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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

DEATH PENALTY CASE

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . (vii.)

LEGAL ARGUMENT

ERRORS IN THE GUILT PHASE

I. THE TRIAL COURT'S EXCLUSION OF EVIDENCE IMPLICATING ALTERNATE SUSPECTS WAS CONTRARY TO CALIFORNIA LAW AND VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS 1

A. Background and Overview of Claims 1

B. Respondent Mischaracterizes Significant Facts and Incorrectly Applies the Standard of *People v. Hall* 4

C. The Exclusion of this Evidence Was an Abuse of the Trial Court's Discretion under Evidence Code Section 352 10

D. Respondent Fails to Explain How Appellant's Case Was Not Prejudiced by the Exclusion of this Evidence 11

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FIRST DEGREE MURDER VERDICT 13

A. Overview of Appellant's Claims and Respondent's Contentions 13

B. Appellant Utilizes the Proper Standard of Review 14

C. Respondent Strings Together a Series of Tenuous Inferences from an Incomplete Picture of the Evidence 15

1. The circumstantial evidence did not suggest a motive 16

2. There was no evidence of advanced planning 17

TABLE OF CONTENTS

V. RESPONDENT MAKES NO EFFORT TO REFUTE APPELLANT'S CLAIMS CONCERNING THE IMPROPER AND UNCONSTITUTIONAL USE OF CALJIC 2.52 33

A. Introduction and Overview 33

B. CALJIC 2.52 Duplicated Other Circumstantial Evidence Instructions, Was Argumentative and Unfairly Emphasized the Prosecution's Case 35

1. Duplicative instructions are disfavored 36

2. CALJIC 2.52 is argumentative 37

C. Respondent Fails to Refute the Claim That CALJIC 2.52 Was Unconstitutional in this Case Because the Instruction Permitted Irrational Inferences Regarding Appellant's Mental State 39

D. Respondent Cannot Establish That the Instructional Error Was Harmless Beyond a Reasonable Doubt 42

ERRORS IN THE PENALTY PHASE

VI. RESPONDENT CANNOT JUSTIFY THE TRIAL COURT'S ADMISSION OF THE EXCESSIVE, INFLAMMATORY AND IRRELEVANT VICTIM IMPACT EVIDENCE PERTAINING TO OFFICER GANZ 43

A. Introduction And Overview 43

B. Appellant Has Accurately Portrayed The Record 44

C. Respondent's Analysis Of The Constitutional Principles Involved In Victim Impact Evidence Is Incomplete And Self-Serving 47

TABLE OF CONTENTS

C. Trial Courts in this State Have the Discretion to Exclude Unduly Prejudicial Victim Impact Testimony from Section 190.3(b) Evidence 76

D. It Was Wholly Improper for Prosecution Witnesses to Offer Opinions and Characterizations of Appellant 77

E. Respondent Fails to Address the Prejudicial Effect of this Testimony in Connection with the Other Errors in Appellant's Capital Trial 77

VIII. REVERSAL IS REQUIRED DUE TO THE PERVASIVE MISCONDUCT IN THE PROSECUTOR'S CLOSING ARGUMENT. 78

A. Introduction and Overview 78

B. Respondent Cannot Justify the Inflammatory appeals to Jurors' Fears of Crime and Their Loyalty to Police and the Government 79

C. Appeals to Society's Expectations and the Jurors' Oaths 82

D. Other Improprieties in this Argument Compounded the Prejudice 84

IX. THE USE OF CALJIC 17.41.1 VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY AN IMPARTIAL JURY 86

X. THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO MODIFY THE VERDICT 86

XI. - XIV. REPLY CONCERNING THE SYSTEMIC ERRORS 86

TABLE OF AUTHORITIES

CASES **_Page_**

Beck v. Alabama (1980)
447 U.S. 625[100 S.Ct. 2382, 65 L.Ed.2d 392] 23

Booth v. Maryland (1987)
482 U.S. 496 [107 S.Ct 2529, 96 L.Ed.2d 440] . . . . passim

Braxton v. United States (1991)
500 U.S. 344 [111 S.Ct. 1854, 114 L.Ed.2d 385] 20

Bruton v. United States (1968)
391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] 79

Buchanan v. Angelone (1998)
522 U.S. 269 [118 S.Ct. 757, 139 L.Ed.2d 702] 79

Caldwell v. Mississippi (1985)
472 U.S. 320 . . . . 51, 79

Chambers v. Mississippi (1973)
410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] 23, 25

Chapman v. California (1967)
386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] . . . . 11, 12, 27, 31 ,35, 42

Crane v. Kentucky (1986)
476 U.S. 683 [106 S.Ct. 2142, 90 L.Ed.2d 636] 23, 78

Darden v. Wainwright (1986)
477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144] 78

Davis v. Alaska (1974)
415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347] 25

Delaware v. Van Arsdall (1986)
475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674] 11, 12, 25

TABLE OF AUTHORITIES

Lambert v. State (Ind. 1996)
675 N.E.2d 1060 . . . . 63, 64

Lambright v. Stewart (9th Cir. 1999)
167 F.3d 477 . . . . 4, 23

Lincoln v. Sun (9th Cir.1987)
807 F.2d 805 30

Lindsay v. Normet (1972)
405 U.S. 56 [92 S.Ct. 862, 31 L.Ed.2d 36] 36, 37

Payne v. Tennessee (1991)
501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] . . . . passim

People v. Adcox (1988)
47 Cal.3d 207 19

People v. Alcala (1992)
4 Cal.4th 742 [842 P.2d 1192, 15 Cal.Rptr.2d 432] 8

People v. Alcala (1984)
36 Cal.3d 604 [842 P.2d 1192, 15 Cal.Rptr.2d 432] 18, 20

People v. Allen (1986)
42 Cal.3d 1222 [729 P.2d 115, 232 Cal.Rptr. 849] 83

People v. Alvarez (1996)
49 Cal.App.4th 679 [56 Cal.Rptr.2d 814] 3, 24

People v. *Anderson* (1968)
70 Cal.2d 15 [447 P.2d 942, 73 Cal.Rptr. 550] 13, 16, 17, 40

People v. Babbitt (1988)
45 Cal.3d 660 [755 P.2d 253, 248 Cal.Rptr. 69] 24

TABLE OF AUTHORITIES

People v. Cornwell (2005)
37 Cal.4th 50 [117 P.3d 622, 33 Cal.Rptr.3d 1] 82, 84

People v. Crandell (1988)
46 Cal.3d 833 [760 P.2d 423, 251 Cal.Rptr. 227] 39, 42

People v. Cudjo (1993)
6 Cal.4th 585 [863 P.2d 635, 25 Cal.Rptr.2d 390] 9

People v. Cunningham (2001)
25 Cal.4th 926 [25 P.3d 519, 108 Cal.Rptr.2d 291] 24

People v. Daniels (1991)
52 Cal.3d 815 [802 P.2d 906, 277 Cal.Rptr. 122] 37

People v. Davenport (1996)
11 Cal.4th 1171 [906 P.2d 1068, 47 Cal.Rptr.2d 800] 85

People v. Davis (2005)
36 Cal.4th 510 [115 P.3d 417, 31 Cal.Rptr.3d 96] 66

People v. Edelbacher (1989)
47 Cal.3d 983 [766 P.2d 1, 254 Cal.Rptr. 586] 5, 8, 83

People v. Edwards (1991)
54 Cal.3d 787 [819 P.2d 436, 1 Cal.Rptr.2d 696] 49, 50, 54, 79

People v. Eggers (1947)
30 Cal. 2d 676 [185 P.2d 1] 18

People v. Frye (1998)
18 Cal.4th 894 [959 P.2d 183, 77 Cal.Rptr.2d 25] 31

People v. Gurule (2002)
28 Cal.4th 557 [51 P.3d 224, 123 Cal.Rptr.2d 345] 54

TABLE OF AUTHORITIES

People v. Larson (Colo. 1978)
572 P.2d 815 38

People v. Lewis (2001)
26 Cal.4th 334 36

People v. Love (1960)
53 Cal. 2d 843 [350 P.2d 705, 3 Cal.Rptr. 665] 54, 55, 56

People v. Lucas (1995)
12 Cal.4th 415 [907 P.2d 373, 48 Cal.Rptr.2d 525] 85

People v. Lucero (1988)
44 Cal. 3d 1006 [750 P.2d 1342] 18

People v. Marks (2003)
31 Cal.4th 197 [72 P.3d 1222, 2 Cal.Rptr.3d 252] 14, 15, 18

People v. Marshall (1996)
13 Cal.4th 799 [919 P.2d 1280, 55 Cal.Rptr.2d 347] 40

People v. Mayfield (1997)
14 Cal.4th 668 [928 P.2d 485, 60 Cal.Rptr.2d 1] 79

People v. Medina (1995)
11 Cal.4th 694 [906 P.2d 2, 47 Cal.Rptr.2d 165] 31

People v. Michaels (2002)
28 Cal. 4th 486 [49 P.3d 1032, 122 Cal.Rptr.2d 285] 65

People v. Millwee (1998)
18 Cal.4th 96 [954 P.2d 990, 74 Cal.Rptr.2d 418] 17, 20

People v. Mincey (1992)
2 Cal.4th 408 [827 P.2d 388, 6 Cal.Rptr.2d 822] 37

TABLE OF AUTHORITIES

People v. Ratliff (1986)
41 Cal.3d 675 [715 P.2d 665, 224 Cal.Rptr.2d 705] 20

People v. Robillard (1960)
55 Cal.2d 88 [358 P.2d 295, 10 Cal.Rptr. 167] 16

People v. Robinson (2005)
37 Cal.4th 592 [724 P.3d 363, 36 Cal.Rptr.3d 760] 59

People v. Rodgers (1979)
90 Cal.App.3d 368 [153 Cal.Rptr. 382] 30

People v. Roldan (2005)
35 Cal.4th 646 [110 P.3d 289, 27 Cal.Rptr.3d 360] 54, 56

People v. Sandoval (1992)
4 Cal.4th 155 [841 P.2d 862, 14 Cal.Rptr. 342] 5

People v. Silva (2001)
25 Cal.4th 345 [106 Cal.Rptr.2d 93, 21 P.3d 769 14

People v. Smith (Gregory S.) (2005)
35 Cal.4th 334 [107 P.3d 229, 25 Cal.Rptr.3d 554] 61, 65

People v. Stitley (2005)
35 Cal.4th 514 [108 P.3d 182, 26 Cal.Rptr.3d 1] 14, 61

People v. Strickland (1974)
11 Cal.3d 946 [523 P.2d 672, 114 Cal.Rptr. 632] 77

People v. Thomas (1945)
25 Cal.2d 880 [156 P.2d 7] 17, 18

People v. Tubby (1949)
34 Cal.2d 72 [207 P.2d 51] 20

TABLE OF AUTHORITIES

State v. Bone (Iowa 1988)
429 N.W.2d 123 38

State v. Cathey (Kan. 1987)
741 P.2d 738 38

State v. Dann (2003)
205 Ariz. 557 [74 P.3d 231] 17

State v. Grant (S.C. 1980)
272 S.E.2d 169 38

State v. Hatten (Mont. 1999)
991 P.2d 939 38

State v. Nelson (Mont. 2002)
48 P.3d 739 38

State v. Reed (Wash. App.1979)
604 P.2d 1330 38

State v. Thompson (2003)
204 Ariz. 471 [65 P.3d 420] 17

State v. Wrenn (Idaho 1978)
584 P.2d 1231 38

Ulster County Court v. Allen (1979)
442 U.S. 140 [99 S.Ct. 2213, 60 L.Ed 2d 777] 41

United States v. Cotnam (7th Cir. 1996)
88 F.3d 487 . . . . 30, 31

United States v. Gainey (1965)
380 U.S. 63 [85 S.Ct. 754, 13 L.Ed.2d 658] 41

TABLE OF AUTHORITIES

Zant v. Stephens (1983)
462 U.S. 862 [103 S.Ct. 2733, 77 L.Ed.2d 235] 23

CONSTITUTIONS

California Constitution
Art. 1, §§ 1 . . . . passim
7 . . . . passim
15 . . . . passim
16 . . . . passim
17 . . . . passim
24 70
28(d) 24

United States Constitution

Amendment V . . . . passim
Amendment VI . . . . passim
Amendment VIII . . . . passim
Amendment XIV . . . . passim

STATE STATUTES

California Statutes

Evidence Code

§352 . . . . passim
§402 . . . . 2, 57

Penal Code

§190.3(a) 50, 51, 54, 66, 70
§190.3(b) 66
§190.4(e) 86
§243(e)(1) 22

TABLE OF AUTHORITIES

S. Kraus, *Representing The Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing* (1989) 64 Ind.L.J. 617 84

were published, a number of people called the Task Force reporting a strong resemblance between Miko and the suspect. (2 RT 506.) Police subsequently learned that Miko and prosecution witness Jennifer La Fond were friends, and that she purchased drugs from him. (2 RT 506.) When interviewed by police investigators, La Fond denied that Miko was involved in the Ganz killing. (10 CT 2546.) In Clue No. 1506 an Asian man contacted the Task Force to identify another Asian man, David Fukoto. Mr. Fukoto was known to be hostile to police. On February 14, 1994, several weeks after the Ganz shooting, Mr. Fukoto shot and killed two police officers in a hotel meeting room in Torrance not far from where the Ganz shooting took place. Fukoto was shot and killed in the incident. Investigators later discovered that he had possessed a large number of firearms, and suspected that Fukoto committed at least one armed robbery before killing the two police officers in February of 1994. (10 CT 2546.)

Defense counsel moved to admit the four Clues into evidence on multiple legal grounds. Counsel argued that all four Clues were substantive evidence of third-party culpability and were, therefore, relevant and admissible pursuant to Evidence Code section 402. (2 RT 503.) Additionally, the Clues were relevant and admissible as they reflected the state of mind of the police detectives responsible for the investigation. (*Id.*) Defense counsel made several more specific points in connection with three of the Clues. Regarding Clue No. 1796 (the confession by Mr. Casteneda), counsel noted that the five month delay in contacting Mr. Casteneda arguably demonstrated bias and/or incompetence on the part of police investigators. (2 RT 503-504.) Defense counsel noted that Clue No. 192 (connecting alternate suspect Miko and the prosecution's chief identification witness Jennifer LaFond) was highly relevant to impeach LaFond's testimony. Finally, defense counsel explained the relevance of Clue No. 1506 concerning alternate suspect David Fukoto. Here counsel noted similarities between the Ganz case and the double homicide carried out by Fukoto on February 14,

Respondent contends that the Clues evidence was not credible. The trial court was therefore, according to Respondent, correct to exclude the Clues because this information did not meet the standard for third party culpability evidence set forth in *People v. Hall, supra,* 41 Cal.3d 826, and subsequent decisions of the California Supreme Court. (Resp. Brief at pp. 64-66.) Respondent next argues that the clues were objectionable on hearsay grounds and, contends that the defense did not establish an applicable exception. (Resp. Brief at pp. 66-67.) Appellant's constitutional concerns are dispensed with in a footnote, with Respondent flatly asserting that the application of state evidence law does not implicate federal constitutional rights. (See Resp. Brief at pp. 69, fn. 42.) Finally, Respondent contends that any error by the trial court was harmless. (Resp. Brief at pp. 69-72.) Based on its evaluation of the evidence, Respondent finds no reasonable probability that Appellant could have received a more favorable outcome had the trial court admitted the proferred evidence. (Resp. Brief at p. 69.) Respondent's analysis of the four Clues evidence is incorrect for all of the reasons set forth below.

B. Respondent Mischaracterizes Significant Facts and Incorrectly Applies the Standard of *People v. Hall.*

As discussed in the AOB, California's standard for the admission of third party culpability evidence is set forth in *People v. Hall, supra,* 41 Cal.3d 826. Under *Hall,* the defense must identify the alternate suspect and must also proffer "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra,* at p. 833.) The four Clues in this case specifically identified alternate suspects.[2] In two of the Clues the informants themselves claimed

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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.)

2

It is unclear whether the *Hall* test was satisfied with respect to the "Non-

suspect. (See Resp. Brief at p. 67.) Several people called the Task Force tip hotline to identify Michael Herbert, *a.k.a.* Miko, after the release of the composite sketch. Police later verified that Miko was also a social friend of, and drug connection for, Jennifer LaFond. In its discussion Respondent also minimizes LaFond's importance to the state's case. Jennifer LaFond was central to the prosecution's case from its inception.[4] LaFond was the prosecution's chief eyewitness to the crime and the person responsible for the composite drawing of the suspect. Investigators were able to release a composite sketch to the news media only because of LaFond's work with the police artist. She identified Appellant in the Oregon line-up, while Don Ganz could not. LaFond was clearly the prosecution's chief identification witness at trial, as she had the best vantage point from which to view the suspect unencumbered by the intense stress and trauma Don Ganz was undoubtedly experiencing. Although LaFond was a strong witness for the prosecution her testimony was not unassailable. On the day of the crime LaFond had been under influence of what she claimed was an insignificant, "experimental" use of methamphetamine. She failed to identify Appellant from photo "six packs" of suspects shown to her by investigators, and her positive identification occurred some six months later when she was flown to Oregon to view a lineup. (See AOB at pp. 5-6; 9-14.) Evidence from several independent sources connecting LaFond's friend and drug connection, Miko, to the shooting was highly relevant to her credibility. Defense counsel should have been permitted to

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The only other witness close enough to the suspect to give police a description was the then 12-year-old Don Ganz. Don's identification of was questionable for numerous reasons. Don had one or two brief looks at the suspect when he peered out from his hiding place under the dashboard of the police car. He was undoubtedly under tremendous stress at that time. Don twice failed to identify Appellant. He did not select Appellant's picture when shown a photo lineup and later said he could not make an identification from a live lineup in Oregon. Don only identified Appellant in the highly suggestive setting of the Oregon trial. (See 6 RT 1499, 1529-1530.)

unremarkable that an imbalanced individual would call in to claim responsibility for the offense, and in no way does this act create a reasonable doubt in Appellant's guilt." (*Id.*) Respondent offers no evidence to support the claim that Casteneda was "imbalanced."

It is not clear what types of "substantive evidence" or "personal knowledge" Respondent has in mind, and the cases noted in the Respondent's Brief are not helpful in this respect. The defense evidence proffered in those instances raised only general possibilities of a third party's presence or speculated about a motive for another person's involvement. (See *People v. Alcala* (1992) 4 Cal.4th 742 [842 P.2d 1192, 15 Cal.Rptr.2d 432] [proffer insufficient where evidence consisted of alternate suspect's mere presence in the area on the day after the crime]; *People v. Kaurish* (1990) 52 Cal.3d 648, 685[802 P.2d 278, 276 Cal.Rptr. 788] [evidence properly excluded where it merely showed that another person had a reason to be angry with the victim]; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1017-1018 [third party's possible motive alone insufficient].) Unlike the cases Respondent relies on, the Clues were supported by independent information specifically tying the identified suspects to the Ganz shooting.

It is inconsequential that Respondent does not find the Clues' information reliable or persuasive. In *People v. Hall* the California Supreme Court made clear that the *jury* determines credibility and assesses the strength of the evidence. Trial courts were expressly cautioned not to be unduly restrictive in assessing the relevance of third-party culpability evidence: "[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.) The California Supreme Court limited the trial court's discretion, clearly indicating that the judge's personal assessment of the proffered evidence is not a factor. Consistent with California's traditionally inclusive approach to evidence in criminal cases, the trial

the victim and agreed to accompany her to a meeting where she was to planning to purchase a quantity of drugs. The meeting did not take place. The defendant testified that he spoke to the victim later that evening. It was not disputed that the victim had been alive on the morning of October 31st, and there was no evidence that she was with any identified suspect from 1:00 p.m. on October 31st to 2:30 p.m. that day when defendant allegedly discovered her body in her van parked outside his motel room. The defense proffer consisted of the following evidence: 1) a store clerk would testify that the victim purchased ammunition the evening before, and 2) the victim's daughter would testify that her mother had bought pot and drugs on other occasions. The trial court allowed the defendant to testify about the victim's history of drug trafficking but did not permit the other two defense witnesses to testify. The California Supreme Court held that the trial court had not erred. The defense evidence at best showed that victim was with Pablo on the evening of October 30th. The defendant's testimony and the daughter's only established that there may have been unidentified persons involved in drug sales with a motive or opportunity to kill the victim. The proffered evidence thus established no link - direct or circumstantial - between the victim and an identified third party on the day of her death. (*People v. Gutierrez*, *supra*, at pp. 1136-1137.)

C. The Exclusion of this Evidence Was an Abuse of the Trial Court's Discretion under Evidence Code Section 352.

Respondent contends that, even if all or some of the Clues had been relevant, the trial court properly exercised its discretion to exclude the evidence under Evidence Code section 352. These arguments largely revisit the discussion of relevance, with Respondent again stating that the proffered evidence had "insufficient indicia of reliability." (See Resp. Brief at pp. 66-68.) With respect to the Casteneda confession, Respondent additionally argues: 1) that defense counsel failed to establish an exception to the hearsay rule which would allow this evidence; and 2) that the trial

(1986) 475 U.S. 673, 676 [106 S.Ct. 1431, 89 L.Ed.2d 674][where error is in limiting defense cross-examination of a prosecution witness: "[t]he 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."].) Appellant recognizes that 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].) The AOB discusses the excluded Clues, defense counsel's proposed use for this evidence and the effect of the trial court's ruling. Appellant demonstrates that the exclusion of this evidence was highly prejudicial and requires reversal under either the *Chapman* or *Watson* standard.

Respondent predictably finds that any error was inconsequential. According to Respondent, the identification testimony (primarily given by Don Ganz and Jennifer LaFond) was "overwhelming." (Resp. Brief at p. 70.) Respondent contrasts the defense case, observing "Appellant offered no alibi evidence at trial and he provided no independent evidence challenging the issue of identity." (*Id.*) The AOB's discussion of the prejudice to the defense case resulting from the trial court's refusal to admit the Clues evidence is criticized as "pure speculation," and Respondent concludes that Appellant has failed to establish prejudice under either the *Chapman* or *Watson* standards. (Resp. Brief at pp. 69-73.)

Respondent's analysis is mistaken largely because it depends solely upon Respondent's view of the evidence. Whether Respondent is persuaded by the excluded evidence is not relevant to gauging the effect of the error. The relevant question is whether the error would have made a difference to the *jury*. The difficulty with rulings to exclude defense evidence is that one may only speculate on that point. The AOB notes Justice Traynor's observation in this regard: "errors at a trial that deprive a

precluding effective defense challenges to the credibility of the state's witnesses. (See AOB Args. I, III, IV and V.) As a result, Appellant was denied his state and federal constitutional rights to due process of law and a fair and reliable determination of guilt and of the penalty. (AOB at pp. 52-71.)

Predictably, Respondent finds that the evidence was sufficient to sustain the verdict. Respondent contends that Appellant has "egregiously" misrepresented the standard of review applied to sufficiency of the evidence claims. (Resp. Brief at p. 81.) Respondent next discusses the prosecution's evidence in three key areas: pre-existing motive, planning activity, and manner of killing. (Resp. Brief at pp. 75-76, citing *People v. Stitely* (2005) 35 Cal.4th 514, 543 [108 P.3d 182, 26 Cal.Rptr.3d 1] .) The evidence in each of these three categories was, according to Respondent, more than sufficient to support an inference of premeditation. (Resp. Brief at pp. 74-81.)

B. Appellant Utilizes the Proper Standard of Review.

The legal standard for Appellant's claim is well settled. Where a claim on appeal challenges the sufficiency of the evidence, the 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." (AOB at p. 54; *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].) Respondent argues that this standard is improperly applied in the AOB's discussion of the evidence supporting the first degree murder verdict:

> More egregiously, appellant relies on an improper standard of review in setting forth his claim, asserting repeatedly that the People's evidence did not "compel" a particular inference or conclusion (AOB 52, 61, 63), and arguing that the evidence was "consistent with a sudden, random explosion of violence." (AOB 69.) This is not the proper standard of review and it is irrelevant that evidence at trial was possibly consistent with a different interpretation [than] the one found by the jury.

Anderson (1968) 70 Cal.2d 15 [447 P.2d 942, 73 Cal.Rptr. 550]; *Jackson v. Virginia, supra,* 443 U.S. 307, 313-314.) The prosecution's case for first degree murder was based on a few select circumstances, and a series of inferences drawn from that evidence. In the AOB Appellant points out two sets of problems with the prosecution's theory. First, the underlying facts and circumstances were not sufficiently credible and reliable. Second, the inferences themselves were not exclusive and in some instances not especially strong.

1. The circumstantial evidence did not suggest a motive.

The prosecution arrived at a motive for the shooting by stringing several inferences together. According to this theory, Appellant feared that the traffic stop would lead to a search of the car. The search of the car could have led to the discovery of the gun, and this would have led to a parole revocation hearing in federal court. If the federal court found that Appellant had violated his conditions of parole by possessing a gun, this would have led to his federal parole being revoked which would ultimately have led to his return to federal custody. The fear of arrest, according to the prosecution, thus gave Appellant a motive for killing Officer Ganz.

There are several weak or broken links in this inferential chain. The circumstances of this traffic stop were unlikely to start Appellant down the path taken by the prosecution in its theory. The AOB notes critical differences in the facts of other cases where a motive to avoid arrest could be inferred. Unlike the defendant in *People v. Robillard* (1960) 55 Cal.2d 88 [358 P.2d 295, 10 Cal.Rptr. 167], Appellant was not driving a stolen car but the family sedan registered to his father. Appellant had not led police on a high speed chase, or been driving so fast or recklessly that he could expect to be arrested and charged on that basis. The prosecution's own evidence established that Officer Ganz stopped the suspect for a minor traffic infraction - stopping past the limit line too far into the intersection. Even if the Officer determined that Appellant was on parole, the circumstances of the traffic stop did not support a search of the car.

Caldwell (1965) 43 Cal.2d 864, 869 [279 P.2d 539]. See also *People v. Thomas, supra,* 25 Cal.2d 880; *People v. Holt, supra,* 25 Cal.2d 59.) The circumstances of the traffic stop do not indicate planning. As noted in the AOB, California cases where the circumstantial evidence did support an inference of premeditation are distinguishable. In these cases the evidence showed extensive planning and preparation for the killing.[7]

Respondent also argues that the presence of the gun in Appellant's car is evidence of planning activity sufficient to infer premeditated and deliberate murder. (Resp. Brief at p. 79.) This argument has no merit under the facts of this case and, as Respondent surely knows, is not supported by the cases cited in Respondent's Brief. None of those cases involved an armed suspect found guilty of first degree murder arising from a chance encounter with the victim. In the cases Respondent relies on the suspect took affirmative steps to confront the unsuspecting victim. In *People v. Alcala, supra,* 36 Cal.3d 604, 627, the inference of premeditated intent was supported where the defendant stalked the 12 year-old victim, armed himself with a knife, kidnaped the girl, tied and blind-folded her, and drove to remote location. In *People v. Marks, supra,*31 Cal.4th 197, 232, the defendant brought a concealed handgun into retail stores and shot the victims from a few feet away as they stood behind the

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AOB at pp. 65-66, citing, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237-1238 [805 P.2d 899, 278 Cal.Rptr. 640]; *People v. Wharton* (1991) 53 Cal.3d 522, 548 [809 P.2d 290, 280 Cal.Rptr. 63]; *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]; *People v. Eggers* (1947) 30 Cal.2d 676 [185 P.2d 1] (defendant sold wife's rings under an assumed name and forged her signature to certificate of ownership for car); *People v. Cooper* (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).

People v. Welch (1999) 20 Cal. 4th 701, 759 [976 P.2d 754, 85 Cal.Rptr.2d 203] [defendant crouched over victim to shoot her repeatedly]; *People v. Millwee, supra,* 18 Cal.4th 96 [unequivocal evidence of "contact wound" where gun held to victim's head].)

Even accepting Respondent's version of events (in which the shoulder wound preceded the fatal shot to the head) these circumstances do not clearly indicate premeditation. On the contrary, the more plausible explanation is that the crime resulted from a "random explosion of violence." (*People v. Alcala, supra,* 36 Cal.3d at p. 623.) As noted in the AOB, 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]].) Appellant supposedly chased the Officer for a close distance over a period of several seconds while firing some number of shots. The pursuit came immediately after the initial shot, and was part of a single course of conduct. Even if this scenario arguably supports an inference of specific intent to kill, it 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; *People v.Tubby* (1949) 34 Cal.2d 72, 78 [207 P.2d 51]. See also, AOB at pp. 69-70, contrasting cases in which marked persistence and/or pursuit may suggest premeditation.)

For all of the reasons discussed above and in the AOB, the prosecution failed to establish the elements of premeditation and deliberation needed to prove first degree murder beyond a reasonable doubt.

shot, Doyle turned in the direction of the sound, toward the suspect's car. (6 RT 1583.) He saw the officer running back toward the patrol car with the suspect in pursuit. (6 RT 1584.) The suspect was around twelve feet behind the officer, and he appeared to be holding a gun in his right hand. (6 RT 1585.) The officer reached the patrol car and ducked down or crouched behind it. 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 then saw the suspect 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.) The suspect fired a second and then a third shot from this position. (6 RT 1587, 1590.)

On cross-examination, defense counsel noted the significant contradictions between Doyle's statements to investigators and his trial testimony. In his interview with police Doyle stated that he *heard* three shots, but specifically said that he had not turned to view the scene until *after* the shots were fired. (7 RT 1648-1649; 1655; 9 RT 2256.) He did not tell police that he saw the suspect fire two of the shots (9 RT 2258). Doyle did not tell police that he had seen the suspect pursuing the officer. Nor did he describe the suspect shooting down at Ganz over the back of the patrol car. (7 RT 1658; 9 RT 2258.) Defense counsel was unable to introduce evidence to explain why this witness might be motivated to assist law enforcement by (consciously or unconsciously) altering his account of the crime to conform with the state's theory. The trial court denied counsel's request to elicit the fact that at the time of trial Doyle was on summary probation following his negotiated plea to a charge of abuse or battery of a spouse or co-habitant in violation of Penal Code section 243(e)(1). (See AOB at pp. 74-75; 7 RT 1634-1635, 1640.)

As discussed in the AOB, the trial court's ruling was contrary to California law which generally favors the admission of evidence in criminal cases particularly where the evidence bears on a witness's motives. (AOB 79-81.) The trial court's ruling also

Respondent notes the one or two points on which Doyle's initial account matched his trial testimony, and offers no explanation for the critical changes. (Resp. Brief at p. 91.) Instead, Respondent theorizes "had Mr. Doyle wished to embellish his testimony in favor of the prosecution, he could have simply identified appellant as the man he saw on the night of the offense." (*Id.*) In any event, Respondent concludes that there was no prejudice because the evidence against Appellant was "overwhelming." In Respondent's view, Doyle's testimony had no effect on the outcome because other prosecution witnesses gave similar accounts of the events and equally dramatic descriptions of the crime scene. (Resp. Brief at pp. 89-93.)

B. Appellant Should Have Had the Benefit of This Evidence In His Capital Trial.

In the AOB Appellant discusses the abundance of state law and federal constitutional law supporting the proposition that a criminal defendant (much less the defendant in a capital case) should be given wide latitude to introduce evidence casting doubt on credibility of the prosecution's witnesses. (See AOB at pp. 81-86.) [10] The

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lack of information is a direct result of the trial court's ruling. Had defense counsel been permitted to ask the questions speculation would be unnecessary. The simplest and fairest course would have been to allow the defense to elicit the information.

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Granting the defense request to the admit evidence of Doyle's conviction would have been consistent with California's traditional approach to evidence which favors the inclusion rather than the restriction of information in criminal trials. (See AOB at pp. 79-80 [discussing Cal. Const., Art. I, § 28(d), and Evid. Code § 352].) The California Supreme Court has repeatedly directed trial courts to exercise their discretion in evidentiary matters so as to afford the jury a complete picture of the facts. (See AOB at pp. 79-80 [discussing, *inter alia*, *People v. Cunningham* (2001) 25 Cal.4th 926, 998 [25 P.3d 519, 108 Cal.Rptr.2d 291]; *People v. Babbitt* (1988) 45 Cal.3d 660, 684 [755 P.2d 253, 248 Cal.Rptr. 69].) Admission is favored where, as in the present case, the evidence pertains to bias or 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."].)

C. Exclusion of the Evidence in this Case Was an Abuse of the Trial Court's Section 352 Discretion.

The right of the accused in a criminal case to present and develop his/her theory of the defense is constitutionally protected. Restrictions on defense evidence, therefore, require substantial justification. The trial court's exercise of its discretion under Evidence Code section 352 must be preceded by serious assessment of the competing values and interests. This type of analysis is absent from the trial record and also from Respondent's Brief. Respondent fails to explain how the proffered evidence would have posed a risk of harassment, undue prejudice or confusion of the issues. Respondent does not seriously consider the competing considerations, and apparently assigns no weight to the defendant's constitutional rights. Like the trial court, Respondent simply concludes that it is not persuaded by the proffered evidence and refuses to allow it on this basis. (Resp. Brief at pp. 85-87.)

Respondent correctly notes that evidence of a misdemeanor conviction may be excluded where its admission would result in an undue consumption of time, confuse the issues, or result in prejudice outweighing its probative value. (Resp. Brief at p. 86, citing *People v. Wheeler* (1992) 4 Cal.4th 284, 296-297.) Respondent does not address these considerations. Instead, it simply re-evaluates the weight of the defense evidence. Respondent notes several circumstances which, in its view, suggest that Doyle's probationary status did not influence on his testimony, specifically: Doyle entered a plea of "no contest" the day after his arrest; the record does not indicate that the same prosecutorial agency was involved in Doyle's and Appellant's cases; and, there was no evidence that the witness had been threatened with revocation of his probation if he failed to testify favorably for the prosecution. (Resp. Brief at p. 87.) These circumstances do not detract from Appellant's argument and they do not rule out an inference of bias.

The fact remains that Doyle's description of the crime changed markedly over

testimony of other eyewitnesses to the shooting. (Resp. Brief at pp. 91-92.) Respondent further contends that Doyle's testimony was not significant as basis for the flight instruction, CALJIC 2.52, and that his probationary status would not have created lingering doubt given the other evidence against Appellant. (*Id.* at p. 92.)

As defense counsel explained in the trial court, Doyle's testimony was important for the prosecution and attacking his credibility was critical for the defense. Evidence supporting an inference of bias in his testimony was, therefore, highly relevant. Armed with this information, defense counsel could have accounted for the increasing detail and pro-prosecution slant in Doyle's trial testimony as compared to his police interview of December 28, 1993. Counsel could have argued far more forcefully that Doyle's description of the shooting had been influenced by publicity, the passage of time and a desire to aid law enforcement. Having heard this evidence and argument, the jurors could reasonably have concluded that Doyle had embellished his account of the events. As a result, 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.

IV.

RESPONDENT FAILS TO JUSTIFY THE PROSECUTOR'S CLOSING ARGUMENT OR TO DEMONSTRATE THAT THE *GRIFFIN* ERROR WAS NOT PREJUDICIAL.

A. Overview of Appellant's Claims and Respondent's Contentions.

The prosecutor commented on Appellant's failure to testify, in violation of *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], during her closing argument in the guilt phase. After summarizing 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*

defense" and never to "the defendant." (Resp. Brief at p. 101.) Because the prosecutor's remarks did not refer to Appellant personally the jury could not have understood the comments to refer to his failure to testify. (*Id.*) Moreover, Respondent argues that the facts of *Northern* (a hand-to-hand drug sale) logically ruled out the existence of any contravening evidence apart from the defendant's own account whereas the circumstances of this case allow for other types of defense evidence such as alibi witnesses. (*Ibid.*) Respondent speculates that the jury could have understood the prosecutor's remarks to refer to the general absence of evidence, and not a reference to the absence of Appellant's testimony. Based on this possibility, Respondent concludes that the prosecutor's comments were entirely proper and not in violation of *Griffin v. California*. (Resp. Brief at pp. 99-101.)

Respondent's hyper-technical distinction between comments referring to "the defense" and remarks referring to "the defendant" is not in keeping with the spirit of *Griffin v. California* and finds no support in the case law. 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.) This Court has found *Griffin* error following comments which maintain the very distinction Respondent relies upon. (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"].)

Respondent tries to justify the prosecutor's argument by speculating about appropriate meanings which the jurors might have attached to these remarks.

comments which may be deemed harmless error. (Resp. Brief at pp. 101-102.) No error, in Respondent's view, could have made a difference as the evidence against Appellant was so strong. Respondent here notes the identification testimony and the discovery of the gun tied to the Ganz shooting. Additionally, Respondent notes that defense counsel argued that the prosecution had the burden of proof with respect to identity and, the trial court instructed the jury with CALJIC 2.60 ("Defendant Not Testifying - No Inference of Guilt May Be Drawn") and 2.61 ("Defendant May Rely on State of Evidence"). (Resp. Brief at p. 103.) Finally, Respondent apparently contends that the jury would disregard the prosecutor's comments because the trial court gave CALJIC 1.02, which provides, in part, that "statements made by the attorneys during trial are not evidence." (*Id.*) These arguments are not persuasive and fall far short of meeting Respondent's burden to prove the absence of prejudice beyond a reasonable doubt. California law holds 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* (1967) 66 Cal.2d 695, 714 [427 P.2d 788, 59 Cal.Rptr. 124].) The prosecutor's comments in this case did both.

The AOB discusses some significant gaps in the prosecution's case and demonstrates how the prosecutor's assertion that "the defense did not appear to refute the issue of identity" helped to fill those gaps. The repeated failures of Don Ganz and Jennifer La Fond (the two eyewitnesses closest to the victim and the suspect) to identify Appellant was a significant hole in the state's case. Another weakness in the state's case was law enforcement's decision to dismiss Appellant in spite of: receiving a Clue identifying him as the suspect; establishing surveillance and searching the family home; and viewing the Diahatsu Charade. The identification evidence was not as credible as the prosecutor wanted the jury to believe for a variety of reasons discussed in the AOB. By shifting the jurors' focus to the defendant's failure to testify, and asserting that Appellant should have offered evidence to "refute" the identification,

which allows jurors to infer consciousness of guilt based on the defendant's flight from the scene of the crime.[13] Appellant contends that the flight instruction was improper under California law and denied him several fundamental rights guaranteed by the state and federal constitutions. CALJIC 2.52 was duplicative of the trial court's other instructions on the use of circumstantial evidence. (See AOB at pp. 109-110.) Receiving several instructions pertaining to circumstantial evidence offered by the prosecution gave jurors the impression that this evidence was especially significant and entitled to greater weight. CALJIC 2.52 was also improper because it was argumentative. This instruction focused the jurors' attention on the prosecution's theory of the case, isolated specific facts, and directed jurors to a particular inference, i.e., flight reflects consciousness of guilt. (AOB at pp. 110-116.) Finally, CALJIC 2.52 was highly inappropriate in the context of this case because the instruction permitted an irrational inference which reduced the prosecution's burden of proof. Flight from the scene of a crime does not establish the elements of premeditation and deliberation necessary to prove first degree murder. Appellant was charged with first degree murder in the Ganz shooting. By instructing the jurors that they could infer "guilt" based on evidence of flight, the court allowed flight to be used in support of a first degree murder verdict. For all of these reasons, the trial court's use of CALJIC 2.52 denied Appellant his state and federal constitutional rights to due process of law, a fair trial by jury, equal protection and reliable determinations of guilt, the special

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[13] The trial court instructed the jury as follows:

> 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.)

intent or mental state (CALJIC 2.02). CALJIC 2.52 suggested a specific inference from a single circumstance, i.e., that flight implied consciousness of guilt. These instructions were improper for several reasons as discussed below and in the AOB. Respondent does not address the substance of Appellant's legal arguments. Instead, Respondent simply states that this Court has rejected similar claims and that Appellant offers no valid reason for reconsideration. (Resp. Brief at p. 106-107.)

1. Duplicative instructions are disfavored.

Redundant instructions are generally disfavored irrespective of their content. Even where the instructions are proper standing alone, the repetition of like principles is unfair because the repeated instructions appear more significant than principles stated in other instructions. (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 673, 72 Cal.Rptr.2d 656].)[15] In Appellant's case the multiple instructions conveyed the impression that the circumstantial evidence in this case was especially important. The prosecution's case depended upon inferences drawn from circumstantial evidence. By giving multiple instructions the trial court emphasized the significance of the circumstantial evidence and effectively lessened the prosecution's burden of proof. 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

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Respondent does not address this argument and does not discuss the aforementioned California Supreme Court's decisions. Respondent has apparently confused this argument with Appellant's arguments concerning the argumentative nature of the flight instruction. (See Resp. Brief at p. 107, fn. 51, citing *People v. Mendoza*, supra, 24 Cal.4th at p. 179.)

federal constitutional standards. 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* (1979) 397 U.S. 364.) A number of other states have recognized that argumentative consciousness-of-guilt instructions invade the province of the jury, focus the jury's attention on evidence favorable to the prosecution, and place the trial court's imprimatur on the prosecution's theory of the case. As noted in the AOB, many jurisdictions no longer permit these instructions because they effectively decrease the prosecution's burden of proof in violation of the defendant's rights to equal protection under state and federal constitutions. (See AOB at pp. 114-116, discussing *Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233 [Indiana Supreme Court disapproves flight instructions]; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749 [reasoning of prior case disapproving flight instruction extended to cover all similar consciousness-of-guilt instructions]; *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [reasons for disapproving flight instructions extended to instruction on defendant's false statements]. Also citing, *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. Reed* (Wash. App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818.)

"consciousness of guilt." In Appellant's case (and presumably in many others utilizing the CALJIC series of instructions) other CALJIC instructions use the term "guilt" 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"].) The *Crandell* opinion does not explain why the jury would define "guilt" in CALJIC 2.52 to mean "wrongdoing" where such an interpretation is not only contrary to the plain meaning of the language but inconsistent with all of the other instructions given. Second, while *Crandell* notes that CALJIC 2.52 does not specifically mention inferences pertaining to mental state, neither does this instruction forbid such an inference. As Appellant points out, the instructions indicate that the scope of the permitted inferences is very broad. The jurors are advised that the "weight and significance" of the consciousness-of-guilt evidence are matters for them to decide.[16]

The improper instruction thus allowed the jury to use the evidence of "flight" (in this instance simply leaving the crime scene) to infer that Appellant was guilty of the crime charged, i.e., the deliberate and premeditated killing of Officer Ganz. This inference is not logical. Assuming, *arguendo*, that a defendant's flight from the scene

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16

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* (1987) 43 Cal.3d 333, 352 [729 P.2d 802, 233 Cal.Rptr. 368.)

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.) As discussed in the AOB, CALJIC 2.52 permitted inferences which did not meet this standard.

D. Respondent Cannot Establish That the Instructional Error Was Harmless Beyond a Reasonable Doubt.

Assuming for argument's sake that the trial court erred by giving CALJIC 2.52, Respondent concludes that there was no prejudice. Applying the standard of *People v. Watson*, *supra*, 46 Cal.2d at p. 836, Respondent contends that it is not reasonably probable that Appellant would have had a more favorable outcome without the use of CALJIC 2.52. (Resp. Brief at p. 108.) Here Respondent notes that the jurors were free to give the evidence of flight whatever weight they felt appropriate, and that the instruction informed them that flight alone was not sufficient to establish guilt. (*Id*, citing *People v. Carter* (2005) 36 Cal.4th 114-1182-1183, *People v. Crandell*, *supra*, 46 Cal.3d at p. 870.) Respondent further notes that the jury would still have been aware of the suspect's flight from the scene and thus able to "give this evidence the same weight during deliberations." (Resp. Brief at p. 108.) In addition, Respondent states that the flight instruction played no part in the prosecutor's closing argument and that the evidence of guilt and mental state was "overwhelming." (*Id.*) For these reasons, Respondent concludes that any error was harmless, even under the stricter standard of *Chapman v. California*, supra, 386 U.S. at p. 24.) (Resp. Brief at pp. 108-109.)

Respondent is incorrect for all of the reasons set forth in the AOB. Giving CALJIC 2.52 was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, Appellant's conviction and sentence 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,*

amount of this material and mischaracterizes the quality of the evidence and testimony. Respondent contends that the victim impact was appropriate in every respect, and "well within" the boundaries set by the United States Supreme Court's decision in *Payne v. Tennessee*. Respondent likewise concludes that the evidence was proper victim impact according to California law, and was not unduly prejudicial. In the event that any error is found, Respondent concludes that Appellant could not have been prejudiced thereby due to the "overwhelming" evidence of his guilt and the nature and circumstances of the crime. Respondent is incorrect for all of the reasons set forth below.

B. Appellant Has Accurately Portrayed The Record.

Respondent contends that Appellant misrepresents the trial record in the AOB's discussion of the victim impact claims. There have been no intentional misstatements, and Respondent's contentions are unfounded. Some of Respondent's assertions are demonstrably false as discussed below. In other instances, Appellant's understanding of the record simply differs from Respondent's interpretation of the evidence, the arguments of counsel, or the trial court's rulings. A different viewpoint is not equivalent to an intentional misrepresentation. The trial record will speak for itself, and will establish that the proceedings below are accurately stated in the AOB. However, certain of Respondent's allegations are refuted below where necessary to avoid any misunderstandings about the factual basis for Appellant's claims.

Respondent claims that Appellant misleads this Court by exaggerating the extent of the jury's exposure to the victim impact material related to Officer Ganz. Respondent states: "[t]he victim impact evidence concerning Officer Ganz was presented to the jury over the course of just a few hours, and not 'nearly two days' as Appellant repeatedly describes it." (Resp. Brief at p. 123, citing AOB at 126, 194.) Curiously, it is Respondent, and not Appellant, who takes liberties with the record

effects of the testimony, Respondent states: "[t]he victim impact evidence concerning Officer Ganz was presented to the jury over the course of just a few hours." (*Id*, at pp. 122-123.) The appellate record does not supply enough information to make such a specific calculation, and Respondent does not explain the basis for its estimate. At best, one may estimate roughly when the testimony began and when it concluded based on the times noted by the court reporter. Even if such a calculation were feasible it would be largely unavailing. The amount of time devoted to the testimony is only one of several factors relevant to evaluating prejudicial effect. Respondent cites no authority holding that the length of time the victim impact witnesses spent testifying is a key factor when evaluating a record for undue prejudice. (See Resp. Brief at p. 123.) This evidence was highly prejudicial for an abundance of reasons as discussed in the AOB. Prejudicial impact is not measured solely in reference to the temporal limits of the jurors' exposure. The amount of time taken to present the evidence is but one factor relevant to assessing the prejudicial effect.

Appellant did not mislead the Court in this respect. Nowhere in the AOB does Appellant state that the Ganz victim impact evidence occupied every moment of court time for two eight-hour days. Appellant observed, and the record confirms, that the Ganz victim impact material was presented over a period of two consecutive days. The jurors ended one day with this evidence, and had all evening to reflect on what they had seen and heard before returning to court the next morning for more of the same. It is fantastic to think that the jurors would not be preoccupied with this disturbing material on both days they were exposed to it. As discussed in the AOB, the fact that the testimony was presented by emotionally distraught family members and friends surely made a deep impression that was not dispelled the moment the

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properly admitted. (See AOB VII.)

discuss limits on types or quantities of victim impact, but suggests that the State and the defendant are entitled to equal treatment. Here Respondent notes: "More importantly, the Court recognized that its decisions in *Booth* and *Gathers* had resulted in an inequity, as a defendant could present any relevant mitigating evidence, irrespective of whether it directly related to the circumstances of his offense, while the State was prevented from 'demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.'" (Resp. Brief at p. 120, quoting *Payne* at p. 822.)

In *Payne v. Tennessee*, the United States Supreme Court reasoned that states should not be forbidden to present any evidence whatsoever about the victim and the effects of his/her death in capital sentencing proceedings. *Payne v. Tennessee* removed the absolute bar to victim impact testimony and argument imposed under *Booth* and *Gathers*. (*Id* at p. 827.) Allowing some information about the victim's unique characteristics might, the Court reasoned, properly *counterbalance* the broad range of mitigation evidence the defendant is constitutionally entitled to present to the sentencer. (See *Payne v. Tennessee*, *supra*, at p. 809.) However, the Supreme Court expressly stated that it was not encouraging the use of victim impact and that this type of evidence was not exempt from constitutional limits. The *Payne* Court stated that the admission of such evidence could result in a capital sentencing which was "fundamentally unfair" thereby violating the Due Process Clause of the federal constitution. (*Payne* at p. 825.) Contrary to Respondent's view, *Payne* does not mandate equal time for evidence about the deceased and background concerning the defendant.

The United States Supreme Court did not consider in *Payne*, or in any subsequent case, precisely which types or quantities of victim impact evidence are constitutionally permissible. *Payne v. Tennessee* is, therefore, only the starting point

case. The *Edwards* opinion clearly states that even victim impact evidence falling within the statutory provision is subject to exclusion or limitation like any other proffered evidence. (*Id.* at 835-836.)[22] In both *People v. Haskett, supra*, 30 Cal.3d at page 864, and in *People v. Edwards*, the California Supreme Court cautioned that excessively emotional victim impact poses an unacceptable risk of undue prejudice. Capital sentencing requires the utmost rationality, and the trial court should take precautions to dispel any idea that the jurors may allow their feelings to guide their judgment. Neither *People v. Edwards* nor any subsequent case defines the scope of admissible victim impact evidence and argument under California law.[23] This Court has considered a variety of cases concerning the admission of victim impact evidence, first under *Booth v. Maryland, supra,* 482 U.S. 496, and later under *Payne v. Tennessee*. In most of these decisions the capital defendants' claims of error were based on only one or two prejudicial aspects of the prosecution's penalty phase case. Appellant's case is distinguishable in several critical respects.

As discussed in the AOB, the prosecution presented an excessive quantity of victim impact. The testimony of the eight victim impact witnesses covers 140 transcript pages and was accompanied by numerous exhibits and two videotapes. The sheer quantity of evidence was sufficient to overwhelm the jurors. The content and

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Appellant contends that in addition to being unduly prejudicial the victim impact evidence admitted here did not concern "circumstances of the crime" and therefore was not properly admitted under California Penal Code section 190.3(a). (*See* AOB at pp. 132-135.)

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In *Edwards*, this Court stated: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that [Penal Code § 190.3] factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* . . ." (*Id.* at pp. 835-836.)

the victim's injuries and the cause of death in the guilt phase. Witnesses there described Ganz's injuries and the events immediately after the shooting. (See AOB at pp. 146-147.) Penalty phase witnesses related these circumstances a second time, adding their subjective impressions of the crime scene and their responses to discovering the fatally injured Officer Ganz.

One witness, Officer O'Gilvy, included new material in his penalty phase testimony which was, although not duplicative of his testimony in the guilt phase, exceptionally inflammatory. Officer O'Gilvy described the ambulance ride, Martin Ganz's death at the hospital and the immediate aftermath in a dramatic narrative which continued uninterrupted for seven transcript pages. (19 RT 4230-4237.) In the AOB Appellant points out that, in addition to the undue prejudice, O'Gilvy's testimony could not be considered a reliable account of the facts. O'Gilvy testified, among other things, that Ganz communicated with him during the ambulance trip by squeezing O'Gilvy's hand, and that Ganz looked up at his friend and said "I'm sorry" just before he died. (19 RT 4235.) The medical evidence from both sides directly contradicted O'Gilvy's testimony. The prosecution's expert, Deputy Medical Examiner Solomon Riley, M.D., and the defense neurologist, John Gruen, M.D., stated that Ganz would have been unconscious and non-responsive within minutes after the fatal shot to his head. (See AOB at pp. 145-146; citing 8 RT 2038-2073; 9 RT 2232-2248.)

Respondent contends that the testimony of Officers O'Gilvy and Nilsson was not cumulative.[24] According to Respondent all of this testimony, including O'Gilvy's

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[24] Somewhat remarkably, Respondent asserts that Appellant did not object to Nilsson's or O'Gilvy's testimony. (Resp. Brief at p. 124.) The record reveals that defense counsel objected repeatedly on multiple grounds. (See, e.g., 8 RT 1858-1861; 18 RT 3937; 19 RT 4220-4222.) Respondent in fact notes the defense

California cases (supposedly involving "just such evidence") to support its contention that O'Gilvy's testimony was relevant to a circumstance of the crime and not unduly prejudicial. (Resp. Brief at p. 126, citing *People v. Montiel, supra*, 5 Cal.4th at p. 935; *People v. Harris, supra*, 37 Cal.4th at pp. 351-352; *People v. Roldan* (2005) 35 Cal.4th 646, 732 [110 P.3d 289, 27 Cal.Rptr.3d 360]; and, *People v. Gurule* (2002) 28 Cal. 4th 557, 658 [51 P.3d 224, 123 Cal.Rptr.2d 345].) These cases are distinguishable in the very respect most relevant to Appellant's claim. None involved disturbing or graphic descriptions of the victim's death.

As discussed in the AOB, *People v. Love* (1960) 53 Cal.2d 843 [350 P.2d 705, 3 Cal.Rptr. 665], provides a closer analogy. (See AOB at pp. 147-149.) There, the California Supreme Court acknowledged as a matter of common sense that dramatic evidence concerning the victim's experience of death and suffering is likely to evoke an emotional response from the jurors. The analysis in *People v. Love* focused on the proper balance of prejudice and relevance with respect to penalty phase evidence depicting a murder victim's final moments. The California Supreme Court commented on the profoundly prejudicial effects of graphic and detailed evidence relating the victim's suffering and death, and concluded that the probative value of the death scene evidence (in *Love*, the tape recording of the victim's groans) was outweighed by its potentially inflammatory effect. The California Supreme Court has cited *Love* in subsequent opinions where the Court has re-affirmed the need for caution in admitting victim impact evidence in order to ensure that capital sentencing decisions are made in the atmosphere of fairness and rationality required by the Fifth, Eighth and Fourteenth Amendments. (See *People v. Haskett, supra,* 30 Cal.3d 841, 864, and *People v. Edwards, supra,* 54 Cal.3d 787.) *People v. Love* is still good law, and the reasoning the California Supreme Court applied in that case is equally sound here.

distraction. For all of the reasons stated above and in the AOB, the same reasoning applies to the death scene evidence admitted in Appellant's case.

E. The Character And Life History Evidence Was Excessive.

Respondent defends the abundance of information describing Officer Ganz's life history, character and personality, by contending that evidence concerning the victim's character, background and personal traits is a "well established" form of victim impact admissible under California law as a circumstance of the crime. (Resp. Brief at p. 132.) Several cases are cited in support of this contention. In those instances, this Court declined to reverse penalty verdicts following the introduction of testimony revealing some aspect of the victim's personal history or a particular character trait. (See Resp. Brief at p. 132.) Respondent, however, ignores the critical distinctions between these cases and Appellant's case.

In two cases Respondent relies on, *People v. Roldan*, *supra*, and *People v. Huggins, supra,* 38 Cal.4th at pp. 236-238, the prosecution presented several victim impact witnesses. However, those trial courts took affirmative steps to prevent unduly prejudicial or cumulative testimony. In *People v. Huggins*, seven or eight victim impact witnesses testified in the penalty phase, but the trial court pared the prosecutor's list of witnesses down from its initial list of 27. The trial court also held extensive 402 hearings to preview the testimony, and the opinion does not suggest that the testimony was lengthy. In *People v. Roldan*, *supra*, the trial court offered to hold Section 402 hearings, something the trial court refused to do in Appellant's case. (See 33 CT 9226-9227 [Motion *In Limine* With Respect to the Prosecution's Victim Impact Evidence"].) (See also *People v. Panah* (2005) 35 Cal.4th 395, 416, 494-495 [107 P.3d 790, 25 Cal.Rptr.3d 672] [five family members testified].)

Respondent undertakes no analysis of the content and nature of the character

as a 'tribute' or 'memorial' to Officer Ganz." (Resp. Brief at p. 130.) Respondent distinguishes the tape at issue in *State v. Salzar* and discussed by this Court in *People v. Robinson* (2005) 37 Cal.4th 592, 724 P.3d 363, 36 Cal.Rptr.3d 760] on the grounds that the presentation there was centered on the *victim*, and the tape and testimony here focused on the *survivors* and their suffering. (*Id.*) By comparison, Respondent notes that the trial court excluded one of the posterboard exhibits titled *In Memory*, because this exhibit stood in abstract tribute to Officer Ganz. (Resp. Brief at p. 130.) Finally, Respondent concludes that any error could not have resulted in prejudice to Appellant. Respondent reasons: The jury was aware that Officer Ganz had been murdered and could presume that he had been honored during a funeral or memorial service. The evidence concerning the funeral 'was not significant in light of the emphasis placed in the penalty phase on the effect of the crime itself on the victim's family, the brutality of the murders, and the paucity of significant mitigating circumstances.'" (Resp. Brief at p. 131, quoting *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

There are several critical flaws in Respondent's analysis. The first error is Respondent's assumption that California law sanctions the admission of funeral evidence irrespective of prejudice. *People v. Harris* does not extend this far. In *Harris* this Court expressly cautioned that depictions of funerals and the attendant mourning and displays of grief and distress could become excessive. (*Id.*) Other courts have commented on the uniquely prejudicial effect of evidence displaying funerary images. (See AOB at pp. 155-159.) Extreme displays of grief by the victim's survivors are similarly likely to cause undue prejudice and are disfavored in capital sentencing. (See generally, Annotation (2004) 79 A.L.R. 5th 33, Victim Impact evidence in capital sentencing - post - *Payne v. Tennessee.*) *Payne v. Tennessee* did not involve funeral evidence and nothing in the United States Supreme

G. The Disturbing Testimony Of Three Friends.

As discussed in the AOB, the testimony given by three of the victim impact witnesses was uniquely prejudicial. These witnesses described reactions to Ganz's death which ranged from extreme to bizarre. Martin Ganz's fianceé, Pam Hamm Magdaleno, had married another man by the time she appeared at trial. Mrs. Magdaleno testified at length about meeting Officer Ganz, their courtship and relationship, how she learned of his death and her immediate feelings and reactions to the loss. (19 RT 4178-4195.) Mrs. Magdaleno also described the continuing impact of losing Ganz.[28] The jury learned that she still keeps Martin Ganz's photo on the inside visor of her car. For her wedding, she had a piece of Ganz's uniform sewn into the garter she wore under her wedding gown. In the strangest testimony of all, Mrs. Magdaleno described how Martin Ganz still contacts her from beyond the grave. Mrs. Magdaleno described one such incident which had occurred only a few days earlier when Martin Ganz miraculously intervened so she could be number 187 (which, as the witness testified, is the California Penal Code Section for murder) of 200 people able to buy a limited edition Beanie Baby stuffed toy. (19 RT 4192-4193.)

Karl Nilsson testified that after Ganz's death he was unable to function in his leadership position in the Manhattan Beach Police Department. Nilsson became an alcoholic, and was demoted. At the time of trial he was no longer a sergeant. According to Nilsson, his personal life also fell apart and he lost a relationship with a woman he planned to marry. (18 RT 4089-4091.) Neil O'Gilvy testified in some

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[28] Although the trial court had ruled to exclude 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.)

had become associated with his parents' violent deaths. *People v. Pollock, supra,* 32 Cal.4th 1153. Common sense dictates that evidence or testimony relating an extreme, unusual or unexpected reaction on the part of the witness is more likely to be prejudicial. For all of the reasons discussed in the AOB, the testimony of these three witnesses was unduly prejudicial and inflammatory.

H. Evidence of the Impact to the Entire Police Community.

Three witnesses, Officers Nilsson and O'Gilvy and Chief Mertens, testified at length about the effects of Officer Ganz's death on his police department, the greater law enforcement community and the general public. Appellant contends that this community victim impact was irrelevant and highly prejudicial. As discussed in the AOB, the California Supreme Court has never extended the range of permissible victim impact to include the victim's professional community. Courts in other states have considered this specific type of testimony, and have ruled that the impact of the victim's death on the police force is of marginal relevance and highly prejudicial. In Appellant's case this evidence was improper and unduly prejudicial, particularly in combination with the prosecutor's closing argument which was built around an inflammatory appeal to society's "debt of gratitude" to police. (See AOB at pp. 201-206.)

Respondent argues that this evidence was entirely proper. *Payne v. Tennessee* contemplates the introduction of evidence about the loss to society resulting from the victim's death and, according to Respondent, the specific effect on the police force is within this larger category of societal loss. (Resp. Brief at p. 141.) Respondent further contends that the California Supreme Court sanctions the admission of evidence concerning community impact. (*Id.,* citing *People v. Huggins, supra,* 38 Cal.4th at pp. 236-238; *People v. Pollock, supra,* 32 Cal.4th at pp. 1182-1183.) Respondent largely ignores the more analogous decisions from other jurisdictions,

Respondent observes that in a footnote to the *Lambert* opinion the Indiana Supreme Court stated "[we] make no ruling today on the impact, if any, of the new statute." (Resp. Brief at p. 143, quoting *Lambert, supra,* at p. 1064, fn. 1.) Respondent apparently concludes that the amendment to Indiana's statute mentioned in this footnote would have altered the Indiana Supreme Court's decision. If this is in fact Respondent's reasoning, it is incorrect. The amendment to the Indiana law did not affect the range of victim impact admissible in the penalty phase. The statutory amendment permitted the trial court to hear and consider evidence of the impact to the victim's family prior to sentencing and *after* receiving the jury's sentencing recommendation. (See *Lambert, supra,* at p. 1064, fn.1, citing, Indiana Code Section 35-50-2-9(e).) This amendment would not, therefore, have made any difference to the Indiana Supreme Court's evaluation of whether the jury should receive particular victim impact evidence. As discussed in the AOB, the Court in *Lambert* analyzed the evidence in view of the United States Supreme Court's decision in *Payne v. Tennessee.* The opinion of the Indiana Supreme Court makes clear that the driving concern was the prejudicial effect of the victim impact testimony on the jury. The victim impact admitted in this case was similarly excessive and, as in *Lambert*, the potential for undue prejudice was too great.

I. Conclusion.

Respondent attempts to characterize each type of victim impact evidence so as to minimize the overall size and scope of the state's presentation concerning Officer Ganz. The record in this case speaks for itself. For all of the reasons discussed above and in the AOB, the victim impact evidence admitted in this case was excessive, unduly detailed and largely irrelevant.

Respondent fails to recognize the difference between victim impact and other potentially prejudicial evidence; differences which are not overlooked by the United States Supreme Court in *Payne v. Tennessee.* It is the dramatic and emotionally

VII.

RESPONDENT FAILS TO JUSTIFY THE TRIAL COURT'S REFUSAL TO EXCLUDE OR MEANINGFULLY LIMIT THE VICTIM IMPACT TESTIMONY GIVEN BY WITNESSES TO PRIOR CRIMES ALLEGED PURSUANT TO PENAL CODE SECTION 190.3(b).

A. Overview of Appellant's Claims and Respondent's Contentions.

In the penalty phase, the prosecution presented 40 civilian witnesses to 21 separate past crimes or instances of conduct alleged in aggravation pursuant to Penal Code section 190.3(b). The Section 190.3(b) prior crimes (primarily armed robberies) were allegedly carried out by Appellant, although some of the offenses were never adjudicated. In spite of a defense motion in *limine* and repeated defense objections, the trial court allowed these "factor b" witnesses to testify not only about their immediate reactions but, also, to describe the lasting ill-effects of their experiences. The prejudice of this testimony was compounded by a number of objectionable and misleading exhibits and an inflammatory closing argument in which the prosecutor urged that Appellant deserved a death sentence because his crimes had affected so many people.

In Argument VII of the AOB, Appellant contends that this testimony should not have been admitted for several reasons. Under *Payne v. Tennessee*, *supra,* 501 U.S. 808, and *Booth v. Maryland, supra,* 482 U.S. 496, some amount of victim impact testimony is permissible when related to the death of the capital homicide victim. The California Supreme Court has declined to reverse capital sentences where the testimony of a factor b witness revealed some information about that crime's impact. The Court has not, however, held that victim impact is generally admissible for crimes or conduct alleged pursuant to Section 190.3(b). Moreover, California law grants the trial judge the discretion to exclude evidence or testimony pertaining to

Respondent charges that the AOB misrepresents the record below in order to advance this legal argument. For this reason, the relevant proceedings are reviewed in some detail below.

1. The defense Motion in *Limine* and the trial court's ruling.

Several weeks before the start of trial 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.) Respondent advances its own interpretation of the defense motion and the ruling in the trial court. Respondent asserts that the defense motion sought to exclude only victim impact evidence concerning the Correa homicide case, and was never intended to apply to testimony offered by witnesses to other Section 190.3(b) allegations. (Resp. Brief at p. 148.) Respondent concludes, therefore, that the trial court's ruling granting the defense Motion applied only to the Correa victim impact evidence.[31] These arguments have no merit.

The defense motion was clearly entitled "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 [emphasis added].) By its plain terms the Motion applied to any and all testimony regarding Section

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[31] Respondent states:

> Appellant mischaracterizes the trial court's ruling in which it excluded victim impact evidence pertaining to Ms. Correa, as he suggests that the ruling encompassed evidence concerning the impact of Appellant's prior robbery offenses upon the victims of those crimes. (AOB 219.) The trial court's ruling did no such thing, and appellant expressly conceded the admissibility of this evidence in his motion.

(Resp. Brief at p. 148, fn 58, citing 9 CT 2415, 2468.)

The trial court heard the defense "Motion in *Limine* to Bar the Prosecution from Introducing 'Victim Impact' Evidence Pursuant to Any Factor Other Than Penal Code Section 190.3(a)" several weeks before jury selection began. The court granted the Motion at the conclusion of the hearing. Respondent contends that Appellant has misrepresented the trial court's ruling. (Resp. Brief at p. 148, fn 58.) The record will speak for itself. Ruling from the bench at the end of the hearing, the trial judge 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].)

Arguably it is Respondent who takes liberties here in interpreting the record. The trial court does specifically exclude the Correa victim impact evidence. However, the court does not limit its ruling to this evidence. Twice in the course of announcing its holding the judge clearly states that victim impact is limited to the capital crime and does not include evidence from prior crimes. Other circumstances also suggest that the ruling was not so narrowly constrained as Respondent would have it. As discussed above, the title of the defense Motion includes any evidence other than Section 190.3(a) material. The Correa incident was, at that time, the only Section

information about ongoing effects or significant trauma sustained by these witnesses. There was no discovery whatsoever concerning Roger Brady's alleged bank robberies in 1989 apart from the witnesses' initial statements. The same was true for the Correa homicide, where the most recent discovery was compiled for the Oregon trial in 1995. (*Id.*) Defense counsel again asked the prosecutor to disclose recent interviews of or statements from the factor b witnesses. (12 RT 2642-2644.) The prosecutor stated there were no written reports or statements as she had not interviewed the witnesses and had no plans to do so. (12 RT 2645.) While the prosecutor acknowledged having met with the witnesses to the 1989 robberies during the noon recess, she claimed that no additional victim impact information was obtained. The purpose of these meetings was to review the witnesses' prior statements and to prepare them to testify in court that afternoon. (12 RT 2646-2647.) Defense counsel made clear that she expected to receive notice of any differences from the original statements in the form of changes or additions to the testimony, and the prosecutor expressed her agreement. (12 RT 2647.) In conclusion, defense counsel reiterated her concerns about the prosecutor's repeated failures to adhere to the letter and the spirit of reciprocal discovery:

> 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

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.) Defense counsel's relevance objection was overruled. (14 RT 3113.)

On the fourth day of the penalty phase, defense counsel raised some concerns about the parameters of the factor b witnesses' testimony. As discussed in the AOB, defense counsel anticipated problems with the testimony of two witnesses to an unadjudicated pharmacy robbery. Attempting to clarify the trial court's position with respect to factor b victim impact testimony, defense counsel stated: "The only point I want to make is I gather the court is taking the view with respect to these various robbery victims that the prosecution has been able to elicit testimony regarding emotional impact, if that's the right phrase, in other words, how they feel about these events or how the events have influenced their lives or impacted their lives." (14 RT 3250.) The court responded that the impact testimony was relevant to establish the elements of force and fear for the robbery offenses. The court and both counsel continued to discuss the discovery situation, with the court finding that the prosecutor had not violated the disclosure obligations imposed by Penal Code Section 1054. (14 RT 3250-3252.) The prosecutor then returned to the subject of victim impact:

> On the issue of – because counsel raised it, and I concur with the court's attitude of asking victims of robbery about fear, that being an element of it, but I will also direct the court's attention to the case of *People v. Price* at 1 Cal.4th 324, page 479, and I'll just read it to the court quoting from that. "At the penalty phase the prosecution may introduce evidence of the emotional effect of defendant's prior criminal acts on the victims of those acts." And there are some cases cited at that point also.

(14 RT 3253.) The court expressed its agreement with the prosecutor, stating:

had prepared the witness and had expressly admonished him to maintain his composure. Despite these assurances, Mr. Schoenborn made observations and comments about Appellant's eyes having looked "like death." (See AOB at p. 230.)

C. Trial Courts in this State Have the Discretion to Exclude Unduly Prejudicial Victim Impact Testimony from Section 190.3(b) Evidence.

Respondent contends that Appellant's claim is not cognizable because the trial court had virtually no discretion to exclude evidence pertaining to Section 190.3(b) allegations. (Resp. Brief at pp. 150-152, citing *People v. Jablonski* (2006) 37 Cal.4th 774, 834 [126 P.3d 938, 38 Cal.Rptr.3d 98]; *People v. Karis, supra,*46 Cal.3d 612, 641-642.) Respondent has overstated the holdings of these cases. The trial court may not ***completely*** exclude evidence of the defendant's prior crimes from the penalty phase. However, the court retains the discretion to shape the testimony in order to prevent undue prejudice. In *People v. Karis,* the California Supreme Court specified:

> We do not mean to suggest that evidence may not be excluded under Evidence Code section 352, at the penalty phase. The manner in which the prosecution seeks to present its case may give rise to meritorious objections to particular items of evidence. We hold here only that the court does not have discretion to prevent introduction at the penalty phase of all evidence of a capital defendant's commission or attempted commission of a prior violent felony.

(*People v. Karis, supra,* 46 Cal.3d 612, 641-642, fn. 21.)

The trial court could have limited the testimony of the factor b witnesses, and should have done so in this case. As defense counsel recognized, the prosecutor's penalty phase opening statement signaled an intent to elicit this type of testimony. The trial judge could have acted at that time, ordering the prosecutor to maintain appropriate boundaries in her questioning. The court might have advised the prosecutor to ask specific and narrowly focused questions regarding a witness's response at the time of the robbery. Prior to their testimony and outside the jury's presence, witnesses could have been told not to volunteer observations about

process of law, a jury trial and a reasoned determination of the penalty require that the jurors consider the relevant evidence without being subjected to unduly prejudicial influences. The presence of this irrelevant and improper testimony (particularly in combination with the other penalty phase errors) denied Appellant these rights and the sole remedy is reversal of his sentence.

VIII.

REVERSAL IS REQUIRED DUE TO THE PERVASIVE MISCONDUCT IN THE PROSECUTOR'S CLOSING ARGUMENT.

A. Introduction and Overview.

The prosecutor's penalty phase closing argument combined multiple forms of misconduct which violated California law and denied Appellant his state and federal constitutional rights. The prosecutor made multiple appeals to passion and prejudice. The jurors were told that the community desired a death verdict and that their oaths bound them to fulfill this expectation. The prosecutor argued that a death sentence would serve as a tribute to Officer Ganz and a source of comfort to his survivors. As she had done in the guilt phase, the prosecutor commented on Appellant's failure to testify. (*Griffin v. California, supra,* 380 U.S. 609.) In addition, she argued facts not in evidence, stated her personal opinion about the appropriate sentence, alluded to religious doctrine, and used a metaphor with offensive racial and ethnic overtones. For all of the reasons discussed in the AOB, this argument reveals a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084 [767 P.2d 619, 255 Cal.Rptr. 352]; *Darden v. Wainwright, supra*, 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 436.].) Reversal is required under California law

According to Respondent this argument was entirely proper. Respondent relies on two decisions, *People v. Brown* (2004) 33 Cal.4th 382 [93 P.2d 244, 15 Cal.Rptr.3d 624], and *People v. Mayfield* (1997) 14 Cal.4th 668, 803 [928 P.2d 485, 60 Cal.Rptr.2d 1], and asserts that the argument here was similarly appropriate commentary on the role police officers play in insuring "safe and peaceful communities." (*Id.* at p. 164, quoting *People v.Brown, supra,* 33 Cal.4th at p. 399-400.) Respondent is incorrect and the comparison to the argument at issue here illustrates Appellant's position. *People v. Brown* and *People v. Mayfield* also involved police officers as victims of capital homicide. Prosecutors in both cases argued that killing a police officer is an especially egregious crime because police preserve law and order for the whole society. These arguments were not lengthy and the prosecutors' comments are milder and stated in neutral language. There were no fanciful metaphors and no imagery of medieval towns with walls and castles to keep out the barbarian marauders. Neither *Brown* nor *Mayfield* used hyperbolic praise to glorify the individual victim or the police as an institution. [34] The prosecutors in those cases did not harken back to the days of knights and chivalry. Instead, they made relatively brief and contemporary observations about the need for police in an ordered society. Those comments stand in marked contrast to the prosecutor's extended excerpt of the atrocious speech by television newscaster Stan Chambers.

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The AOB observes that appeals to jurors' appreciation for police are widely acknowledged to pose a risk of undue prejudice. (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.].)

prosecutor's multiple appeals to public fear and police loyalty, and the problem Respondent fails to address. These types of arguments seek to persuade by playing on jurors' emotional responses to larger social issues. The circumstances of the particular case become almost irrelevant. Instead, jurors are strongly encouraged (if not blatantly told) to return a verdict for larger reasons. In the capital sentencing context, the offender's characteristics are no longer the focus of the decision. This is not the individualized sentencing the Eighth Amendment requires. (See, e.g., *Payne v. Tennessee, supra.*)

C. Appeals to Society's Expectations and the Jurors' Oaths.

As discussed in the AOB, the prosecutor heightened the prejudicial effect of these inflammatory arguments by making related appeals to the jurors' oaths and their social and moral duty. (See AOB at pp. 251-255.) Respondent avoids discussing the merits of this claim by asserting first that the argument is waived. (Resp. Brief at p. 167.) Respondent states: "Other than appellant's narrow pre-argument objection to the prosecutor's use of the Edmund Burke quotation, he failed to object to any of the portions of the prosecutor's arguments which he contends appealed to societal expectations of a verdict of death, and he has forfeited his remaining claims on appeal." (Resp. Brief at p. 167, citing *People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) However, Respondent acknowledges that defense counsel objected at sidebar and requested curative instructions based in part on the prosecutor's request for a death verdict to fulfill society's reasonable expectations. (See Resp. Brief at pp. 160-161, citing 21 RT 4770-4771.) The trial court overruled all defense objections and refused to give curative instructions. (*Id.*)

Respondent next characterizes the prosecutor's argument as a "temperate speech concerning the function of the jury and the rule of law." (Resp. Brief at p. 168, quoting *People v. Cornwell* (2005) 37 Cal.4th 50, 92-93 [117 P.3d 622, 33 Cal.Rptr.3d 1].) This contention too fails for all of the reasons stated in the AOB.

People v. Brown (Albert) (1985) 40 Cal.3d 512, 541 [726 P.2d 516, 230 Cal.Rptr. 834].)[36] 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].)

D. Other Improprieties in this Argument Compounded the Prejudice.

In the AOB Appellant notes that the prejudicial effect was heightened because these comments were combined with other improper argument. The prosecutor improperly conveyed her personal opinion that death is "the only just verdict." (*United States v. Young* (1985) 470 U.S. 1, 18-19 [105 S.Ct. 1038, 84 L.Ed.2d 1].) She also indicated that the jurors' duty was to return the verdict the prosecution requested (*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 the evidence]), rather than simply commenting on the importance of the jury system, or reminding jurors to "do your job." (*People v. Cornwell, supra*, 37 Cal.4th 50, 92-93; *United States v.*

36

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.)

IX.

THE USE OF CALJIC 17.41.1 VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY AN IMPARTIAL JURY.

Appellant's jury was instructed, over defense objections, with a modified version of CALJIC 17.41.1. (33 CT 9459.) In the AOB Appellant contends that the use of this instruction violated his rights under the Sixth and Fourteenth Amendments. Appellant respectfully requests that this Court reconsider its previous decisions holding that this instruction does not violate federal constitutional rights. (AOB, Arg. IX, pp. 270-272.) Because this issue is thoroughly discussed in the AOB, Appellant will not address it further here. The issue is not conceded but is submitted for the Court's consideration based on the arguments raised in the AOB.

X.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO MODIFY THE VERDICT.

In Argument X of the AOB, Appellant contends that the trial court erred in denying his motion to modify the death judgment pursuant to Penal Code section 190.4, subdivision (e). (AOB, Arg. X, pp. 273-288.) Because the facts and circumstances, and the applicable law, are thoroughly addressed in the AOB, Appellant will not address it further here. The issue is not conceded but is submitted for the Court's consideration based on the arguments raised in the AOB.

XI. - XIV.

REPLY CONCERNING THE SYSTEMIC ERRORS

In Arguments XI through XIV of the AOB Appellant raises a number of systemic issues pertaining to California's death penalty. (AOB at pp. 289-363.) As Respondent notes, and Appellant acknowledges, this Court has repeatedly rejected

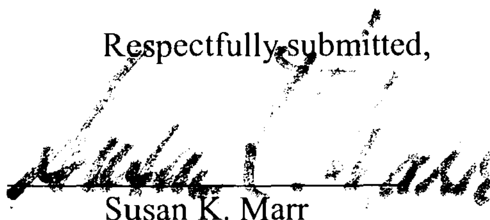
these claims in other cases. (See Resp. Brief at pp. 191-204.) Accordingly, Appellant does not concede these issues but will submit these arguments for consideration based on the AOB.

CONCLUSION

For all of the foregoing reasons, and those stated in the AOB, Appellant, Roger Brady, respectfully submits that this Court should reverse his convictions and/or sentence of death.

Dated: April 24, 2008

Respectfully submitted,



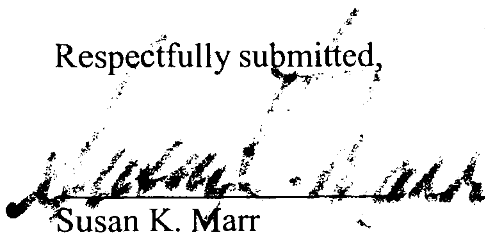
Susan K. Marr

Attorney for Appellant
Roger Hoan Brady

CERTIFICATE PURSUANT TO CALIFORNIA RULE OF COURT 36(b)

I hereby certify that, according to the word-processing program used to create this brief (Word Perfect 12), the APPELLANT'S REPLY BRIEF uses a 13 point Times New Roman font and contains 30,505 words.

Respectfully submitted,



Susan K. Marr

Attorney for Appellant
Roger Hoan Brady

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 an active member of the State Bar of California, and not a party to the within action; my place of business address is 9462 Winston Drive, Brentwood, Tennessee 37027.

On April 21, 2008, I served the attached

APPELLANT'S REPLY 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.

John A. Clarke, Clerk of Court
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012
Attention: The Hon. Andrew Kauffman, Judge

Ms. Addie Lovelace
Death Penalty Appeals
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Attention: Mordecai Garelick, Esq.

I declare under penalty of perjury, according to the laws of the state of California, that the foregoing is true and correct.

Executed on April 21, 2008, at Brentwood, Tennesee.

Susan K. Marr