* (1993) 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom* 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights). *Soering* specifically held that, for this reason, it would be inappropriate for the government of Great Britain to extradite a man under indictment for capital murder in the state of Virginia, in the absence of assurances that he would not be sentenced to death.

In an earlier generation, prior to the adoption and development of international human rights law, this Court rejected a somewhat similar claim. (*People v. Chessman*, *supra*, 52 Cal.2d 467, 498-500.) But the developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling appellant to relief for that reason as well.

Further, the process used to implement appellant's death sentence violates international treaties and laws that prohibit cruel and unusual punishment,

including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. (*United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) The length of Brady's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. (*United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) Pain or suffering may only be inflicted upon a person by a public official if the punishment is incidental to a *lawful* sanction. (*Id.*) Roger Brady has made a prima facie showing that his convictions and death sentence were obtained in violation of federal and state law. In addition, he has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death." Camus, *Reflections on the Guillotine*, in *Resistance, Rebellion and Death* 173, 200 (1961). The international community has increasingly recognized that prolonged confinement under a death sentence is cruel and unusual, and in violation of international human rights law.

(*Pratt v. Attorney General for Jamaica*, 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom*, 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights) [United Kingdom refuses to extradite German national under indictment for capital murder in Virginia in the absence of assurances that he would not be sentenced to death].)

The violation of international law occurs even when a condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death, and with the expectation that they will be used by death-sentenced prisoners. Roger Brady's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-term confinement under judgment of death. The death sentence must be vacated permanently, and/or a stay of execution must be entered permanently.

XIV.
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT ROGER BRADY'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by the California Supreme Court, Roger Brady presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these constitutional defects require that his sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach. As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of

death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will execute dominates the entire process of applying the penalty of death.

A. Penal Code section 190.2 is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As the California Supreme Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*Furman v. Georgia, supra,* 408 U.S. 238, [conc. opn. of White, J.]; accord *Godfrey v. Georgia, supra*, 446 U.S.

420, 427 [plur. opn.].)

(*People v. Edelbacher, supra,* 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. 862, 878.) The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. The California Supreme Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo, supra,* 6 Cal.4th 857, 868.) The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Roger Brady the statute contained twenty-six special circumstances[93] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent. In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if

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[74] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-two.

you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441. Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales*, *supra*, 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically

possible categories of first degree murder that would not be capital crimes under section 190.2. (See Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).) It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*) Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will *not* be available.

The issue presented here has not been addressed by the United States Supreme Court. The California Supreme Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley, supra,* 10 Cal.4th 764, 842, the California Supreme Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris, supra*, 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris, supra*, 465 U.S. at p. 52, fn. 14.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by

seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. Appellant's Death Penalty is Invalid Because Penal Code section 190.3(a) As Applied Allows Aribitrary and Capricious Imposition of Death In Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning. Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, the California Supreme Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[94] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after

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[94] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

the crime defendant sought to conceal evidence,[95] or had a "hatred of religion,"[96] or threatened witnesses after his arrest,[97] or disposed of the victim's body in a manner that precluded its recovery.[98]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [114 S.Ct. 2630, 129 L.Ed.2d 750]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

> a. Because the defendant struck many blows and inflicted multiple wounds[99] or because the defendant

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People v. Walker (1988) 47 Cal.3d 605, 639, fn.10.

[96] *People v. Nicolaus, supra,* 54 Cal.3d 551, 581-582.

[97] *People v. Hardy, supra*, 2 Cal.4th 86, 204.

[98] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35.

[99] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 [defendant inflicted many blows]; *People v. Zapien, supra*, S004762, RT 36-38 [same]; *People v. Lucas*, No. S004788, RT 2997-98 [same]; *People v. Carrera*, No. S004569, RT 160-61 [same].

killed with a single execution-style wound.[100]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[101] or because the defendant killed the victim without any motive at all.[102]

c. Because the defendant killed the victim in cold blood[103] or because the defendant killed the victim during a savage frenzy.[104]

d. Because the defendant engaged in a cover-up to conceal his crime[105] or because the defendant did not engage in a cover-up and so must have been proud of

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[100] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 [defendant killed with single wound]; *People v. Frierson*, No. S004761, RT 3026-27 [same].

[101] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[102] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[103] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[104] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[105] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

it.[106]

e. Because the defendant made the victim endure the terror of anticipating a violent death[107] or because the defendant killed instantly without any warning.[108]

f. Because the victim had children[109] or because the victim had not yet had a chance to have children.[110]

g. Because the victim struggled prior to death[111] or because the victim did not struggle.[112]

h. Because the defendant had a prior relationship with

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[106] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[107] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[108] See, e.g., *People v. Freeman*, No. S004787, RT 3674 [defendant killed victim instantly]; *People v. Livaditis*, No. S004767, RT 2959 [same].

[109] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) [victim had children].

[110] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 [victim had not yet had children].

[111] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 [victim struggled]; *People v. Webb*, No. S006938, RT 5302 [same]; *People v. Lucas,* No. S004788, RT 2998 [same].

[112] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 [no evidence of a struggle]; *People v. Carrera*, No. S004569, RT 160 [same].

the victim[113] or because the victim was a complete stranger to the defendant.[114]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. *The age of the victim.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[115]

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[113] See, e.g., *People v. Padilla*, No. S014496, RT 4604 [prior relationship]; *People v. Waidla*, No. S020161, RT 3066-67 [same]; *People v. Kaurish , supra*, 52 Cal.3d 648, 717 [same].

[114] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 [no prior relationship]; *People v. McPeters*, No. S004712, RT 4264 [same].

[115] See, e.g., *People v. Deere*, No. S004722, RT 155-56 [victims were young, ages 2 and 6]; *People v. Bonin*, No. S004565, RT 10,075 [victims were adolescents, ages 14, 15, and 17]; *People v. Kipp*, No. S009169, RT 5164 [victim was a young adult, age 18]; *People v. Carpenter*, No. S004654, RT 16,752 [victim was 20]; *People v. Phillips* (1985) 41 Cal.3d 29, 63 [26-year-old victim was "in the prime of his life"]; *People v. Samayoa,* No. S006284, XL RT 49 [victim was an adult "in her prime"]; *People v. Kimble*, No. S004364, RT 3345 [61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"]; *People v. Melton*, No. S004518, RT 4376 [victim was 77]; *People v. Bean*, No.

(continued...)

b. *The method of killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[116]

c. *The motive of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[117]

d. *The time of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[118]

(...continued)
S004387, RT 4715-16 [victim was "elderly"].

[116] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 [strangulation]; *People v. Kipp*, No. S004784, RT 2246 [same]; *People v. Fauber,* No. S005868, RT 5546 [use of an axe]; *People v. Benson*, No. S004763, RT 1149 [use of a hammer]; *People v. Cain*, No. S006544, RT 6786-87 [use of a club]; *People v. Jackson*, No. S010723, RT 8075-76 [use of a gun]; *People v. Reilly*, No. S004607, RT 14,040 [stabbing]; *People v. Scott*, No. S010334, RT 847 [fire].

[117] See, e.g., *People v. Howard*, No. S004452, RT 6772 [money]; *People v. Allison*, No. S004649, RT 969-70 [same]; *People v. Belmontes*, No. S004467, RT 2466 [eliminate a witness]; *People v. Coddington*, No. S008840, RT 6759-61 [sexual gratification]; *People v. Ghent,* No. S004309, RT 2553-55 [same]; *People v. Brown*, No. S004451, RT 3544 [avoid arrest]; *People v. McLain*, No. S004370, RT 31 [revenge]; *People v. Edwards*, No. S004755, RT 10,544 [no motive at all].

[118] See, e.g., *People v. Fauber*, No. S005868, RT 5777 [early
(continued...)

e. *The location of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[119]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale. In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853, 100 L.Ed.2d 372] [discussing the holding in *Godfrey v. Georgia*, *supra*, 446 U.S. 420].)

(...continued)
morning]; *People v. Bean*, No. S004387, RT 4715 [middle of the night]; *People v. Avena*, No. S004422, RT 2603-04 [late at night]; *People v. Lucero*, No. S012568, RT 4125-26 [middle of the day].

[119] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 [victim's home]; *People v. Cain*, No. S006544, RT 6787 [same]; *People v. Freeman*, No. S004787, RT 3674, 3710-11 [public bar]; *People v. Ashmus*, No. S004723, RT 7340-41 [city park]; *People v. Carpenter*, No. S004654, RT 16,749-50 [forested area]; *People v. Comtois*, No. S017116, RT 2970 [remote, isolated location].

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth and Fourteenth Amendments to the Federal Constitution.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive. Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Roger Brady's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. All this was consistent with the California Supreme Court's previous interpretations of this state's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, the Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] (hereinafter *Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S. Ct. 2428, 153 L.Ed.2d 556] (hereinafter *Ring*).

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.) In *Ring*, the high court held that Arizona's death

penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the state bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by the California Supreme Court violates the federal Constitution.

a. In the Wake of *Ring*, Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[120] Only

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[120] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann.

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter. California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne, supra,* 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors. According to California's "principal sentencing instruction" (*People v. Farnam, supra*, 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission

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§§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990). And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).

of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.) Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[121] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[122]

In *People v. Anderson, supra,* 25 Cal.4th 543, 589, the California Supreme Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*],

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[121] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: '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.'" (*Id.*, 59 P.3d at p. 460.)

[122] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen, supra*, 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[123] indicates, the maximum penalty for *any* first degree murder conviction is death.

> Arizona advanced precisely the same argument in *Ring* to no avail: "In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." (*Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.)

(Ring, 124 S.Ct. at p. 2431.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only

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[123] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

in a formal sense." (*Ring, supra,* 122 S.Ct. at p. 2440.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole, or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither life without possibility of parole nor death can actually be imposed unless the jury finds a special circumstance. (Pen. Code §190.2.) Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (Pen. Code §190.3; CALJIC 8.88 (7th ed., 2003).) It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[124] while California's

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[124]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated

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statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[125]

There is no meaningful difference between the processes followed under each scheme. "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*, 124 S.Ct. at 2439-2440.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's

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in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[125] California Penal Code section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown, supra*, 40 Cal.3d 512, 541, 545, fn.19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).

previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow, supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson, supra,* 25 Cal.4th at 589-590, fn.14.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa, supra*, 512 U.S. at p. 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at p. 263 [emphasis added].) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale. The fact that no

single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring, supra,* 122 S.Ct. at 2439-2440.)

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto, supra*, 30 Cal. 4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.

(*Ring, supra*, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L. Ed.2d 615] ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring, supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . 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.

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. Jury Agreement and Unanimity.

The Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; accord, *People v.*

Bolin, supra, 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to Roger Brady's jury requiring jury agreement on any particular aggravating factor. Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[126] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The

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[126] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51, 112 S.Ct. 466, 116 L.Ed.2d 371 [historical practice given great weight in constitutionality determination].

United States Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra.*)

These protections include jury unanimity. The United States Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[127] accord *Johnson v.*

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[127] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder.

> It is of vital importance that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida, supra,* 430 U.S. 349, 358.) Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio, supra,* 438 U.S. 586, 604, (opn. of Burger, C.J.) [stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; see also *Strickland v. Washington, supra,* 466 U.S. 668, 704 (Brennan, J., concurring in part and dissenting in part) ["[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding"].

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Mississippi, supra, 486 U.S. 578, 584.), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury. An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code §§ 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836], and certainly no less (*Ring*, 122 S.Ct. at p. 2443).[128]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[129] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina, supra,* 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, as well as the Sixth Amendment's guarantee of a trial

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(*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

[128] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[129] The first sentence of article 1, section 16 of the California Constitution provides: "Trial 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 the inviolability of the unanimity requirement in criminal trials].

by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley, supra,* 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California, supra*, 524 U.S. at p. 726; *Strickland v. Washington, supra*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816 [119 S.Ct. 1707, 143 L.Ed.2d 985], the United States Supreme Court interpreted 21 U.S.C. section 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The*

> *second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson, supra*, 526 U.S. at p. 819 [emphasis added].)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521 [78 S.Ct. 1332, 2 L.Ed.2d 1460].) The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14 [99 S.Ct. 235, 58 L.Ed.2d 207].) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt

b. Imposition of Life or Death.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323].) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship, supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [102 S.Ct. 1388, 71 L.Ed.2d 599]; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335 [96 S.Ct. 893, 47 L.Ed.2d 18].)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," (*Speiser, supra*, 375 U.S. at 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra* [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d

630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" (*Santosky, supra*, 455 U.S. at p. 755), the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'

(455 U.S. at p. 756.) Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra*, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a

reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship, supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638.) In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n 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." (*Monge v. California, supra*, 524 U.S. at p. 732 [citations omitted].) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. See, e.g., *Griffin v. United States*, *supra,* 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1856) 59 U.S. 272, 276-277, 18 HOW 272, 15 L.Ed. 372 [due process determination informed by historical settled usages].

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on

that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of Section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana, supra.*) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra,* 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors

on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374, [108 S.Ct. 1860, 100 L.Ed.2d 384]) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

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.*) 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.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove

mitigation in penalty phase would continue to believe that. Such jurors do exist. 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. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana, supra.*)

6. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at p. 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.Ct. 745, 9 L.Ed.2d 770].) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*In re Sturm, supra,* 11 Cal.3d at p. 267.) The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code §1170 (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994. Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the

aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, *supra*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *Id.* at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra,* 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[130]

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[130] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); 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); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons.

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Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by this Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has

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Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1983) 463 U.S. 939, 954 [103 S.Ct. 3418, 77 L.Ed.2d 1134] (plurality opinion, alterations in original), quoting *Proffitt v. Florida, supra*, 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra,* 465 U.S. at p. 52, fn. 14.

That greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*. (See section A of this Argument, *ante*.) Further, the statute lacks

numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The United States Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831, 108 S.Ct. 2687, 101 L.Ed.2d 702; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [102 S.Ct. 3368, 73 L.Ed.2d 1140]; *Coker v. Georgia* (1977) 433 U.S. 584, 596 [97 S.Ct. 2861, 53 L.Ed.2d 982].)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision

was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed 346] . . ." (*Gregg v. Georgia, supra*, 428 U.S. at 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida, supra*, 428 U.S. 242 at p. 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[131]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case

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[131] 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 § 19-2827(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. § 15A-2000(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. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(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).

Also 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. 1981) 417 N.E.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]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall, supra,* 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals 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. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192, citing *Furman v. Georgia, supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also 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.

8. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

In accordance with customary state court practice, nothing in the instructions advised 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. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra*, 47 Cal.3d 983, 1034; *People v. Lucero, supra,* 44 Cal.3d 1006, 1031, fn.15; *People v. Melton, supra,* 44 Cal.3d 713, 769-770; *People v. Davenport, supra*, 41 Cal.3d 247, 288-289.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. 280; *Zant v. Stephens, supra*, 462 U.S. at p. 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584-585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made 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 [112 S.Ct. 1130, 117 L.Ed.2d 367].)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California, supra*, 512 U.S. at p. 973, quoting *Gregg v. Georgia, supra*, 428 U.S. at p. 189 (joint opinion of Stewart, Powell, and Stevens, JJ.) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.)

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution By Denying Procedural Safeguards to Capital Defendants that Are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 [emphasis added].) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights.'" (*Commonwealth v. O'Neal* (1975) 367 Mass. 440, 449 [327 N.E.2d 662, 668]; quoting *Trop v. Dulles* (1958) 356 U.S. 86, 102.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies

the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [62 S.Ct. 1110, 86 L.Ed. 1655].) The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[132] as in *Snow*,[133] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code §§1158, 1158a.)

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[132] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra*, 30 Cal.4th at p. 275.)

[133] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subdivision (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See Sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

The California Supreme Court has most explicitly responded to equal protection challenges to the death penalty scheme by rejecting claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen, supra,* 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-

capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen, supra*, the California Supreme Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding. (1) The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen, supra,* 42 Cal. 3d at p. 1286.) But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp, supra,* 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia, supra*, 433 U.S. 584) or offenders. (*Enmund v. Florida, supra*, 458 U.S. 782; *Ford v. Wainwright, supra,* 477 U.S. 399; *Atkins v. Virginia, supra*, 536 U.S. 304.) Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to

impose death. (*McCleskey v. Kemp, supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes. Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code §190.4; *People v. Rodriguez, supra,* 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen, supra,* 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra*, 477 U.S. at p. 411.) "Death, in its finality, differs more from life imprisonment than a

100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305 [opn. of Stewart, Powell, and Stephens, J.J.].) The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "non-quantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "non-quantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore, supra*, 531 U.S. 98.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.) The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of

convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia, supra,* 536 U.S. 304.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases (*Allen, supra*, 42 Cal.3d at p. 186) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*) [134] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments.

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[134] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra,* 122 S.Ct. at pp. 2432, 2443.)

(See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates 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 [the former *apartheid* regime] 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) 185 Ill.2d 179, 225 [705 N.E.2d 824] [dis. opn. of Harrison, J.].) Since that article, in 1995, South Africa abandoned the death penalty.

The non-use of the death penalty, or its limitation to "exceptional

crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.]. Indeed, *all* nations of Western Europe have now abolished the death penalty. (See Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].) [135]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "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 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227 [16 S.Ct. 139, 40 L.Ed. 95]; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of

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[135] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 100; *Atkins v. Virginia, supra*, 122 S.Ct. at pp. 2249-2250.) It 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 antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 122 S.Ct. at p. 2249, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

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. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 122 S.Ct. at p. 2249.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international

law is a part of our law. (*Hilton v. Guyot, supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

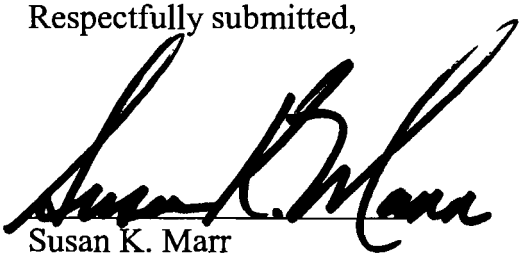
Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights [limiting the death penalty to only "the most serious crimes"].) Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright, supra*, 477 U.S. 399; *Atkins v. Virginia, supra,* 536 U.S. 304.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

For all of the foregong reasons, Appellant, Roger Brady, respectfully submits that this Court should reverse the conviction and the sentence of death.

Respectfully submitted,

Dated: 3-7-06



Susan K. Marr
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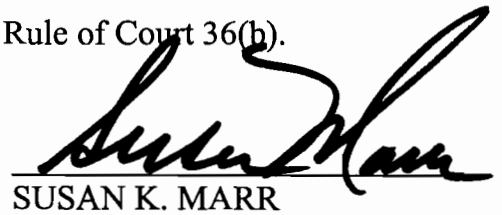
CERTIFICATE PURSUANT TO CALIF. RULE OF COURT 36(b)

I hereby certify that, according to the word-processing program used to create this brief (Word Perfect 12) that the brief, exclusive of tables, is 104,280 words. Accordingly, I am filing contemporaneously herewith, an application for leave to file a brief in excess of the 95,200 word limit specified in California Rule of Court 36(b).



SUSAN K. MARR
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: People v. Roger Hoan Brady
Case Number: Crim. S078404
Los Angeles County Superior Court No. YA020910

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 9462 Winston Drive, Brentwood, Tennessee 37027.

On March 7, 2006, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and
by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Brentwood, Tennessee, with
postage thereon fully prepaid.

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I declare under penalty of perjury, according to the laws of the state of California, that the foregoing is true and correct. Executed on March 7, 2006, at Brentwood, Tennesee.

SUSAN K. MARR