No. S148863

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT WARD FRAZIER, Defendant and Appellant.	(Contra Costa County Sup. Ct. No. 041700-6)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Contra Costa

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	S148863
Plaintiff and Respondent,	)	Contra Costa Cty Superior Court No. 041700-6
v.	)	
ROBERT WARD FRAZIER,	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death and is automatic under Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

On November 5, 2004, appellant was charged in Contra Costa County Superior Court case number 041700-6 by a three-count indictment. Count One alleged the murder of Kathleen Luise Loreck. (Pen. Code, §

187.)[1] The indictment alleged two special circumstances under section 190.2 (a)(17), felony murder, that the murder was committed during the commission of rape and sodomy. The information also charged forcible rape in violation of section 261, subdivision (a)(2) (Count Two), and sodomy by use of force in violation of section 286, subdivision (c)(2) (Count Three). (2 CT 336-338.)

Jury selection began on March 27, 2006. (4 CT 1123.)[2] The prosecution case began on May 23, 2006. (5 CT 1536.) On June 14, 2006, the prosecution concluded its case-in-chief and the defense began its case. (6 CT 1586.) On June 20, 2006, the defense rested. (6 CT 1603.) The prosecution presented no rebuttal. (*Ibid.*)

The jury began deliberating on June 20, 2006. (6 CT 1604.) On June 21, 2006, the jurors returned their verdicts, finding appellant guilty of first degree murder, and guilty of counts two and three, and finding true the special circumstances. (6 CT 1640-1641.)

On July 31, 2006, the penalty phase of the trial began. (6 CT 1865.) On August 21, 2006, the jurors began deliberating and returned a death verdict on August 24, 2006. (7 CT 2032, 2034-2035, 2043.)

On December 15, 2006, the court denied the automatic motion to modify the verdict and imposed a sentence of death for the murder conviction. The court also imposed six years each for counts two and three, to run concurrent and stayed them pursuant to section 654. (8 CT 2263.)

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] "CT" refers to the Clerk's Transcript on appeal; "RT" refers to the Reporter's Transcript.

STATEMENT OF FACTS

I. GUILT PHASE

A. Kathleen Loreck is attacked

On May 13, 2003, Kathleen Loreck left her office at Systron Donner in Concord for a midday walk on the Canal Trail located behind her office. (35 RT 7188; 38 RT 7684; 39 RT 7723; 41 RT 8164, 8165.) At approximately 1:45 p.m., while talking on her cell phone with her husband, Johannes Loreck, who was living in Austria at the time, Loreck mentioned that there were homeless people near the trail where she was walking, and that she did not want them to hear her talking. [3] (35 RT 7186, 7187, 7190-7192, 7201, 7214.) After his wife made this statement, Johannes Loreck heard a low sigh on the phone, but when he called Loreck's name, she did not respond. (35 RT 7193.) When Johannes called back and could not get through, he called his father, Heinz Loreck, who also worked at Systron Donner. (35 RT 7194, 7195, 7196.)

After speaking with his son, Heinz noticed Loreck's regular shoes still at her desk so he went to the trail to look for her. (35 RT 7213.) When he could not find her, he returned to Systron Donner and called the police. (*Ibid.*) A police officer was dispatched to Systron Donner at 3:10 p.m. (36 RT 7278; 39 RT 7876.) Officer Paul Borda, who was assigned to the downtown unit riding an off-road motorcycle to patrol parks, canals, and trail areas, and to deal with homeless people in these areas, also received the call and began searching the Canal Trail at Cowell Road for Loreck. (36 RT 7293, 7299-7300, 7301.)

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[3] There were several homeless encampments along the trail near Systron Donner. (36 RT 7292.)

During his search, Officer Borda saw blood on the trail. (36 RT 7313, 7315.) To the left of the blood, the trail went down at a steep angle to a cut in a fence. (36 RT 7314.) Officer Borda walked through the cut in the fence and found Loreck lying on her back, about 12 feet from a eucalyptus tree, near the bottom of a dirt path. (36 RT 7317, 7319.) She had no clothing on from the navel to the calf, and her legs were bent. (36 RT 7317.) Her pantyhose was pulled down to her lower calf and her underpants were off of one foot. (36 RT 7321.) The upper garments were twisted, her bra was removed, her skirt was pulled up, and her blouse was pulled up around her midsection. (36 RT 7322.) Loreck's face and chest were covered with blood. (*Ibid.*) There was a gash to the scalp area along the right side of her head. (36 RT 7327.) A few feet away, Officer Borda found a two-foot-long piece of metal fence post material with blood on it. (36 RT 7331; 38 RT 7504.)

Officer Borda began rendering first aid to Loreck. Her breathing was labored, she had a rapid pulse, and her eyes were pointing in different directions. (36 RT 7320-7321.) Officer Borda testified she was moving, but visibly relaxed when he spoke her name. (36 RT 7317, 7324; 38 RT 7576.) Officer Borda acknowledged that in his statement to officers later, he said he did not think Loreck could hear him. (38 RT 7577.) The records of medical personnel who arrived shortly after Borda stated that Loreck was unresponsive to pain or anything else. (44 RT 9014.)

Loreck died at the hospital at 4:45 p.m. (44 RT 8884.) According to Dr. Brian Peterson, who performed the autopsy, her death was the result of blunt force injuries located primarily on the back of the head. (41 RT 8197.)

B. Investigation - Potential Suspects

Eduardo Mendez was the first suspect. (41 RT 8276-8279.) On May 13, Mendez was riding his bike on the Canal Trail when he found a phone on the trail. (40 RT 7927.) He picked up the phone and kept riding. (40 RT 7930.) On direct examination, Mendez testified that the phone rang three to four times, but he did not answer it. (40 RT 7931.) On cross-examination he admitted that he answered the phone the first time it rang, but did not understand English. (40 RT 7940.) He rode away from the trail after finding the phone, using the streets to go home rather than continue on the trail. (40 RT 7946.) Police investigators obtained Loreck's cell phone records that day and discovered that a call had been made to the house where Mendez was living. (43 RT 8632; 44 RT 8793.) Around 2:00 a.m. the next morning police came to his house to retrieve the phone. (40 RT 7935.) The next day he showed police where on the trail he found the phone. (40 RT 7936, 7949.) Mendez was later eliminated by DNA as a contributor of the semen found at the scene. (43 RT 8648.)

The second suspect was John Kahler.[4] (43 RT 8648.) A records check showed that Kahler lived close to the crime scene and had a history of mental illness. (4 CT 1184.) Police went to Kahler's house on May 16, 2003, and were told by his sister that he had committed suicide on May 14, 2003. (*Ibid.*; 39 RT 7836, 7812; 40 RT 8112.) Even after Kahler was eliminated by DNA as a contributor of the semen found at the scene, authorities continued to investigate him as a suspect because they could not confirm his whereabouts on the day of the crime. (43 RT 8661, 8648.) Investigators searched Kahler's house again on May 21, 2003. (38 RT

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[4] A pretrial motion by the defense to present evidence of third-party culpability related to Kahler was denied. (Sealed 5 CT 1414-1426; 19 RT 3858-3863.)

7647.)

According to Detective Michael Finney, after the first two suspects were investigated the focus was on the homeless population in the area. (43 RT 8653.) A homeless camp down to the left of the trail behind Systron Donner, covered by trees and bushes, was about 150-200 yards away from where the blood was found on the trail. (36 RT 7273; 38 RT 7586.) Heinz Loreck told police that he saw two suspicious people whom he believed were homeless while he was on the trail looking for Loreck. (35 RT 7215, 7217; 36 RT 7258.) Among the homeless people on the trail on May 13, Detective Finney interviewed Phillip Hughes. (43 RT 8646.) DNA on one of the cigarette butts found at the scene matched Hughes.[5] (42 RT 8567-8568.)

Witnesses who were on the trail on May 13 consistently described seeing a white male, mid-30s, medium build, with sandy brown medium length hair – a description that resembled appellant – near where Loreck was walking. (38 RT 7687; 39 RT 7753; 40 RT 7959.) According to the witnesses, he was not threatening anyone, and not hiding his presence, but engaging people in conversation. (38 RT 7694; 39 RT 7760, 7778; 40 RT 8004, 8027.) Notably, the man talked to people on the trail about tadpoles in the canal. (38 RT 7694; 39 RT 7731, 7770; 40 RT 8027.)

One of the witnesses, Bryan Gomez, was riding his mountain bike on the trails around Systron Donner that day. (40 RT 7956.) Gomez testified that he had a conversation with a man whom he identified at trial as appellant, and that he gave appellant one of his Marlboro Lights cigarettes and they smoked together. (40 RT 7964, 7990.) Gomez testified that he

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[5] Phillip Hughes was one of many individuals swabbed for DNA. (39 RT 7831.)

gave appellant a second cigarette as he was leaving, which he saw appellant light, but did not see him finish smoking. (40 RT 7966.) Gomez never saw appellant with a metal bar. (40 RT 7991.)

After he spoke to the police, Gomez went back with a detective to the area where he had been standing and found two Marlboro Lights cigarette butts. (40 RT 7967.) A profile of DNA found on one of the cigarette butts matched Gomez. (42 RT 8555.)

Detective Finney believed that the man Gomez was talking to was the killer. (43 RT 8656.) In speaking with a homeless man, Shawn Stelman, who lived in one of the camps behind Systron Donner, investigators learned that appellant had talked with Stelman on May 13 about getting work at a telemarketing company in Walnut Creek. (40 RT 8000, 8004-8005, 8015.) Based on this information, investigators contacted Margie Kyle, the manager for Walter Backes's company, Creative Marketing. (40 RT 8142.) From the investigators' description of the man they were looking for, Kyle identified appellant, who had worked at Backes's telemarketing company. (40 RT 8144.)

C. Observations of Appellant's Injuries

The prosecution presented several witnesses who claimed to have seen appellant on or around May 13, 2003, to testify to their observations of his physical condition. The prosecution theory was that he was scratched and bruised as a result of his physical altercation with Loreck.

In May 2003, appellant was staying periodically with Walter Backes and his wife, Margie Jacobson, in exchange for doing yard work.[6] (40 RT 8038.) Jacobson testified that the day of the killing, appellant left on a bike

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[6] Ms. Jacobson is also referred to in the record as Mickey Jacobson. (43 RT 8733.)

in the morning and returned with it later. (40 RT 8088, 8132.) When she saw appellant that day around 5:00 or 6:00 p.m. he looked dirty and beat up. (40 RT 8088-8089.) Jacobson testified that appellant was bleeding, and had scrapes and bruises primarily on his face, and injuries on his arms. (40 RT 8089.) According to Jacobson, appellant's clothes and hair were dirty and he had lots of abrasions and dried blood on him. (40 RT 8090, 8138.) She did not know if there was other blood on his clothes, or if there was any blood on appellant's face or arms not associated with his injuries. (40 RT 8138.) Jacobson told investigators that the day she saw appellant with injuries he had been drinking and was high. (43 RT 8744.)

Jacobson testified that appellant said he had been in a fight with some guys in the park over a cell phone. (40 RT 8091.) Appellant had a cell phone that was disconnected. (40 RT 8121.) According to Jacobson, she and appellant had the conversation about the fight in front of the television while they were watching the news about the killing.[7] (40 RT 8089, 8091.)

When Jacobson spoke to investigators, she gave them two different time periods for when appellant came to stay at her house, May 11 or May 12, and May 12 through May 14, and told investigators that she did not know the date she made her observations. (40 RT 8120; 43 RT 8735.)

According to Walter Backes, appellant came home one night around 9:00 p.m. (40 RT 8040.) The next day Backes noticed that appellant had scratch marks on his temple and a bruised cheek. (40 RT 8041.) Backes testified that appellant's injuries looked like he had been in a fight. (40 RT

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[7] The earliest news coverage of the killing aired on May 13, 2003, at 10 p.m., on Channel 2. The story was followed extensively early the next morning, throughout rest of the day, and in the days and weeks that followed. (46 RT 9275.)

8073.) Backes was impeached with his statement to police that he did not recall seeing any injuries on appellant, and admitted it was possible he was mistaken. (40 RT 8073, 8074.)

Debra Gardner met appellant in 2001 when they both worked at Primary Strategic Alliance. (41 RT 8314.) When appellant returned from Texas after having lived there briefly, Gardner offered to let him stay at her home, and he started staying with her around April 2003. (41 RT 8316.) Appellant and her daughter did not get along, however, and Gardner told him on Mother's Day in 2003 that he had to move out.[8] (41 RT 8317, 8318.)

Two days later appellant was at her house when she got home from work around 5:00 or 5:30 p.m. He looked dirty and like he had been sleeping on the trail. (41 RT 8319.) He asked if she had heard that a woman was killed on the trail where he hung out. (41 RT 8320.) He took a shower at Gardner's house and then left. (41 RT 8320-8321.) She did not see any injuries on him that day. (41 RT 8320; 43 RT 8679.) Gardner testified that a few days later appellant came by the house again and showed her scratches underneath his shirt on his back, chest and arms. Gardner testified that appellant said that he got scratched while he was pruning trees. (41 RT 8323.)

Gardner last saw appellant on May 26, 2003. (41 RT 8331.) Appellant told Gardner before Mother's Day that he had plans to return to Indiana to work with his brother. (41 RT 8339.) Gardner gave investigators a toothbrush appellant had used and left at her house. (41 RT 8324.)

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[8] Mother's Day in 2003, was Sunday, May 11. (40 RT 8086.)

Marie Zabbo, Gardner's best friend, testified that she was at Gardner's house when appellant pulled up his shirt and showed them his injuries. (41 RT 8367.) According to Zabbo, appellant had injuries on his face, chest and back, more on his neck than his face. (41 RT 8369.) She could not positively say there were injuries on appellant's face or arms. (41 RT 8370.) Zabbo did not give investigators a date for when she saw injuries on appellant, but said it was two or three days after he was kicked out of Gardner's home. (43 RT 8737.) Zabbo told investigators in October of 2003, however, that she remembered seeing appellant at Gardner's house on the day of the killing and saw no injuries on him. (43 RT 8694.)

Bryan Schmidt, the former boyfriend of Debra Gardner's daughter, testified that he saw appellant at some point with blood on his hands, on his shirt and maybe a cut on his face. (41 RT 8380.) He did not remember appellant pulling up his shirt. (41 RT 8386.) Schmidt testified that appellant said he had been in a fight. (41 RT 8380.) Schmidt was not contacted by the police until 2006. (41 RT 8383.)

During the investigation of the case, Detective Warnock also spoke with Zachary Fitzsimmons-Wright. (41 RT 8295.) According to Fitzsimmons-Wright, appellant left Gardner's house and stayed at his house toward the end of appellant's time in California. (41 RT 8290.) Three days after his initial conversation with investigators, Fitzsimmons-Wright contacted Detective Warnock, and told him that during appellant's last night at his house, appellant confessed that he was the "trail side killer." (41 RT 8292, 8295.) They were drinking that night and Fitzsimmons-Wright was drunk. (41 RT 8305.) When he heard the comment, he thought it was just another weird comment made by appellant. (41 RT 8306.) Fitzsimmons-Wright admitted at trial that he might have spoken to Gardner before calling Detective Warnock about appellant's statements. (41 RT

8307.) Detective Warnock testified that Fitzsimmons-Wright made his statement after he heard about the case on the news. (43 RT 8669.)

D. Evidence of Sexual Assault and DNA evidence

Dr. Peterson performed a sexual assault exam. (41 RT 8174.) Using a dissecting microscope, Dr. Peterson examined the internal and external surfaces of the vagina, cervix and anus and found no injuries, cuts, bruises, scrapes or microscopic trauma. (41 RT 8181, 8186, 8190.) Dr. Peterson was unable to determine whether there was penetration of the vagina or anus. While he was unable to offer his opinion whether the lack of genital trauma was because the victim was unconscious at the time of the assault, he testified that it was possible for a person to be sexually assaulted and suffer no injuries. (41 RT 8190, 8260.)

During the autopsy, Dr. Peterson noted Betadine staining and plastic covering the lower abdomen and pubic area of the body. (39 RT 7811; 41 RT 8240; 43 RT 8653-8654.) Using an alternate light source, he found pin size evidence of semen on the left knee, right thigh, mid-pubis, above the pubic bone, and on the lower abdomen. (41 RT 8180.) Dr. Peterson took swabs from the mouth, vagina and anus. (41 RT 8174, 8186.) The vagina was swabbed about two inches inside. (41 RT 8187.) The anus was swabbed about an inch or two inside. (41 RT 8189.) Dr. Peterson admitted that he did not swab the perineum before taking the anal swabs. (41 RT 8249.) Dr. Peterson described some difficulty in dealing with the body when taking the swabs because rigor mortis had already set in, but testified that it was not possible that he put the sperm found inside the body there during swabbing, or otherwise contaminated the swabs. (41 RT 8186.)

The sexual assault kit in this case contained four vaginal swabs, one vaginal smear, four rectal swabs, and one rectal smear. (44 RT 8841.) Testing of the vaginal and anal swabs revealed a very low number of sperm.

(42 RT 8575; 44 RT 8813, 8817, 8820, 8842.) Sherry Holes, a forensic serologist with the Contra Costa County Sheriff's Crime Laboratory, testified that the low number of sperm found could be related to low sperm count and did not preclude a finding of ejaculation. (42 RT 8577.) According to Holes, the P30 protein can indicate when the ejaculation was deposited. (42 RT 8580.) A tested vaginal swab was positive for the P30 protein, while a rectal swab tested negative. (*Ibid.*) Holes looked for the presence of sperm on a rectal smear and found some intact sperm which, according to Holes, meant that ejaculation had occurred within hours of the swabs being collected. (42 RT 8539.)

During the autopsy, Dr. Peterson also assessed external physical injuries, opining that there was not enough blood on the trail to account for all of Loreck's injuries. (41 RT 8208.) Based on this observation, Dr. Peterson testified that the blow to Loreck was struck to disable her and then she was taken to another location. (*Ibid.*) Dr. Peterson observed that there were scratches and bruises on the back of the left hand, front of the left hand, scratches on the inside of the right thigh, on the knee, the left lower leg, and on the back of the left lower leg. (41 RT 8201.) Based on the injuries to the back of the hands and injuries to the back of the head, Dr. Peterson testified that it made sense that Loreck was trying to protect the back of her head with her hands. (41 RT 8209.) Dr. Peterson testified that there was also a brush abrasion patch in the middle of her back, and blunt force injuries on her hands and wrists. (41 RT 8200.) No male DNA, however, was found under Loreck's fingernails. (42 RT 8569.)

Holes conducted the DNA testing on swabs from the sexual assault kit taken by Dr. Peterson. (42 RT 8538.) The DNA profiles developed from a thigh swab, a vaginal swab and a rectal swab matched those from two of the three cigarette butts collected from the trail. (42 RT 8541-8542,

8554-8555; 39 RT 7853; Exhs. 20, 21, 22.)

Based on a comparison of a DNA profile from a blood sample taken from appellant, Holes concluded that appellant was included as a possible source of the sperm on the swabs.[9] (42 RT 8558, 8560-8561.)

Holes also conducted DNA analysis on a semen stain in the upper back left shoulder of the victim's sweater. (42 RT 8529, 8531.) She concluded that it matched appellant's DNA profile. (42 RT 8561.) The stain also contained nucleated epithelial cells which Holes concluded were from Loreck. (42 RT 8534, 8536.)

Jason Kwast, a sheriff's department criminalist and expert in trace evidence, testified that he was asked to perform certain tests on a metal bar found at the scene, a piece of angle iron that had blood on it, that may have been the murder weapon. (42 RT 8443-8444, 8446-8447.) Kwast collected 14 sample swabs, including samples of what appeared to be blood on the bar. (42 RT 8452-8453.) Holes developed DNA profiles from seven of the eight swabs with detectable levels of male DNA. (42 RT 8544-8545.) One of the swabs taken from the metal bar, swab 1000N, had almost a complete male DNA profile (as opposed to a mixture of male and female DNA on other swabs). (42 RT 8547.) Holes compared appellant's DNA profile to swab 1000N (42 RT 8588), and concluded that appellant was included as a potential source of the DNA (42 RT 8551). There was no indication of a third person's DNA from the swabs taken from the metal bar. (42 RT 8553-8554.)

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[9] Holes also tested DNA found on a toothbrush allegedly used by appellant, and found it unsuitable as a reference sample because it had the DNA of three people on it. (42 RT 8552, 8557.) Holes compared the mixture of DNA from the toothbrush to the DNA profile from the cigarette butts and concluded that the person could be included as a source of DNA on the toothbrush. (42 RT 8557.)

E. Appellant's Arrest

Investigators located appellant in Indiana in late August, 2003. (43 RT 8636.) Concord Police Sergeant Judith Moore, Detective Warnock and Detective Finney interviewed appellant in the Lake County Jail Facility in Indiana. (43 RT 8752.) By the time they interviewed appellant they knew that his DNA matched that taken from the cigarette butts found at the scene. (43 RT 8768.)

Appellant waived his *Miranda*[10] rights and spoke with the detectives. (43 RT 8637-8638, 8640.) According to Detective Finney, appellant said that he had been on the trail on May 13 near the crime scene, but denied seeing Loreck that day. Later, he saw a picture of her on television. (43 RT 8640.) Consistent with what others had told the police, appellant confirmed that he spoke to a lot of people on the trail. (43 RT 8727.) Appellant denied ever holding a metal bar. (43 RT 8641.) When he was confronted with the DNA evidence, appellant explained that he had urinated in the area of the crime scene and told the officers that DNA was unreliable evidence. (43 RT 8643.)

After a defense motion to exclude the audio and video tape of appellant's statement was denied, portions of both audio and video of the interrogation were played for the jury. (37 RT 7437-7446; 43 RT 8755-8756, 8762, 8764-8765; Exhs. 137 & 138.)

F. Defense Case

The defense challenged the admission of DNA evidence through several pretrial in limine motions.[11] When their efforts were unsuccessful,

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[10] *Miranda v. Arizona* (1966) 384 U.S. 436.

[11] After a hearing, the pretrial motions by the defense to exclude (continued...)

defense counsel conceded that appellant's DNA matched that found at the crime scene, but disputed the prosecution theory that the DNA evidence proved the allegations of rape and sodomy by challenging the integrity and significance of the physical evidence. (See, e.g., 35 RT 7170, 7175-7176 [defense opening statement].)

Defense experts Dr. Keith Inman and Dr. Paul Herrmann reviewed Dr. Peterson's work. Dr. Inman, a forensic specialist, examined the physical evidence and found evidence of external contamination on the swabs taken during the sexual assault exam. (44 RT 8917-8918, 8929-8930.) There was particulate matter that appeared to be soil on a rectal swab, and on one vaginal swab, Dr. Inman found blood and a dense number of epithelial cells. (44 RT 8930, 8968.) Dr. Inman explained that if a victim is lying on her back, it is possible for fluid such as blood or Betadine to drain into the vaginal vault. (44 RT 8940.) He also testified about the possibility of contamination of vaginal or rectal swabs by picking up material from the exterior of the body if the collection is not done properly. (44 RT 8932-8935.)

Almost all of the swabs examined by the crime lab employees, Kim Willey and Leah Priest, had some brownish-red or yellow staining of some kind. (44 RT 8836.) Presumptive tests for blood were performed on some, but not all of the swabs. The tests on the oral swab and swab from the left nipple were positive for blood. (44 RT 8833-8834.) The rectal swab was negative for P30, a protein made in the prostate; the vaginal swab was positive. (44 RT 8836-8837.) Willey and Priest found low numbers of sperm on the thigh and vaginal swabs (44 RT 8812-8814, 8817-8819,

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[11](...continued)
DNA evidence on various grounds was denied. (Sealed 5 CT 1220-1232; Sealed 13 RT 2600-2817; Sealed 28 RT 5750-5755; 5 CT 1519-1525.)

8842), and a higher number of sperm in the rectal smear (44 RT 8844).

Responding to a defense hypothetical, Dr. Inman agreed that, based on the physical evidence in this case – where more semen was found on the anal swab than vaginal swabs, the swabs had evidence of blood and soil, there was a lot of blood in other areas of the body, the largest amount of semen was found on a stain on a sweater away from the body, and the stain was not a mixture of DNA from two people (perpetrator and victim) – it was a reasonable inference that there was no penetration. (44 RT 8954-8955.)

Dr. Herrmann testified that it was very easy to contaminate swabs going into the vagina or anus, and in the absence of evidence of an injury to the vaginal area, the fact that blood was found on a vaginal swab suggested there had been contamination. (44 RT 9001-9003, 9012.) Dr. Herrmann also explained that drainage from the vaginal area to the rectum could bring with it small amounts of sperm, and that placing Betadine on the lower abdominal area could wash away any semen in that area. (44 RT 9010-9011.) Dr. Herrmann further testified that the most common injury in rape cases is tearing of the back part of the vagina, and that even with an unconscious victim, vaginal injuries could result from a lack of lubrication. (44 RT 8999, 9006.)

Dr. Herrmann questioned Dr. Peterson's findings regarding defensive wounds on Loreck's hands. (44 RT 8990.) Dr. Herrmann testified that the wounds on the back of Loreck's hands were not very severe, and looked as if the hands had scraped on the sidewalk. (44 RT 8990, 8995.) Thus, Dr. Herrmann theorized that the wounds could have been caused by dragging her down the trail. (44 RT 8991.) Dr. Herrmann did not think that the scratch on the front of her wrist was severe enough to account for fending off a metal bar, as Dr. Peterson had opined. (44 RT

8990; 41 RT 8222.)

Dr. Inman opined that it was reasonable to conclude that any sexual assault occurred after Loreck was hit in the head and rendered unconscious. (44 RT 8953, 9016.) Dr. Peterson agreed that it was a fair interpretation of the physical evidence that the blows to Loreck's head occurred before a sexual assault. (41 RT 8259.)

Sherry Holes's conclusions about the stain on the victim's sweater were challenged by Dr. Inman, who also conducted DNA analysis on the sweater stain, but did not find trace DNA from Loreck on the sweater. (44 RT 8975.) Dr. Inman explained that if there was vaginal fluid in the semen stain on the sweater he would expect Loreck's DNA to be present in greater concentrations. (44 RT 8944.)

The defense also challenged the implication that Loreck was conscious at the time she was found, as suggested by Officer Borda's testimony that when he called her name she visibly relaxed. (36 RT 7324.) Officer Borda and Officer Sean Phelan, who arrived at the scene immediately after Borda's announcement that he had located Loreck, gave a taped statement to Concord Police officials that night about their observations at the scene. (44 RT 8846-8848, 8852, 8864-8866.) In the statement, Officer Phelan said that Loreck did not respond to anything Officer Borda said and it did not appear that she knew they were present. (44 RT 8852.)

In addition, the defense called Isaias Menchaca, who was a police officer in May 2004. He was at the hospital when Loreck arrived by ambulance. An officer who accompanied her in the ambulance told Menchaca that she was unconscious during the ride to the hospital. (44 RT 8878-8880.)

Officer Ivan Menchaca was dispatched to Systron Donner on May 13 and spoke to Heinz Loreck. Mr. Loreck told the officer his son had been talking with Kathleen Loreck on the phone. She yelled something about transients and the conversation ended abruptly. (44 RT 8876.)

II. PENALTY PHASE

A. Prosecution Case in Aggravation

The prosecution presented evidence of appellant's prior convictions and uncharged acts of violence under section 190.3, subdivisions (b) and (c), and victim impact evidence under subdivision (a).

1. Robbery, October 1985

Rita Ann Bomher testified that she worked at the White Hen Pantry in Moken, Illinois on October 18, 1985. (49 RT 9921.) On that date, a man she identified as appellant, held up a "black tire billy round heavy stick" about two feet long and herded her into the back area of the store so that she could not see who was coming in. (49 RT 9923.) When other people came in the store, appellant told her to stay, and then turned to walk away. (49 RT 9927.) When Bomher moved to follow appellant, he threatened her with the stick. (*Ibid.*) The people who entered the store took about $250.00, Bomher's purse, and lottery tickets. (49 RT 9930.) Appellant seemed nervous and tried to shake Bomher's hand during the encounter. (49 RT 9931.)

A certified copy of appellant's conviction by plea to robbery was admitted into evidence. (8 CT 2343-2346; Exh. 154.)

2. Prison Assault, June 1986

Richard Randall Sutton was serving a sentence for robbery at the Shawnee Correctional Center in Illinois in 1986, where he was housed with appellant for approximately three months. (50 RT 10098-10099.) Sutton testified that appellant attacked him in the gym, cutting his face with a

razor. (50 RT 10100.) Appellant later apologized, claiming that the "Latin guys" had put him up to it. (50 RT 10103.) Sutton explained that "in prison if you are told to do something and do not do it, something will happen to you." (*Ibid.*) Appellant was 21 or 22 years old at the time. (50 RT 10105.) Sutton testified that appellant was a follower. (50 RT 10107.)

A certified copy of appellant's conviction by plea to aggravated battery was admitted into evidence. (8 CT 2347-2350; Exh. 155.)

3. Threat of Violence, April 1989

Linda Van Dyck (also known as Sagel-Chasteen) testified that she was a co-worker of appellant's at the Orland Park Car Wash in Illinois. (49 RT 9933.) On April 17, 1989, Ms. Van Dyck had people over to her house, including appellant. Appellant had been drinking and tried to kiss her. (49 RT 9935, 9936.) When she told him to leave, he pulled a knife, put it close to her face, and told her, "you don't want to mess with me." (49 RT 9939.) Appellant then folded the knife and put it in his pocket. (*Ibid.*) She put appellant's guitar outside the front door, and when he went to get it, locked him out of the house. (49 RT 9940.) Appellant began yelling, stomping, and banging. (*Ibid.*)

Officer Anthony Farrell testified that he was dispatched on April 17, 1989, to a disturbance at an apartment building. (49 RT 9954.) Farrell testified that appellant was on the side of the street. (49 RT 9955.) Appellant voluntarily handed Farrell a knife and said, "You better take this from me before I kill somebody with it," or "I will kill somebody with it." (49 RT 9956.) Farrell arrested appellant and when he did, appellant became very angry, out of control, and punched walls at the police station. (49 RT 9956-9957.) Appellant threatened to slash Farrell's tires, and threatened Sergeant Greg Okon and Farrell personally. (49 RT 9957.) The case was dismissed on the date set for trial and appellant was prosecuted for a parole

violation instead. (49 RT 9959-9960.)

Ms. Van Dyck testified that a month after the incident at her apartment, while she was in the ladies' room at work, when she tried to open the door, appellant and others were holding the door closed. (49 RT 9941.) Appellant threatened her while keeping the door closed, telling her to watch her back. (49 RT 9943.) When they released the door it caught her toe and ripped the nail off. (*Ibid.*) Appellant was 24 or 25 years old. (49 RT 9949.)

4. Robbery, September 1991

Lynn Murray testified that on September 20, 1991, she was working at a gas station in Orland Park, Illinois, when appellant – whom she had known for six months – came to the gas station. He talked about how easy it would be to steal money from the station and told Murray to go along with it and make it look like a robbery. (49 RT 9965-9966.) Appellant took money that was sitting on the counter and money from the drawer, totaling about $540.00. (49 RT 9972, 9966.) During the encounter, a woman drove by and picked him up. (49 RT 9964.) Appellant did not threaten Murray or her safety, but put her in a position where she had to call the police to save her job. (49 RT 9971, 9975.)

A certified copy of appellant's conviction by plea to robbery was admitted into evidence. (8 CT 2356-2359; Exh. 156.)

5. Victim Impact Evidence

Loreck's brother, William St. John, described Loreck, her funeral and memorial service. (49 RT 10002-10008.) Loreck's father, Paul Aiello, also testified. (49 RT 10010.) He described Loreck, told stories about Christmas gifts, their family traditions, a trip to Europe, and Loreck singing in the glee club. (49 RT 10011-10018.) During his testimony, Mr. Aiello addressed trial counsel Downing directly: "But my dear, had you known

her – I am talking to Ms. Downing there – you won't be so proud to defend this guy. But I know everyone deserves a defense, and I think you're doing a fine job." (49 RT 10018-10019.)

Loreck's adult son, Eric Lyon, also testified. He described Loreck, her role in the family and the effect of her death on him and his family. (49 RT 10019-10030.)

B. Defense Case in Mitigation

Before and during the penalty phase, appellant made repeated motions to relieve counsel and to represent himself based on his objection to the case in mitigation presented by his attorneys. The motions were denied. (See Argument II.)

The defense presented extensive mitigation evidence about appellant's family background, childhood and upbringing from relatives, friends, teachers and treating clinicians. Expert testimony was presented by forensic psychologist Gretchen White about the impact of appellant's childhood on his personality development and behavior, and by Dr. Douglas Tucker, a psychiatrist, about appellant's psychological impairments. Dr. Stephen Seligman testified about attachment theory and the detrimental effect of appellant's separation from his birth mother at a young age.

Illinois prison expert George De Tella testified about conditions in the penal system at the time appellant was incarcerated there, and James Esten testified regarding prison security for inmates serving life-without-parole sentences in California.

1. Appellant's Life

Barbara Tinsley, appellant's birth mother, testified that he was born on July 6, 1964, when she was 15 years old and his father, Lanny Frazier, was 19. (50 RT 10148.) When Barbara discovered she was pregnant, they

got married. (50 RT 10149.) After appellant was born, Barbara and Lanny moved in with Lanny's parents, Betty and Bill Frazier. (50 RT 10153.) While Barbara worked as a waitress, Betty took care of appellant. (50 RT 10154.)

When appellant was about five to seven months old, Lanny divorced her. (50 RT 10156-10157.) Barbara had lost her job and was told by Lanny's parents that they would take custody of appellant until she was back on her feet. (50 RT 10157.) The Fraziers asked Barbara to sign papers, telling her that she did not have to read what she signed. (*Ibid.*)

After leaving the Frazier's house, Barbara moved in with her parents. (50 RT 10158.) Soon after, Barbara met her second husband, Larry, and they have been married for 40 years. (*Ibid.*) Appellant's brother Larry, Jr. was born when Barbara was 17 years old. (50 RT 10155.) Including appellant, Barbara has seven children, four of whom went to college. (50 RT 10146, 10159.)

When Barbara attempted to regain custody of appellant when he was six months old and she was about 16 and pregnant with her first child with Larry Tinsley, she discovered that the papers she had signed were adoption papers. (50 RT 10160-10161, 10188, 10189.) Betty refused to return appellant; Barbara considered fighting to get appellant back, but did not have the money, and she thought he might be better off with the Frazier family. (50 RT 10165.)

Barbara testified that appellant called her before she came to California to testify at the penalty phase and told her she did not have to come. He was afraid the experience would be too emotional for her and he did not want to put her through it. (50 RT 10146-10147.) Barbara testified that she "wanted to come out to try to save [his] life." (50 RT 10147.) Barbara broke down during her testimony when she stated, "All I have is

his letters now. And everybody has been . . . taking him away from me his whole life." (50 RT 10183.) She ended her testimony by stating that she was here to save his life. (50 RT 10196.)

Larry Tinsley, Jr., appellant's half-brother testified that he grew up in a loving and nurturing environment with this mother, Barbara, his father and his siblings. Theirs was a happy and close family, despite not having a lot of money and living in a small house. None of his family members had issues with substance abuse. (50 RT 10221-10224.) He went to college with financial help from his parents. (50 RT 10225.) Larry, Jr. found out appellant was his brother when Larry, Jr. was about 12-13. He visited appellant at Betty's house once, and appellant was very welcoming, while Betty was not. (50 RT 10224-10225.)

Gretchen White, a forensic psychologist, testified that she was retained by the defense to develop a psychosocial evaluation of appellant. (51 RT 10391-10392.) She reviewed records and reports of interviews conducted by defense investigators and conducted her own interviews with appellant, family members, friends and clinicians who had evaluated appellant. (51 RT 10394-10397.) Dr. White also reviewed reports by defense experts Dr. Tucker and Dr. Ruben Gur. (51 RT 10400.)

Based on her investigation and evaluation, Dr. White's opinion was that appellant came from a highly dysfunctional family, that there were numerous risk factors he experienced throughout his life, including genetic factors that are risk factors for developing different psychological disorders. (51 RT 10400-10401.)

Dr. White testified about the family dynamics in the Frazier home when appellant was brought in as an infant. His father, Lanny, was 20, and the other siblings were Sharon, who was 19, Glenn who was 18, and Judy who was 13. Bill Frazier was 65 and Betty was 41. (51 RT 10406.) The

Frazier household was very tumultuous, with lots of conflict, emotional warfare, yelling, and criticism. (51 RT 10409.) Bill had been married five times and had at least two other children, one of whom died. (51 RT 10406-10407.) Bill had a problem with alcohol, and may have been bipolar. (51 RT 10407.)

Appellant experienced physical and psychological abuse as a child. (51 RT 10401.) Every member of the Frazier household verbally, emotionally and physically abused appellant, rejected and degraded him. (51 RT 10401, 10417, 10425.) Appellant's biological father, Lanny, beat and slapped appellant. (51 RT 10417.)

By most accounts, Betty was very rigid, cold, angry, critical, and unhappy, and she was not nurturing toward appellant. (50 RT 10154; 51 RT 10370, 10417; 54 RT 11048.) Although Betty bought appellant things and sometimes doted on him, she was also emotionally abusive. (51 RT 10450.)

During appellant's youth, Lanny was in and out of the house between marriages, and was described as a drinker. (51 RT 10410.) Appellant's adopted brother, Glenn, hit and yelled at appellant if he made too much noise or a ball hit the house. (51 RT 10332, 10419.) Glenn had a seizure disorder from a head injury, an explosive temper and documented mental problems. (51 RT 10410, 10415.) Glenn was very resentful of appellant and described appellant's arrival in the family as an incredible burden. (54 RT 10956.) Betty did not protect appellant from Glenn's abuse. (55 RT 11103.)

Dr. White testified that there was an inappropriately sexualized atmosphere in the Frazier household. (51 RT 10427.) An early assessment of appellant hypothesized that he came from an environment that deprived him of psychological nurturance, warmth and comfort, but was also

sometimes overindulgent, and overstimulating, including sexual stimulation. (51 RT 10447.) A report dated May 29, 1981, from Tinley Park Mental Health Center, noted that Betty forced appellant to wear clothing that appeared effeminate, made out of the same material as Betty's outfit. (51 RT 10449.)

Dr. White testified there was a suggestion that appellant was molested, but no firm evidence. (51 RT 10427.) At trial, James Triolo, appellant's only childhood friend, testified that Glenn told Triolo and appellant that he wanted to take naked pictures of them. (51 RT 10337.) According to Triolo, appellant confided that Glenn had been touching him. (51 RT 10355.)

According to Triolo, during his elementary school years appellant was in and out of Tinley Park Mental Health Center. (51 RT 10330.) Triolo testified that appellant essentially roamed the streets during his elementary school years. (51 RT 10330.) According to Triolo, Betty told appellant he was thrown in the garbage and she was stuck with him. (51 RT 10332.) Appellant sniffed gasoline to deal with his emotional state and would often sleep in a field or at a church. (51 RT 10299, 10334.) During his preteen years, appellant would spend three days a week at the Triolo's house. (51 RT 10331.)

When appellant was 12 or 13 years old, his adopted father, Bill, died. (51 RT 10306.) During this time, appellant, who had been told that his father, Lanny, was his brother (51 RT 10320), was told that he was in fact adopted (51 RT 10421).[12]

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[12] Appellant met his biological mother, Barbara, for the first time when he was 15 years old. (51 RT 10434.)

At school, according to records reviewed by Dr. White, appellant acted in bizarre ways to get attention, was impulsively aggressive, hostile, and provocative. (51 RT 10298.) Appellant's friend, Jeff Triolo, testified that appellant was teased by other children who called him "Crazy Bob." (51 RT 10328.) Described as a follower (50 RT 10168-10169), appellant was rejected by his classmates and was the target of school bullies (51 RT 10422-10423). According to Dr. White, appellant's fourth grade teacher, Vicky Hayes, described appellant as one of the most troubled children she ever saw. (51 RT 10428.) Jane Winblad, appellant's sixth grade teacher, testified that appellant acted out by barking, crawling, and disrupting the class to get attention. (50 RT 10205.) Appellant at one point swung from a beam in the classroom screaming "sex for everyone." (50 RT 10208.) According to Ms. Winblad, appellant was not dumb, but hyper. (50 RT 10215.) She did not recall appellant's parents attending parent conferences or open houses. (50 RT 10209.) Ms. Winblad explained that when teachers held a one-day strike, appellant was the only child to come to school. (50 RT 10211-10212.)

Appellant's behavioral problems and sniffing gasoline escalated. (51 RT 10431.) Appellant was stealing, truant, and drinking. (51 RT 10436.) He was transferred to a school for children with behavior problems, and then moved to another school. (*Ibid.*) Appellant was suspended from school, arrested, and talked of suicide. (51 RT 10438.)

Appellant's first evaluation on record was when he was in the eighth grade. (51 RT 10430.) In a report dated December 12, 1977, a school psychologist suggested involving the family in an intensive therapeutic program, but appellant received no family therapy. (51 RT 10432-10433.) Betty and Bill did not meet with the school for the results of the evaluation. (51 RT 10430.) For her part, Betty denied any knowledge that appellant

had problems as a child. (54 RT 10945.)

In 1979, when appellant was 15 years old, he was hospitalized for two weeks at Christ Hospital, an in-patient adolescent psychiatric facility. (50 RT 10243; 51 RT 10438.) He was diagnosed as erratic, labile, somewhat fragmented, easily disrupted by internal and external events, having poor frustration tolerance, an inability to control any negative affect, poor identity, low self-esteem, with grandiose fantasies identifying himself with God and Jesus, verging on serious psychopathology. (50 RT 10244; 51 RT 10439.) Appellant believed at that time that life was dominated by forces of good and evil outside of him that could control what happened to him. (50 RT 10247.)

Dr. Leff, who evaluated appellant at Christ Hospital, expressed serious doubts about appellant's ability to function outside the structure of an institution. (51 RT 10439, 10441.) Authorities at Christ Hospital recommended long term treatment with intensive psychotherapy and a regimen of medication to control hyperactivity and agitation. (50 RT 10244-10245.) Appellant responded well to medication. (51 RT 10438.) Betty was supposed to administer medication to appellant at home after he left Christ Hospital, but did not. (54 RT 11012-11013.) Appellant was taken out of the hospital by Betty, who claimed it was for financial reasons, before the assessment was complete and against medical advice. (50 RT 10245; 51 RT 10439.)

Within six months of leaving Christ Hospital, appellant was sent to a detention center for children who could not be released to home for various reasons, including that their crimes were too dangerous to warrant a release to home. (50 RT 10242; 51 RT 10454.) Appellant had a history of juvenile burglaries where he would break in to garages and sniff gasoline. (50 RT 10243.)

Kimberly Evan Merrill, a clinical psychologist in Illinois evaluated juvenile offenders from 1979 to 1985, and wrote a report about appellant in 1980. (50 RT 10239-10240, 10242.) Merrill testified that she suspected that appellant had organic brain damage. (50 RT 10250.) Merrill also recommended that appellant be placed in long term treatment where he could get psychotherapy and medication. (50 RT 10251.)

During most of his 20's appellant was in and out of jails, hospitals and prisons. (51 RT 10458.) Appellant sometimes went to the psychiatric ward after being arrested. (*Ibid.*) During this time appellant was described as homeless, hyper, bizarre, immature, but intelligent. (51 RT 10369.) Appellant drank to excess as he got older. (51 RT 10335.) People reported appellant reeking of gasoline in late 1986, abusing alcohol, marijuana, LSD, and crack cocaine. (51 RT 10434; 54 RT 10996.)

Appellant's romantic relationships were troubled. His relationship with Julie Steinbaugh was stormy and involved mutual domestic violence. (55 RT 11082.) Ms. Steinbaugh died of a heroin overdose. (55 RT 11084.) Appellant also had a girlfriend, Charmaine Giblin, who rejected appellant's marriage proposal because of his alcohol problems. (55 RT 11085.) Appellant responded by smashing a window with a two-by-four. (55 RT 11086.)

In 1998, appellant came to California and lived with his biological father, Lanny. (51 RT 10459.) The years 1998 to 2001 were the most stable of appellant's life, but even then he was described as manic, and had criminal convictions between 1992 and 2002. (51 RT 10460; 55 RT 11118-11119, 11150.)

In California, appellant met Dee King and she became his girlfriend. They lived together for three to four years and she moved with appellant when he relocated to Texas. (51 RT 10459.) Ms. King was described as a

very difficult and negative person who was often verbally abusive and hostile to appellant. (51 RT 10460, 10462.) Appellant moved to Texas with Ms. King, having been offered what he thought was a promotion in telemarketing, but it did not work out. (51 RT 10463-10464.) Appellant lost his job, was using crack cocaine or methamphetamine, and was drinking. (51 RT 10465.) His relationship with Ms. King ended and the breakup was hard for him to handle. (55 RT 11081.)

After just a few months in Texas, appellant moved back to California, without a girlfriend, a job or a place to live. He was staying at friends' houses and sleeping in the park. (51 RT 10464, 10465, 10467.) Appellant worked for Walter Backes, but could not get to work consistently because of his homelessness. (51 RT 10467-10468.) Appellant worked at Celebrity Prime Foods for a month, but was fired because he could not focus and was paranoid. (51 RT 10468.) Appellant's friends noticed that he seemed different, he reeked of marijuana, was depressed, defeated, disheveled and using crack cocaine. (51 RT 10468.)

2. Appellant's Mental Health Diagnoses

According to Dr. White, substance abuse and hyper dementia in appellant and his family's psychology worked against appellant. (51 RT 10473.) Barbara's father was an alcoholic. (50 RT 10167.) Appellant's father, Lanny, had a history of drug and alcohol abuse, domestic violence, and was diagnosed with bipolar disorder. (51 RT 10402, 10474; 54 RT 10992.) Appellant's half-brother, Christopher, was also diagnosed as bipolar, had attention deficit disorder, and spent two and one half years in a residential treatment facility. (51 RT 10474; 54 RT 10992.)

Dr. White testified that appellant was once diagnosed as schizophrenic. (51 RT 10455.) Dr. White explained that over the years appellant has exhibited psychiatric symptoms including changing moods,

agitation, restlessness, suspiciousness, suicidal thinking, impulsivity, grandiosity, hyperactive behavior, extreme talkativeness, lack of insight, disorganized thought patterns, substance abuse, intermittent explosive behavior, and ideas of reference (thinking things in the outside world refer to him). (51 RT 10455-10456.) According to Dr. White, appellant had eleven out of twelve risk factors for a detrimental adult outcome and ending up in custody. (51 RT 10471.)

Appellant has been diagnosed with atypical bipolar or atypical manic disorder. (51 RT 10473.) Dr. White testified that appellant does not have insight into his psychological problems because he suffers from fragmented thinking and denial. (51 RT 10476.) According to Dr. White, appellant denied any physical or sexual abuse, and anything painful about his background. (51 RT 10477.) In addition, appellant has a diminished capacity to communicate, to abstract from mistakes and learn from experience, and to control his impulses. (51 RT 10479.) Dr. White explained that throughout his life, appellant was unable to sustain periods of good behavior. (52 RT 10577.) Appellant lacks internal controls to sustain control for any significant period, especially in the face of any sort of stressor. (52 RT 10579, 10585.) Dr. White also testified that appellant had a diminished capacity to assist his attorney in his defense and Dr. White in her evaluation. (51 RT 10480; 52 RT 10568; 54 RT 10960.)

Dr. Stephen Seligman, a clinical psychologist, testified as an expert in the treatment of young children. (51 RT 10281.) He described attachment theory as it relates to a mother's relationship with her baby during the first few years of life. (51 RT 10283-10284.) During Dr. Seligman's testimony, the defense played a video documenting an experiment by Dr. Harry Harlow about the effect on baby monkeys of the deprivation of their mothers (51 RT 10285-10287), and another video about

a study by Rene Spitz about the detrimental effect on babies of being deprived of a nurturing caregiver (51 RT 10287-10291).

Dr. Seligman reviewed materials documenting appellant's social history, including interviews with family members, school records and psychological reports, and listened to the trial testimony of Barbara Tinsley and Larry Tinsley, Jr. (51 RT 10295-10296.) Dr. Seligman opined that appellant's behavior is consistent with a person whose attachment to his caregiver has been abruptly disrupted, resulting in bizarre, impulsively aggressive behavior. (51 RT 10297-10298.) Appellant's behavior was very different from that of his half-brother, Larry Tinsley, Jr., who was raised by a nurturing, loving mother and appeared to be well organized and successful. (51 RT 10299-10300.)

Dr. Douglas Tucker, an expert in clinical and forensic psychiatry, specializing in the treatment of sexual offenders or people with sexual disorders, conducted a psychiatric evaluation of appellant, and diagnosed him as having serious mood symptoms, a bipolar spectrum condition, significant substance abuse problems, and severe attention deficit hyperactivity disorder which has persisted into adulthood. (54 RT 10991, 10992.) Dr. Tucker could not determine if appellant's hyperactivity came from attention deficit hyperactivity disorder, or from being hypermanic. (54 RT 10993.)

Dr. Tucker testified that appellant has a poor grasp on reality, is grandiose and paranoid. (54 RT 10997.) According to Dr. Tucker, appellant suffers from paranoid delusions that come and go, unlike a true schizophrenic. (54 RT 10998.) Dr. Tucker explained that the Department of Mental Health in Illinois diagnosed appellant with latent schizophrenia, which is no longer a current diagnosis. (54 RT 11016.) According to Dr. Tucker, appellant does not see himself as having a mental disorder. (54 RT

11003.) Dr. Tucker believed that appellant suffers from an inappropriate affect and affective violence rather than predatory violence. (54 RT 11006.) Dr. Tucker testified that appellant does not meet the diagnostic criteria for a sexual disorder. (54 RT 11051.)

Dr. Tucker confirmed Dr. White's assessment that appellant suffers from pervasive denial (54 RT 11059), and has a diminished capacity to understand and process information (55 RT 11187). Dr. Tucker explained that appellant has a thought disorder that gets in the way of communication, and a diminished capacity to abstract from mistakes and learn from experience. (55 RT 11188.) Appellant has problems controlling and inhibiting his behavior. (*Ibid.*) Dr. Tucker also explained that appellant has previously been diagnosed as antisocial, which is a common diagnosis for people in the prison population. (55 RT 11115.)

Dr. Tucker reviewed a report prepared by Dr. Ruben Gur, a neuropsychologist, summarizing his findings from neuropsychological testing, an MRI scan and a PET scan. (54 RT 11026.) According to Dr. Gur's report, appellant's brain is small – in the fifth percentile of the population – and has lower neurocell activity, which is indicative of brain dysfunction. (54 RT 11028, 11041, 11042.) Dr. Gur also found neurocognitive abnormalities. (54 RT 11045.) Dr. Tucker explained that a small brain is caused by developmental problems in utero, such as drinking, or understimulation of an infant in the first year. (54 RT 11036.) Dr. Tucker, relying on Dr. Gur's report, testified that there is literature suggesting that a person with a globally small brain may lack insight or awareness that he or she is suffering from a psychotic disorder like schizophrenia. (*Ibid.*) Dr. Tucker testified that there is significant evidence that appellant suffers from an organic brain dysfunction. (54 RT 11046.) Appellant has psychiatric symptoms that suggest dysfunction in the frontal

lobe, which was corroborated by the PET scan. (54 RT 11058.)

Dr. Tucker testified that appellant's life shows a pattern of recurrent emotional explosiveness and impulsive outbursts triggered by stress or rejection, particularly in personal relationships. (55 RT 11101.) Appellant has disturbance in his self-image as a man, masculinity, and engaged in sexually inappropriate behavior in school, which is common in children who are sexually molested. (55 RT 11113.)

Based on appellant's statements, Dr. Tucker concluded that it seemed likely that appellant was experiencing severe psychiatric symptoms while on the trail on May 13, 2003. (55 RT 11127.) Two witnesses believed that appellant was engaged in a drug transaction on the trail that day (55 RT 11185), and that evidence suggested that appellant was under the influence of crack cocaine at the time of the crime, which can precipitate psychotic episodes (55 RT 11127, 11184).

Appellant admitted to Dr. Tucker that he was homeless on the day of the crime. (55 RT 11095.) Dr. Tucker theorized that appellant probably heard the victim make a comment about homelessness, did not realize she was on the phone, and because of his history, became explosively angry and impulsively acted in a violent fashion. (55 RT 11131-11132.) Dr. Tucker did not see any evidence of pre-planning or a predatory attack, but rather, evidence of overkill which indicated an emotional explosion. (55 RT 11135, 11194.) Appellant's history of violence for the most part has been when he has been intoxicated and feeling rejected or attacked by a woman. (55 RT 11132.) There has been no evidence in the past of a sexual component to appellant's anger. (55 RT 11133.) Dr. Tucker speculated that appellant acted in an impulsive way to commit rape after the attack to assert his masculinity. (55 RT 11134.)

3. Institutional Violence and Future Violence

In response to the testimony of Richard Sutton regarding the attack by appellant while he was in custody in Illinois, George De Tella, an expert on the Illinois Department of Corrections, reviewed appellant's prison records. According to the records, while appellant was in prison, he asked several times to be placed in protective custody because of his fear of specific gangs. (52 RT 10636.) Appellant had small disciplinary problems that resulted in his being placed in disciplinary segregation. (52 RT 10638.) De Tella testified that possession of weapons was common at that time. (52 RT 10641.) According to De Tella, the incident involving appellant and Sutton was not one of the more significant events during that period of time within the system. (52 RT 10642.) De Tella testified that assaults of this nature happened daily; he was surprised that appellant was prosecuted for the incident. (*Ibid.*) While there was nothing in the records that substantiated that the assault was gang related, De Tella testified that appellant did request protective custody once because the Gangster Disciples were after him. (52 RT 10651, 10653-10654.) According to De Tella, appellant stayed briefly in the psychiatric ward at Menard. (52 RT 10655.) Appellant was written up several times because of threats to staff. (52 RT 10657.) De Tella testified that appellant's threats and assaultive behavior at that time were typical and that appellant was impulsive, immature, problematic, but not considered a major security risk. (52 RT 10658.) Appellant was not adjusting well and thus had frequent transfers within the system. (52 RT 10659.)

Correctional consultant James Michael Esten met with appellant to assess what kind of future risk appellant would be in a level four prison environment. (54 RT 10912.) Appellant had two incidents from the Martinez Detention Facility classified as violent. In one incident, appellant

was non-compliant with an officer and had to be controlled using a rear wristlock. No one was hurt. (54 RT 10912.) A second incident occurred two days later when appellant passed a note saying he was going on a hunger strike. (54 RT 10913-10914.) Appellant had a number of writeups in the jail, the nature of which Esten described as appellant being a "nuisance, bothersome, troublesome." (54 RT 10914.) Esten testified that if appellant received a sentence of LWOP and was housed at a Level 4 maximum security prison, he did not present a future risk of danger to other inmates and staff. (54 RT 10915-10916.)

C. Prosecution Rebuttal

Over defense objection, Deputy Sheriff David Hartman testified that he knew appellant from working at the jail 16-17 months prior to trial. (55 RT 11286, 11296.) Appellant was transferred to be housed with inmates with mental health issues. (55 RT 11298.) Hartman testified that he had a conversation with appellant about why appellant made origami. (55 RT 11301.) Hartman explained that appellant told him that making origami was suggested by his defense attorney, and that it would show the jury a different side of appellant. (*Ibid.*) Appellant was making origami for about a year before being written up for it. (55 RT 11304.) According to Hartman, appellant had a price list for the origami and a business called Bob's Discount Dungeon. (55 RT 11304-11305.) Hartman was aware that a deputy told appellant, "you're going to get a shower only on the day you go to court from now until the time you're taken to San Quentin and are executed." (55 RT 11308-11309.)

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I.

THE TRIAL COURT'S IMPROPER EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR NO. 111 REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. Factual Background

Jury selection in appellant's case proceeded as follows: prospective jurors completed a 51-page questionnaire before individual voir dire took place in open court.[13] The court addressed each panel of prospective jurors, explained the voir dire and trial process, including a brief overview of what would happen if they were to reach a penalty phase.

Prospective Juror No. 111 completed a juror questionnaire and was questioned on voir dire by the trial court, prosecutor and defense counsel. The prosecutor challenged Juror No. 111 for cause, arguing that based on the totality of his answers in his questionnaire and in the courtroom, Juror No. 111 would be "substantially affected" in his decision-making process because of his personal feelings about the death penalty. (12 RT 2585, 2587.) Defense counsel objected to the challenge on the grounds that while Juror No. 111 held personal views against the death penalty, he said he could set them aside and return a verdict of death in this case. (12 RT 2587-2589.) The trial court sustained the prosecutor's challenge for cause. (12 RT 2591.)

The trial court's erroneous ruling, granting the prosecutor's challenge for cause against a juror who, despite his personal opposition to the death penalty, unequivocally stated his ability to follow the law and give a sentence of death in an appropriate case, violated appellant's rights to an

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[13] A defense motion for sequestered voir dire was denied by the trial court. (3 RT 522-529; see Argument V, *post.*)

impartial jury, a fair and reliable capital sentencing hearing, and due process under the Sixth and Fourteenth Amendments to the United States Constitution (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 518 (hereafter "*Witherspoon*"); *Wainwright v. Witt* (1985) 469 U.S. 412, 423) (hereafter "*Witt*"), and article I, section 16 of the California Constitution. Appellant's death sentence must be reversed.

B. Juror No. 111 Was a Qualified Capital Juror; His Exclusion Was Reversible Error

The right to a jury trial "[g]uarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722, quoted in *Morgan v. Illinois* (1992) 504 U.S. 719, 727.) To excuse all jurors who express conscientious objections to capital punishment "violates the defendant's Sixth Amendment-based right to an impartial jury and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1285, quoting *Witherspoon, supra*, 391 U.S. at p. 521.)

In *Witt*, citing the standard enunciated in *Adams v. Texas* (1980) 448 U.S. 38, the United States Supreme Court held that "[a] prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Witt, supra,* 469 U.S. at p. 434; *Adams v. Texas*, *supra*, 448 U.S. at p. 45.) This Court has articulated the same standard. (*People v. Tate* (2010) 49 Cal.4th 635, 665-666, citing *Witt, supra,* 469 U.S. at p. 424; *People v. Stewart* (2004) 33 Cal.4th 425, 445.) Thus, a bias in favor of one penalty warrants disqualification from the jury only if the trial court determines that a prospective juror is unable to "faithfully and impartially apply the law." (*People v. Wilson* (2008) 44

Cal.4th 758, 779.)

The party seeking exclusion of a prospective juror bears the burden of demonstrating that the challenged potential juror lacks impartiality. (*People v. Stewart, supra,* 33 Cal.4th at p. 445, citing *Witt, supra,* 469 U.S. at p. 423.)

Referring to the decision to excuse Juror No. 111 for cause, the trial court observed that it found "this one a little more difficult than the others" (12 RT 2589), but ultimately ruled that the juror's "personal beliefs . . . would result in him being unable to follow the law and impair his ability to accept the responsibilities for this case" (12 RT 2591).

The trial court's finding was based on a misrepresentation of the juror's statements and a misapplication of the law and as such cannot stand.

1. Juror No. 111 Was Opposed to the Death Penalty, but Willing to Set Aside his Beliefs and Follow the Law

A prospective juror's ability to honor his or her oath as a juror even while holding strong feelings about the death penalty is the critical inquiry in determining the qualification to serve. "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *Witherspoon, supra,* 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State"].)

Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by

the court." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) The same standard is applicable under the California Constitution. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 767; *People v. Blair* (2005) 36 Cal.4th 686, 741.)

Juror No. 111 completed a juror questionnaire and was extensively questioned by the parties and court about his attitude toward the death penalty and his ability to follow the law. A review of the record shows that Juror No. 111 said nothing on his questionnaire nor during voir dire to contradict or undermine his consistent assurances that despite his opposition to the death penalty he could and would follow the law.

The questionnaire completed by prospective jurors, including Juror No. 111, had two parts: section A – "General Information," and section B – - "Attitudes Regarding the Death Penalty." (14 CT 4145-4192.) Juror No. 111's responses revealed that he was a married software engineer, and an inexperienced juror with no previous criminal experience other than having spent a night in the "drunk tank" eighteen years previously. (14 CT 4147, 4150-4151.)

His questionnaire answers made clear that Juror No. 111 was opposed to the death penalty. In response to Question 83, which asked, "What are your GENERAL FEELINGS about the death penalty?," he wrote, "I think it is not for human being [sic] to judge whether someone should be killed. I am against it, but I will obey the law and instructions from the court." (14 CT 4176.)

Question 43 asked, "Will you have any difficulty keeping an open mind until you have heard all the evidence and you have heard all the arguments of both counsel, and the court has given you all the instructions?" Juror No. 111 answered "No," and added, "Although I'm not confident I could recommend death in any scenario." (14 CT 4161.)

In response to Question 84, which asked: "(a) Do you feel that the death penalty is used too often? Too seldom? Please explain:" Juror No. 111 wrote, "Too often. I'd rather it not be used at all." (14 CT 4177.)

Along with his opposition to the death penalty, Juror No. 111 made equally clear by his questionnaire answers his willingness to set aside his personal feelings and follow the law. In addition to his answer to Question 83 quoted above, Juror No. 111 answered "Yes," to Question 85(f), which asked: "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?" (14 CT 4182.)

To the remainder of the questions posed in Section B of the questionnaire, Juror No. 111 was equally consistent in his responses. According to his questionnaire answers, he would *not*, because of his views on capital punishment do any of the following: refuse to find the defendant guilty of first degree murder even though he believed the defendant to be guilty just to prevent the penalty phase from taking place; refuse to find the special circumstances to be true in order to prevent the penalty phase from taking place; automatically refuse to vote in favor of a penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole without considering any of the evidence of any aggravating and mitigating factors and background and character of the defendant. (14 CT 4179-4180.) Nor did he belong to "any group(s) that advocate(s) the increased use or the abolition of the death penalty." (14 CT 4177.)

On voir dire, Juror No. 111 was also consistent in his assertions that while he was not in favor of the death penalty, he could envision cases, including the present one, in which he could impose it. Pressed by the prosecutor to explain how he could reconcile his opposition to the death penalty with his obligation as a juror to follow the law, Juror No. 111

answered by describing his thought process on that very question. (12 RT 2503-2504.)

Referring to a statement made during the voir dire of another prospective juror regarding whether "death is appropriate," Juror No. 111 said it had prompted him to try to think of a scenario in which he might consider death to be an appropriate sentence. He described one scenario: "children in a playground and a repeat offender, and you know, someone that is so evil in my mind that there's just no hope of ever being able to contribute back to society in any way, shape or form." (12 RT 2505.) In that case, he asked himself, "could I really think that death was appropriate? Personally? Yeah, I think maybe, you know." (*Ibid.*) At the same time, he said, in "the majority of the scenarios, I just really have a hard time personally thinking that death is an appropriate penalty." (*Ibid.*)

Juror No. 111 continued to explain his thought process:

> Now, the question is how important is my personal opinion as to what's appropriate or not in a case like this. I don't know what all the instructions are going to be. I don't know what the – I don't know – I haven't been through this before. I don't know really where [sic] my personal opinions can amount to. So can I say to you, no, I will never consider voting for death? I – first of all, I don't think I can do it not having listened to any of the evidence, but I think it's very unlikely. There was a question before that said would you be leaning one way or the other, I'd be leaning toward life.

(12 RT 2505-2506.)

In response to the prosecutor's question whether "in almost all cases you would – or could not find it appropriate to impose the death penalty?", Juror No. 111 answered, "Yes." (12 RT 2506.) However, when the prosecutor presented him with the facts of the present case – "one murder, one rape, one sodomy, and the special circumstances that you know about" – and asked if that was a situation in which he could impose the death

penalty, Juror No. 111 answered, "There's a chance, yes." (12 RT 2507.) In addition, as set forth in more detail below, during further questioning by defense counsel, Juror No. 111 agreed that if he were to hear more evidence of aggravating factors, that would enhance his ability to impose the death penalty in this case. (12 RT 2518.)

The prosecutor continued to question Juror No. 111 about his assertion that he would follow the law regardless of his personal feelings about the death penalty. "On a couple of occasions in your questionnaire you maybe expressed your feelings, and then the second part of expressing your feelings as 'whatever my personal feeling is, I will do whatever the law requires me to do.' Is that a fair assessment of your attitude?" Juror No. 111 responded, "I remember the – yeah, I remember it." (12 RT 2503.)

The prosecutor asked Juror No. 111 if his opposition to the death penalty was based on religion. He responded,

> Yeah, I guess . . . I wouldn't associate it with religion. It's a belief. So, if you want to call it religion, I guess you can call it religion. I just don't feel like I could ever possibly having [sic] enough – I'm not sure how to put it. [¶] I mean – yeah, okay, call it religion like you say. It would preferably be something that God chooses whether someone should live or die as opposed to a human being making that choice for another human being. I don't think it's appropriate for –

(12 RT 2510.)

The prosecutor interrupted and asked if the juror was going to say that he could never have enough wisdom, and he responded, "Yeah, wisdom would be the right word, or knowledge, or having lived in a person's shoes, or knowing the circumstances of the events, or what led up to the events, or any of that to feel qualified . . . ." (12 RT 2511.)

In response to the prosecutor's request to explain his position, given his previous statements that he could "maybe impose" the death penalty,

Juror No. 111 described experiencing, "a conflict between my civic duty and what I believe. And so given a choice of how do I choose between those two things, it's kind of one of those things I'm hoping that I don't have to – it doesn't have to come down to that." (12 RT 2511.) He went immediately on to explain how he had resolved that conflict:

> If it does come down to that, my belief is that I will follow my civic duty because it's not – in that case, I guess I justify the decision based on the fact that it's really not my moral choice, it's my choice based on evidence and my civic duty to do this, and it's not like I'm personally volunteering to go and decide whether someone should live or die.

(*Ibid.*)

Before allowing defense counsel to voir dire Juror No. 111, the trial court questioned him further, asking him if he decided that the aggravating evidence was so substantial in comparison with the mitigating circumstances that it warranted a sentence of death, "let's call that the funnel that you have to go through to get to that. You feel that that funnel would be made narrower because of your personal reluctance to impose that?" (12 RT 2513.) Juror No. 111 responded, "I guess maybe the answer to your question is yes, because when I look at this case and the sum total of the charges that are on the table, I – I think that that is going to be very – it's going to be a very narrow funnel." (*Ibid.*)

The court offered its interpretation of the juror's answer:

> So, what I think I just heard you say, correct me if I'm wrong, is that when you get – if you were to arrive at this point, based on the evidence in this case, that under law [sic] you could see your way clear to the option of voting for [sic] death penalty, your mind would then add to the equation but I'm not for this at all, and on that ground I – that's reversing everything that I would otherwise do. I'm going to go the other way. I've narrowed the funnel towards the possibility of death by my personal belief.

(12 RT 2514.)

Before Juror No. 111 could respond, trial counsel objected to the court's characterization of the juror's answer. The court overruled the objection and asked the juror a final question, "I'm simply taking and asking you, sir, to put in the equation, if you wish, your personal feelings, your opposition to the death penalty, and obviously, the overall thrust of my question is whether you feel it would interfere with your ability to consider the options at either end." (12 RT 2515.)

Juror No. 111 responded, "I guess when you say aggravating and mitigating factors, I guess my answer is the bar is going to be higher in terms of the need for substantial aggravating circumstances." (12 RT 2515.) The court asked, "Because of your – " and the juror interrupted to say, "Well, yes." The court responded, "I understand that analogy." (*Ibid.*)

During questioning by defense counsel, Juror No. 111 was asked again about his ability to set aside his personal beliefs about the death penalty and follow the law. Trial counsel asked, "I think you eloquently said that the struggle that you're having is your own moral judgment, if you were king of the land and could write the laws versus your civic duty, right?" Juror No. 111 responded, "Right," and agreed with counsel's observation that civic duty was important to him and "trumps" what he would otherwise do. (12 RT 2517.)

Referring to the court's analogy of the "funnel" through which Juror No. 111 would view the decision whether to impose the death penalty, counsel asked him if there was evidence of additional aggravating factors beyond what he presently knew about the facts of the case "then that might sort of reopen the funnel to some degree; is that fair?" Juror No. 111 responded, "That's fair." (12 RT 2518.)

Defense counsel asked Juror No. 111 if he understood that appellant had the right to a jury that represented a cross-section of the community, including jurors with views like his, as long as they did not say, "I cannot follow – I will not follow that particular law." Juror No. 111 responded, "That makes sense." (12 RT 2518.)

The voir dire ended with counsel summing up his impression of the juror's position, "And it sounds to me like though you have – though it would be difficult, you can impose the death penalty in this case potentially?" Juror No. 111 answered, "That's – that's right. I said that and that's what I believe. It's not that I can look at you and say I've done it before. If I've done it before, I can say with certainty yes, that's how I feel now." (12 RT 2519.)

As the record clearly demonstrates, Juror No. 111 was thoroughly questioned by both parties and the court on the precise question the court had to decide, and at every opportunity, and regardless of who was asking him, Juror No. 111 reaffirmed his commitment to set aside his personal beliefs and follow the law. (Cf., *People v. Gray* (2005) 37 Cal.4th 168, 192-194 [juror's answers differed on ability to impose death penalty depending on who was asking question].)

2. The Court's Ruling Sustaining the Prosecutor's Challenge is Based on a Misrepresentation of Juror No. 111's Consistent and Unequivocal Assertions that He Could Impose the Death Penalty in this Case and a Misapplication of the Law Regarding the Qualifications of a Capital Juror

A review of the record demonstrates that the trial court conducted a careful voir dire, and that the court was receptive to arguments by counsel about its rulings on challenges. Indeed, it is the thoroughness of the court's rulings that reveals that in the case of Juror No. 111, the court made

significant misrepresentations regarding the juror's statements, and manifested by its ruling a clear misapprehension of the law. The statements made by the prosecutor in support of his challenge to Juror No. 111 and the trial court's agreement with his reasoning in sustaining the challenge reveal the misapprehension by both the court and the prosecutor that the juror's statements were disqualifying.

For example, the prosecutor noted that Juror No. 111 had "spent quite a bit of time pursuing this apparent paradox that he was expressing, that he has strong personal feelings against the death penalty but he has a strong feelings [sic] that he wants to do his civic duty." (12 RT 2586.) The prosecutor also noted that Juror No. 111 had made "statements . . . [that] clearly manifest a strong personal animosity towards the death penalty . . . ." (*Ibid.*) Contrary to the prosecutor's erroneous conclusion that, "that manifestation of his personal belief *by itself* would indicate a substantial likelihood that his ability to be fair and impartial would be impaired by those personal feelings," the juror's stated positions were not disqualifying. (12 RT 2586, italics added.) As this Court has consistently held, "strong views for or against the death penalty do not necessarily provide a basis to excuse a juror on the grounds of actual bias." (*People v. Mai* (2014) 57 Cal.4th 986, 1041, citing *People v. Blair*, *supra*, 36 Cal.4th at p. 741; *People v. Martinez* (2009) 47 Cal.4th 399, 425.)

The prosecutor offered his interpretation of Juror No. 111's statements, claiming that he said, "I'm going to raise the bar because of my personal feelings, I'm going to narrow that funnel because of my personal feelings, I'm going to be, *in my interpretation of what he said*, substantially affected in my jury decision-making process by my personal feeling against the death penalty." (12 RT 2587, italics added.) Again, however, the prosecutor's interpretation of the juror's statements as disqualifying – an

interpretation shared by the trial court – was mistaken. As discussed in greater detail below, this Court has held: "That a prospective juror might weigh the aggravating and mitigating evidence in light of his or her death penalty views is not necessarily a ground for exclusion." (*People v. Mai*, *supra,* 57 Cal.4th at p. 1041.)

As trial counsel correctly noted in arguing against the prosecutor's challenge, Juror No. 111 was clear about the different states of mind that he had about the death penalty: "One is a personal view and one is his civic view of it." (12 RT 2588.) Counsel pointed to the juror's "yes" response to the questionnaire query whether he could set aside his personal feelings, and continued, "He went on after much pressing in this area to continue to say that his civic duty overcomes it . . . ." (12 RT 2588.)

The trial court's finding that Juror No. 111 was not a qualified capital juror – a decision which the court deemed "a little more difficult than the others" (12 RT 2589) – was based on a distorted and erroneous characterization of the juror's stated position of his ability to impose the death penalty, and a misapplication of the law regarding the qualifications of a capital juror.

The trial court acknowledged that Juror No. 111 answered the "Witt-Witherspoon question in a manner that would not indicate a difficulty with accepting the law,"[14] and that the answers on his questionnaire to the "specific questions on – the three elements that might potentially come up in the sentencing hearing . . . indicat[ed] he could consider those things

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[14] Presumably, the court was referring to Question 85 (f) which asked: "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?" (14 CT 4182.)

without difficulty." [15] (12 RT 2589.) The court noted that he answered Question 43 by saying "I'm not confident I could recommend death in any scenario." (12 RT 2589.) As previously discussed, however, on voir dire, Juror No. 111 stated his ability to impose the death penalty in certain cases, including the present one.

The court inaccurately represented the juror's position when it stated, apparently reviewing its notes, that the juror said in response to the question asked by the prosecutor or the court whether he could impose the death penalty, that "he was against it generally, that it was hard to – I can't read my word here – it was hard to think of, I guess, or suppose a case where he could impose it." (12 RT 2590.) The record does not support the court's notes or recollection: Juror No. 111 said that he *could* think of cases – albeit not the majority of cases – in which he could impose the death penalty. He gave as an example a case involving child victims and a recidivist defendant, and also agreed that under the bare facts of the present case, knowing nothing more about it than the charges against appellant, that he could impose the death penalty. (Cf., *People v. Bradford* (1997) 15 Cal.4th 1229, 1320 and cases cited therein [jurors properly excused for

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[15] Question 87 asked: "Do you believe the emotional impact of testimony from the victim's family and loved ones about the loss that they have suffered would upset you or influence you so greatly that it would affect your ability to remain impartial between the two available sentences? (Yes? No?)" Juror No. 111 answered: "No." (14 CT 4184.) Question 88 asked: "Would you refuse to consider testimony from the victim's family and friends regarding the impact of the loss of their loved one? (Yes? No?)" Juror No. 111 answered: "No." (14 CT 4184.) Question 89 asked: "In determining the appropriate punishment, life without the possibility of parole or death, would you weigh and consider the defendant's background, upbringing and childhood as factors? Yes? No?" Juror No. 111 wrote: "Yes," and added: "[I]f I was instructed to do so, I would." (14 CT 4184.)

cause whose hypothetical examples of cases in which they could impose the death penalty presented more egregious facts than those involved in the present case].)

At the end of its voir dire of this juror, the court asked him a pointed question: whether his personal beliefs would interfere with his ability to consider both penalties.[16] Juror No. 111 was candid in his response; while he did *not* say that his beliefs would *interfere* with his ability to impose the death penalty, he did acknowledge that they would *influence* his penalty decision. (12 RT 2515.)

It was this position that led the court to its erroneous ruling, as revealed by the court's characterization of the juror's statements. Referring to Juror No. 111's answer, the court stated, "And then he launched into this distinction between his duty to follow the law and his personal beliefs and seemed to say that following the law meant doing the job of a juror as we've all attempted to outline it here without imposing his personal beliefs on the outcome." (12 RT 2590.)

The court continued,

> Given the conflict between his stated written positions and this discussion, I'm the one – I accept the responsibility for trying to put it in a way that was designed to think about if he followed the law, as he put it, and he did this weighing and he became convinced that the aggravating circumstances substantially outweighed the mitigating circumstances would he nevertheless feel compelled to impose his personal belief as a barrier, if you will – I put it narrowing the funnel – as a

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[16] The proper question is whether a juror's ability to *impose* the death penalty is impaired. (*Uttecht v. Brown* (2007) 551 U.S. 1, 10.) While the trial court here, and at other times, framed the issue as the juror's ability to "consider" the death penalty, with the exception of this question, Juror No. 111 was only asked and responded affirmatively to the question whether he could impose the death penalty. (See, e.g., 12 RT 2507, 2518, 2519.)

> barrier to imposing the death penalty. And I didn't write down his exact answer, but, as I recall, he said yes, that's true. He's the one that came up with the answer that yes, he would – the bar would be higher for him. And I took that to mean that the bar would be his personal beliefs which he had difficulty overcoming in considering the death penalty as a result.

(12 RT 2591.)

Asking a rhetorical question "What do I get from all of this?" the court stated, "I get a man struggling with his ability to accept the doctrines of law we would explain to him, to think about the fact that he might be under law and doing his duty feel compelled to reach a decision by the weighing process and then be prevented from doing it because of his personal beliefs." (12 RT 2591.) Juror No. 111 said nothing of the kind, nor were any of the juror's statements reasonably susceptible to the court's characterization of his answers. Contrary to the trial court's understanding, the position taken by Juror No. 111 is not disqualifying; on the contrary, it is one sanctioned by well-settled authority.

A "[s]tate may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths," but it may not "exclude jurors whose only fault [is] to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected" by their views on the death penalty. (*Adams v. Texas, supra,* 448 U.S. at pp. 50-51.)

Consistent with United States Supreme Court precedent, this Court has long held that a "juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Jones* (2012)

54 Cal.4th 1, 42, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 699; see also *People v. Stewart*, *supra*, 33 Cal.4th at p. 447, referring to the decision in *Kaurish*, "a prospective juror may not be excluded for cause simply because his or conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty"].) This precisely describes Juror No. 111, who candidly acknowledged that his opposition to the death penalty would affect his decision.

As the high court explained in *Witherspoon*: "[A] jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death." (*Witherspoon, supra,* 391 U.S. at p. 519, fn. omitted); accord, *People v. Gamache* (2010) 48 Cal.4th 347, 389 [because "jurors *are* the conscience of the community," it was not error for the prosecutor to say so in argument, citing *Witherspoon, supra*, 391 U.S. at p. 519.])

The high court in *Witherspoon* made this point in the context of discussing the jury's broad discretion under Illinois capital sentencing law at the time. (*Witherspoon, supra,* 391 U.S. at p. 519). This Court has stressed the jury's similarly broad discretion under California law: "Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her]

duties as a juror' under *Witt, supra,* 469 U.S. 412." (*People v. Stewart, supra,* 33 Cal.4th at p. 447.)

Instead of recognizing that Juror No. 111 had unmistakably articulated his willingness to set aside his opposition to the death penalty in order to accommodate his strong feelings of civic responsibility, the court inaccurately cast the juror's personal beliefs as a "barrier" to imposing the death penalty – something Juror No. 111 neither said nor implied.[17] Juror No. 111's candid acknowledgment that the "bar would be higher" was not a basis for exclusion. As the record makes clear, however, the trial court believed otherwise and applied an incorrect legal standard in excusing Juror No. 111.

The trial court was aware of the concept discussed in *Kaurish* – the court later quoted from the case during a discussion of a defense challenge (17 RT 3574) – but its interpretation was erroneous. After remarking that "I find some of these cases difficult," and "I'd be the first one to agree with anybody who wants to make a point that these concepts are confusing . . . , the court offered its interpretation of the language from *Kaurish* and portions of CALCRIM No. 766.[18] The court stated, "the appropriateness of

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[17] Further evidence of the strength of Juror No. 111's feelings of civic duty was his willingness to serve as a juror despite the possible financial hardship he said he might experience as a result. When the prosecutor asked him about how the loss of income might affect his ability to concentrate should the trial go longer than anticipated, the juror responded, "I look at it I have a civic duty and I have a capacity to deal with the financial issues and, you know, we don't always get to do what we choose, what we prefer." (12 RT 2503.)

[18] The court quoted from this instruction: "Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. And to return a judgment

(continued...)

the death vote, or the life vote, has to be made based on the weighing circumstances; that they're not free to add, under the guise of something that an individual feels is appropriate, some other consideration, like their personal predilection, their favoring of LWOP, their favoring of death." (17 RT 3576.)

As a result of its misinterpretation of the law, the court incorrectly equated Juror No. 111's statement that the "bar would be higher" – an acceptable position for a capital juror to take so long as it does not preclude him from engaging in the weighing process and returning a death verdict – with an impermissible position – that his personal beliefs would constitute a "barrier" to imposing the death penalty.

The trial court thus abused its discretion and this Court must conclude, "[i]n a case such as this where fundamental rights are affected by the exercise of discretion by the trial court, . . . such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; see also, *People v. Knoller* (2007) 41 Cal.4th 139, 156 [abuse of discretion arises if court's decision based on an incorrect legal standard].)

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[18](...continued)
of death, you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified." (17 RT 3575.) The court also quoted another paragraph of CALCRIM No. 766: "Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together . . . ." (17 RT 3576.)

3. The Court's Decision Was Not Based on the Juror's Demeanor

Lending further strength to appellant's argument that the court's excusal of Juror No. 111 was based on a misapplication of the law is the fact that the record shows clearly that the trial court's ruling was not based on the juror's demeanor.

The trial court was well aware of the role of demeanor-based information in determining the death qualification of prospective jurors. In its resolution of a prosecution challenge to a juror who offered conflicting statements about her ability to impose the death penalty, the court cited *People v. Roldan* (2005) 35 Cal.4th 646, regarding the court's consideration of demeanor. (10 RT 1971.) Thereafter, the court denied the prosecutor's challenge noting that the juror was "calm in her demeanor. She was thoughtful . . . she was very honest . . . ." (10 RT 1972; see also 10 RT 1961-1962 [court comments on juror's demeanor in discussing prosecution challenge for cause].)

The trial court made demeanor findings to resolve conflicting statements by prospective jurors throughout voir dire. Indeed, in the court's rulings on the vast majority of challenges submitted, the court made a point of commenting on the juror's demeanor.

For example, the defense challenged a juror who gave conflicting statements about whether he would require appellant to testify. Initially, the juror said he would need to hear appellant testify, but after hearing more information about the law regarding the issue, he changed his answer and said he would follow the law. (16 RT 3310.) In denying the defense challenge the court noted that the juror,

> upon explanation and upon being reminded of the privilege against self-incrimination and the reasons for it and its place in the process realized that that was something that he should

> not do and changed his answer accordingly, and you'll all note with him, he was fairly thoughtful in his response. He's a quiet speaking man, slow and responsive to questions, and I thought his last answer was worthy of belief, and I accept it.

(16 RT 3311.)

Ruling on a prosecution challenge to a juror who said in her questionnaire that she felt that life without possibility of parole was a more severe penalty than death, the court rejected the defense argument that the juror was qualified based on her statements that she could set aside her personal beliefs and follow the law. During its discussion of the juror's statements on voir dire, the court made the following observations:

> By the way, it's interesting to note as I begin this conversation with you that all during the questioning of the people leading up to her she sat slumped in her seat with her arms crossed across her chest. I was kind of watching that, because it indicated to me someone that was really reluctant to participate in this whole process. That was my observation. When we got to her, she came around, and began responding to the questions. But I think it's worth noting. I read that she was not happy from the get go with the prospect of being here.

(16 RT 3321.)

The court went through the juror's responses and expanded on its own thought process,

> I find – I'm weighing this, and plus my observations of, as I said, her real expressed and implied feeling that she doesn't want to be part of this process but her insistence that if she had to could [sic] follow that law, I find that she is simply equivocal on whether her not wanting to be here and the difficulty of the decision and the feelings that will interfere with her ability to be fair, just I equivocate [sic] when it comes to would these things interfere with her ability to be fair and impartial and to follow the law.

(16 RT 3322.)[19]

By contrast, the trial court made no such demeanor-based comments about Juror No. 111, and nothing in the record suggests in any way that his demeanor was an issue. During voir dire by the trial court and both counsel, he answered each question asked and appears to have been forthright about his views. There is no suggestion that he was evasive, nervous, hostile or confused in answering the trial court's questions. The same is true about his voir dire by the prosecutor. On the contrary, the juror was forthright about his lack of experience as a juror and sought information about the rules and procedures that applied. Moreover, neither the prosecutor in moving to exclude Juror No. 111, nor defense counsel in opposing it, commented on his bearing or behavior. Both counsel, like the court in its ruling, focused entirely on the juror's statements and their significance to his qualification. Juror No. 111's demeanor does not appear from the record to have entered into the prosecutor's challenge, defense counsel's opposition, or the trial court's ruling to exclude him from the jury.

Nor does the record in this case support a finding that, based on the

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[19] The court made many other demeanor-based comments during voir dire. (See, e.g., 9 RT 1868 ["I was watching as he was giving answers. I believe he noted and accepted"]; 10 RT 1972; 10 RT 2033 ["she was extremely hesitant. I watched her. She was slow and reluctant to give answers"]; 11 RT 2356 ["thought her answers were very serious. They were not flip or precanned answers"]; 12 RT 2582 ["I thought [she] was direct and thoughtful about her answers"]; 16 RT 3311 ["quiet speaking man . . . fairly thoughtful in his response, slow and responsive to questions. Thought his last answer worth of belief"]; 18 RT 3814 ["soft spoken, shy . . . reluctant to get too much involved in the questioning process"]; 18 RT 3814 ["answers that are acceptable of belief"];18 RT 3818 ["My conclusion is from all of my observation that his ultimate conclusion is that he could follow the law"]; 24 RT 4921 ["I believe her when she says she's concerned about [her husband]"]; 24 RT 4922 ["this lady was thoughtful, slow to – I mean she spoke slowly and deliberately, thoughtfully"].)

court's observations it simply did not believe the juror's assertion that he could set aside his beliefs and follow the law.

In *Uttecht v. Brown*, *supra*, 551 U.S. 1, the Supreme Court stated that, "In determining whether the removal of a potential juror would vindicate the State's interest [in having jurors who are able to apply the death penalty] without violating the defendant's right [to an impartial jury not tilted in favor of capital punishment], the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." (*Id.* at p. 9, citing *Witt*, *supra*, 469 U.S. at pp. 424-434.)

Relying on *Uttecht*, this Court recently upheld the trial court's dismissal of several prospective jurors based on their brief answers to an initial screening question on the questionnaire about the ability to impose the death penalty. (*People v. Capistrano* (2014) 59 Cal.4th 830, 859-860.) Rejecting the argument that no deference was due because the court lacked a basis for drawing conclusions about the jurors' demeanor or credibility, this Court observed, "The fact remains the trial court was present at the voir dire and we were not." (*Id.* at p. 860.)

Putting aside for the moment the question of whether this statement by the Court reflects a belief that every ruling made by a court on a *Witt* challenge is necessarily demeanor-based and therefore entitled to deference, for the reasons discussed above, the Court's reasoning does not apply in this case. In *Capistrano*, this Court assumed that the trial court's decision was based on its assessment of the jurors' demeanor. In the present case, no such assumptions apply because 1) the court's ruling was based on its erroneous legal analysis of the prospective juror's statements and 2) the court did not make demeanor-based findings as to this juror when it had done so in the vast majority of its rulings on other *Witt* challenges.

Moreover, the *Uttecht* court's conclusion that the trial court was

"entitled to deference because it had an opportunity to observe the demeanor of Juror Z" (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 17) was tied to the record – to the fact that everyone who observed Juror Z's voir dire, including defense counsel who waived an objection to his exclusion, appeared to believe he should be excluded (*id.* at p. 18).[20] As shown above, there is nothing comparable in the record regarding Juror No. 111 to suggest that his demeanor was a ground for the trial court's decision to exclude him. On the contrary, here the defense not only objected to the court's ruling, it also challenged the juror's exclusion by taking a writ to the Court of Appeal. (12 RT 2585; 34 RT 6898.)

Finally, while it is true that the high court in *Uttecht* held that a trial court's conclusion is entitled to deference, it also held, "the need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown*, *supra*, 55 U.S. at p. 20.) As discussed above, the record contains no evidence that Juror No. 111 was substantially impaired.

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[20] The high court explained:

> We do not know anything about his demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal. Nevertheless, the State's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z support the conclusion that the interested parties present in the courtroom all felt that removing Juror Z was appropriate under the *Witherspoon–Witt* rule. See *Darden*, 477 U.S., at 178, 106 S.Ct. 2464 (emphasizing the defendant's failure to object and the judge's decision not to engage in further questioning as evidence of impairment).

(*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 17-18.)

4. The Trial Court's Finding Is Not Binding Because Juror No. 111's Statements about His Ability to Impose the Death Penalty Were Neither Conflicting Nor Ambiguous

A reviewing court will uphold a trial court's ruling on a challenge for cause "if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Lewis* (2008) 43 Cal.4th 415, 483, citations and internal quotation marks omitted.)

In a case such as the present one, however, "[w]hen the juror has *not* made conflicting or equivocal statements regarding his or her ability to impose either a death sentence or one of life in prison without possibility of parole, the court's ruling will be upheld if supported by substantial evidence." (*People v. Pearson* (2012) 53 Cal.4th 306, 327-328, citing *People v. Horning* (2004) 34 Cal.4th 871, 896-897, italics added.)

The record does not support the trial court's finding that Juror No. 111's views regarding the death penalty would prevent or substantially impair the performance of his duties as a juror. In making its ruling, the court cited the "conflict" between the juror's questionnaire answers – which the court found were qualifying under *Witt* – and his voir dire responses – which the court erroneously believed were disqualifying. (12 RT 2591.)

In fact, however, there was no conflict between the juror's statements that while he was opposed to the death penalty, he was willing and able to set aside his personal beliefs and follow the law. While Juror No. 111 asked for clarification and additional information about the appropriate role his personal beliefs played in making a decision about penalty, he never expressed any difficulty accepting or following the law. Indeed, once the court explained that the jurors make an individual decision

about the evidence offered at the penalty phase and the weight to be assigned to aggravating and mitigating evidence, Juror No. 111 not only expressed no difficulty accepting the law as explained by the court, he made quite clear that he understood the court's explanation of the process and with that understanding was willing to follow the law.

By definition, a person who harbors strong feelings against the death penalty experiences a conflict when he or she is asked to sit as a juror in a capital case, but in order to be qualified to sit on a capital case, prospective jurors are required only to temporarily set aside – not disavow – those views. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176.)

Juror No. 111, who had no experience as a capital juror, expressed his unfamiliarity with the process, asking "how important is my personal opinion as to what's appropriate or not in a case like this . . . I don't really know where [sic] my personal opinions can amount to." (12 RT 2505.)

The court explained to another prospective juror who echoed the question posed by Juror No. 111 – "do I just decide this person is going to die?" – that each juror individually makes a determination about aggravating and mitigating factors and, "[t]he way you reach a decision is by studying the evidence – all the evidence you heard in the trial, for openers, and then any additional evidence that comes in in the penalty phase, determining, if you can find anything that's mitigating, anything that's aggravating, weigh them individually as a totality and individually and decide if the aggravating ones substantially outweigh the mitigating ones." (12 RT 2500-2509.) After hearing the court's explanation of the process, Juror No. 111 stated his belief that "I will follow my civic duty because . . . it's my choice based on evidence and my civic duty to do this." (12 RT 2511.)

As this Court has recognized, "A prospective juror's responses on these issues may be conflicting or ambiguous, *or may demonstrate understandable confusion about the complexities of death penalty law.* Such responses do not necessarily require or justify, a juror's excusal for bias." (*People v. Mai, supra*, 57 Cal.4th at p. 1042, italics added.) Instead what often happens during the juror qualification process, and what was clearly the case with Juror No. 111, is that jurors are educated by what they hear during the voir dire process from other jurors and from the court and their opinions evolve. The statements made by Juror No. 111 over the course of voir dire make clear that his questions had been answered and he was confident that he could vote to impose the death penalty. (12 RT 2519.) As he repeatedly explained, any initial hesitation on his part was because of his unfamiliarity with the process.

The trial court recognized this phenomenon, as demonstrated by statements the court made to other prospective jurors. Juror No. 74 stated in her questionnaire that although she was against the death penalty, she would not automatically refuse to vote in favor of it, that she would keep an open mind and that she could be fair. (12 RT 2477.) Questioning her about those statements on voir dire, the court asked, "[W]e threw this questionnaire at you on fairly short notice and you had the better part of about three weeks to reflect further. How do you feel today? Is that still your state of mind that last – [?]" (*Ibid.*) The juror interrupted to say that after reflecting on her answer she realized that she could not be against the death penalty and say she could vote for it. "So, I would have to change my answer to say I would not be able to vote for the death penalty in any situation." (*Ibid.*)

The court asked the juror if she had "given that some thought" "since you wrote those words?" and she said she had. The court stated, "I really

appreciate your candor . . . *What we look for is today's state of mind.* And I'm not going to press you other than to say if the People prove their entire case in the guilt phase and we move to the penalty phase, facing the possibility of choosing between death and life without parole, could you vote for the death penalty?" Juror No. 74 responded, "No." (12 RT 2477-2478, italics added.)

Similarly, while discussing a prosecution challenge to a juror who changed her answers about her ability to impose the death penalty, the court referred to the fact that she "came around" to her "final answer," which the court found to be a "thoughtful and studied conclusion." The court ruled, "So I'm finding that her views *as finally stated* will not impair her performance . . . ." (24 RT 1972, italics added.)

Later in the voir dire process, responding to an objection by trial counsel that the court was improperly rehabilitating death-leaning jurors, the court offered its opinion that "tossing these concepts out to them in the form of a huge questionnaire is – doesn't educate them sufficiently." (32 RT 6633.) The court felt the need, therefore, to offer additional instruction to the panels at the beginning of the day. And further, when the court felt that jurors still did not fully comprehend after voir dire, it "use[d] my judgment and discretion in determining whether or not a juror answering a question . . . has understood the question." (32 RT 6633.)

The trial court thus made clear that it recognized that voir dire responses often reflect a juror's evolution from his or her questionnaire answers. (See, e.g., *People v. Whalen* (2013) 56 Cal.4th 1, 33 [noting with approval trial counsel's statement that "the questionnaire was 'designed to get [the venireperson's] first impression' regarding the matters discussed; the purpose of voir dire was to determine whether or not those first impressions represented 'solid, firm convictions'"].)

Juror No. 111 made no conflicting or equivocal statements about his ability to vote for death in a factually appropriate case. In his written and oral statements, Juror No. 111 consistently acknowledged both his opposition to the death penalty and his willingness to set aside those feelings and follow the law.

The consistency of Juror No. 111's position is best demonstrated by comparing it to that of jurors whose answers this Court has found to be ambiguous or equivocal. In *People v. Jones*, *supra*, 54 Cal.4th 1, Juror C.B., who identified herself as "strongly against the death penalty," twice said it was "hard to say" whether she would automatically vote for LWOP, said that "she "d[id]n't really know, if she could look the defendant in the eye and say that she sentenced him to death, and later said she "d[id]n't think she could do it just because of her beliefs." (*Id.* at pp. 42-43.) She also said she could be "fair" and "keep my own beliefs to myself." (*Id.* at p. 43.) This Court, in upholding the court's dismissal of the juror noted that her answers were "equivocal and conflicting" and she "repeatedly and candidly admitted that she did not know or was not sure she could follow the law." (*Ibid.*)

In *People v. Carey* (2007) 41 Cal.4th 109, Juror S.M., both in her questionnaire and during voir dire, expressed her opposition to the death penalty except in cases of multiple murders. She stated that she would not vote for death in a case like the one before her, which involved a single murder. Even though, in response to one question by trial counsel, she indicated her ability to impose death on the facts of the case, this Court found that her conflicting answers justified deference to the trial court's determination that she was substantially impaired and found her to have been properly excused. (*Id.* at p. 126.)

Unlike Juror No. 111, who stated his belief that he could vote to impose the death penalty based "on evidence and my civic duty," Juror S.G. in *People v. Montes* (2014) 58 Cal.4th 809, stated during voir dire questioning that if he got to the penalty phase, it was more likely than not that he would vote for LWOP, his decision would be based on his religious and moral beliefs and it would not matter what the evidence was. (*Id.* at p. 844.) After stating his belief that every person deserved the opportunity for reform, the juror said there was "a small possibility," he could impose the death penalty. (*Ibid.*) Based on the juror's "conflicting and ambiguous" statements, this Court upheld the trial court's excusal of the juror, accepting the trial court's determination of the juror's true state of mind. (*Id.* at p. 845.)

Similarly, another juror in *Montes* stated that she would always vote for LWOP, regardless of the evidence. (*People v. Montes*, *supra*, 58 Cal.4th at p. 846.) Despite the juror's earlier responses that she would not automatically vote for LWOP, and her stated willingness to set aside her personal beliefs and follow the law, this Court upheld the trial court's dismissal, accepting the trial court's determination of her state of mind given her conflicting or ambiguous statements. (*Id.* at p. 847.)

A third juror in *Montes*, Juror C.J., stated on voir dire that he would automatically vote for LWOP and never impose the death penalty. While he said he could put aside his personal beliefs and listen to the court's instructions regarding penalty, he stated that in order to vote for the death penalty he would have to "break one of my morals." (*People v. Montes*, *supra*, 58 Cal.4th at p. 845.) This Court held that the juror's conflicting and ambiguous statements justified the trial court's determination of his substantial impairment. (*Id.* at p. 846.)

Coupled with the complete lack of demeanor evidence suggesting equivocation by Juror No. 111, his statements do not support the trial court's conclusion of substantial impairment. (Cf., *People v. Roldan* (2005) 35 Cal.4th 646, 697, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 and fn. 22 [comments that a prospective juror would have a "hard time" or find it "very difficult" to vote for death reflect "a degree of equivocation" that, considered "with the juror's hesitancy, vocal inflection, and demeanor, can justify a trial court's conclusion . . . that the juror's views would prevent or substantially impair the performance of his duties as a juror"].)

Unlike the juror in *People v. Duenas* (2012) 55 Cal.4th 1, 17, who made one unequivocal statement that he could vote for death, but whose other statements were equivocal, including a repeated inability to say whether he could vote for death, Juror No. 111 never equivocated in his statements. (See also, *People v. Jones* (2003) 29 Cal.4th 1229, 1247 [although a prospective juror "ultimately stated . . . that he could vote to impose the death penalty 'in the right case,'" his prior "sharply conflicting statements" made the trial court's finding as to his true state of mind "binding on us"].)

Juror No. 111 was consistent in his clearly stated willingness "to temporarily set aside [his] own beliefs in deference to the rule of law." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176.) Because there was no conflict or ambiguity in his responses, the trial court's determination that he was substantially impaired is not entitled to deference.

5. Juror No. 111 Held No Other Disqualifying Beliefs

Nothing about the other responses given by Juror No. 111 in his written questionnaire or during voir dire questioning suggested that his feelings about the death penalty were so extreme that they would impair his

ability to follow the law, nor cast doubt on the credibility of his statements that he would do so.

Although Juror No. 111 preferred not to serve on this case (14 CT 4173 ["I hoped it wouldn't be the one I got assigned to"]), such emotions are neither uncommon nor disqualifying per se. (*People v. Rountree* (2013) 56 Cal.4th 823, 848 ["It is no doubt common for prospective jurors, or even sitting jurors, to believe, and perhaps to state, that sitting in judgment in a capital case would be difficult or even one of the hardest things they have been asked to do"]; see also, *People v. Stewart, supra*, 33 Cal.4th at p. 446 ["In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it 'very difficult' ever to vote to impose the death penalty"].) Unless those personal views would substantially impair the performance of his or her duties as a juror, such a juror cannot be excused simply because of the difficulty inherent in sitting as a capital juror.

Juror No. 111 expressed his preference that the decision whether a person should live or die should be made by God. (12 RT 2510). Such a sentiment is also common among prospective capital jurors, but one that renders them unqualified to sit on a capital jury only if the belief prevents them from performing the duties of a juror. The position of Juror No. 111 is a far cry from the "unyielding general opposition to the death penalty based on her religious and moral beliefs" demonstrated by the juror in *People v. McKinnon* (2011) 52 Cal.4th 610, which justified her excusal. She stated "Only God has the right to take a life"; "The more I study the work of God, I find it more difficult to put someone else in a position to die";"When one believes that God created us to follow him and Jesus by faith – it would be difficult to follow man's law." (*Id.* at p. 652.)

Nor can Juror No. 111's preference be equated with the position of a juror in *People v. Cowan* (2010) 50 Cal.4th 401, 441, who said that because determining punishment was for God alone, she could never vote to impose the death penalty.

In other recent cases this Court has upheld excusals for cause based on the effect of jurors' religious beliefs on their ability to act, none of which support a finding of substantial impairment in the present case. The questionnaire answers of Juror S.L. in *People v. Duff* (2014) 58 Cal.4th 527, "revealed someone profoundly conflicted as to whether she could ever personally vote to impose the death penalty" based on her religious beliefs. (*Id.* at p. 541.) Her responses on voir dire "reveal[ed] a deep-seated internal conflict as to whether she could set aside her profound devotion to the perceived dictates of her religious fath in order to follow the court's instructions." (*Id.* at p. 543.) Similarly, in *People v. Rountree*, *supra*, 56 Cal.4th at p. 847, this Court found the "juror could hardly have been more equivocal about whether he could set aside his religious convictions and perform a juror's duties."

Juror No. 111 agreed to do precisely what the law requires of citizens who serve as jurors. (See Code Civ. Proc., § 232, subd. (b) [jurors must swear an oath that they will render a true verdict "'according only to the evidence presented . . . and to the instructions of the court'"].) Thus, he could not be disqualified because serving on the jury would require him to violate a belief, whether it be religious or another aspect of personal conscience. The relevant question was whether, notwithstanding the conflict between his beliefs about the death penalty and the requirements of jury service, Juror No. 111 was able to subordinate those beliefs to the responsibility to apply the law. Because he stated repeatedly and unequivocally that he could do so, and nothing in the record suggested

otherwise, his excusal from the jury violated appellant's constitutional rights and requires reversal of the death penalty.

There is simply no evidence in this record to support the trial court's "definite impression [citation] that [Juror No. 111] would never, under any circumstances, impose one or the other penalty options, and thus [his] personal beliefs would prevent or substantially impair the performance of his duties as a juror [citation]." (*People v. Whalen* (2013) 56 Cal.4th 1, 41, internal quotation marks omitted.)

C. CONCLUSION

Juror No. 111's personal opposition to the death penalty was clear; equally clear was his willingness to set aside that opposition and follow the law. The trial court's ruling is unsupported by the record as a whole and is not entitled to deference. Accordingly, the trial court's excusal of Juror No. 111 was error which requires automatic reversal of the death judgment. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668 (opn. of the court); *id.* at pp. 669-672 (conc. opn. by Powell, J.); *People v. Heard* (2003) 31 Cal.4th 946, 966.)

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II.

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE APPELLANT WAS ERRONEOUSLY DENIED HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION AT THE PENALTY TRIAL

As soon as appellant was fully aware of the mitigation case his attorneys intended to present at the penalty trial – one with which he fundamentally disagreed – he asked the court to allow him to represent himself and put on a defense he believed could save his life. The court denied his request, saying it was untimely, because it was not made before the start of the guilt phase, and was equivocal. Neither reason justifies denying appellant his Sixth Amendment right to self-representation.

Throughout the penalty phase, appellant persisted in his right to represent himself because he objected to his counsel's presentation of evidence that he claimed was false and would turn the jury against him. Each time the court refused, reiterating its unfounded belief that the request was untimely and equivocal.

In doing so, the court violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to self representation, due process, and a reliable penalty verdict, and appellant's penalty verdict must be reversed. (*Faretta v. California* (1975) 422 U.S. 806, 834-835 (hereafter "*Faretta*); *People v. Windham* (1977) 19 Cal.3d 121, 128-129 (hereafter "*Windham*").)

A. Factual and Procedural Background

1. Before the Start of the Penalty Trial, Appellant Informed the Trial Court He Might Assert His Right to Represent Himself

On Wednesday, June 21, 2006, the jury returned its verdicts finding appellant guilty of first degree murder with special circumstances. (6 CT 1640-1642.) Immediately thereafter, at an in camera hearing, defense

counsel Downing, who would be lead counsel for the penalty phase, notified the court that appellant was considering the possibility of representing himself. (46 RT 9452; Sealed 46 RT 9456; 47 RT 9469, 9497.)[21] Counsel stated that she wanted time to talk to appellant, and the trial court granted her request to continue the self-representation question, as well as other matters including setting the date for the start of the penalty trial, until that Friday. (Sealed 46 RT 9456-9459.)

On June 23, 2006, the trial court, over the prosecutor's objection, granted the defense request that the penalty phase begin on July 31 to allow time for Downing's arm, which was in a cast, to heal. (47 RT 9469, 9505-9506, 9508.)

The court and parties discussed issues related to the penalty phase, including scheduling motions prior to the penalty phase and discovery. (47 RT 9476-9477.) Downing told the court that she expected the defense case to take five court days to present and estimated she had 1800 pages of discovery to turn over to the prosecutor. (47 RT 9477.) In addition, at the court's request, Downing listed the experts she expected to call at the penalty phase and their areas of expertise.[22] (47 RT 9485-9487.)

At the end of the court session, appellant asked to address the court and said:

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[21] All the hearings on appellant's *Faretta* motions, except the hearing held on December 15, 2006, were held in camera without the prosecutor being present. The transcripts of the in camera hearings were sealed by the trial court.

[22] The experts named were Dr. Douglas Tucker, a psychiatrist, with experience in sexual assault; Dr. Gretchen White, a psychologist; Dr. Stephen Seligman, a Doctor of Mental Health and expert in the area of attachment theory; and Dr. Kimberly Merrill, a psychologist who treated appellant when he was young. (47 RT 9487.)

> I think it's necessary to go on the record saying that although I'm not submitting a ***Faretta*** motion to the Court presently, I reserve my right to do so at a future time prior to the commencement of the penalty phase trial. And if I choose to do so it will be in both unequivocal and timely manner which will cause no significant delay, if any at all.

(47 RT 9513, original bold.)

On July 17, 2006, at an in camera hearing with the court and appellant present, Downing asked the court to facilitate a phone call between appellant and his biological mother, Barbara Tinsley. According to Downing, appellant wanted "to hear directly from her whether or not this is something she really wants or whether or not we pressured her to come and testify on his behalf." (Sealed 47 RT 9545.)

On July 26, 2006, the trial court heard in limine motions. The defense moved to admit two videos that would support the testimony of one of their experts, Dr. Seligman, about attachment theory. The videos had to do with experiments involving, among other things, monkeys who were deprived of contact with their mothers and subsequent research on the detrimental effect upon a child's psychological development as a result of a lack of maternal attachment. (47 RT 9626-9631.)

The defense also proffered a video about appellant's family and upbringing, referred to by the parties as the Tinsley video. (47 RT 9632, 9636-9637.) While Downing contrasted the nurturing, loving environment in which appellant's siblings were reared by their birth parents – appellant's birth mother and her second husband – with the cold, rigid, and emotionally abusive environment in which appellant was reared by his paternal grandmother, appellant interjected an objection and moved for appointment of new counsel. (47 RT 9632.) The court said it would take up appellant's motion, but first wanted to hear counsel's presentation. (47 RT 9632-9633.)

Counsel continued to explain that appellant's upbringing left him "severely damaged" and again differentiated appellant from his successful half- brother who was raised in a loving environment. (47 RT 9633-9634.) Appellant again objected to defense counsel's presentation and moved for a mistrial because his motion for appointment of counsel was not being heard. (47 RT 9635.)

The court responded, "It will be, sir, if you wish to renew it, but since you're obviously upset, it seems to me, about some of the material you're hearing, I'd like to make sure you hear it all." (47 RT 9635.) Appellant requested that the evidence "remain in camera" because it would not necessarily be admitted at trial. (*Ibid.*) Further, stating that he would file a *Faretta* motion, appellant asserted, "I'd like to represent myself from this point forward." (47 RT 9635-9636.) The court stated it would listen to that motion after counsel answered some questions about the evidence being discussed. (47 RT 9636.)

Appellant moved for a mistrial, which the court denied. (47 RT 9636.) At the conclusion of this portion of the hearing, the court offered counsel time to consult with appellant, who had been asking the court for permission to speak, and whom the court described as "a little animated, perhaps concerned." (47 RT 9638-9639.) After speaking with appellant, Downing announced that appellant wanted to make a *Marsden* motion. (47 RT 9639.)

In an in camera hearing, appellant explained that although on June 23, he had stated that he would be filing a *Faretta* motion, he had not yet done so because he hoped the court would grant his *Marsden* motion. (Sealed 47 RT 9656.) Appellant sought new counsel because he believed (1) his representation at the guilt phase had been ineffective as a result of Downing having a cast on her arm which required a change in the defense presentation

and (2) his attorneys' approach to the penalty phase, which he considered "cheap emotionalism," would misrepresent him. (Sealed 47 RT 9644, 9655.) Downing told the court that she had been working hard on the penalty phase and outlined the extensive investigation and preparation the defense team was conducting. She characterized appellant's attitude as "disagreement about the strategy," but felt that it was her "duty" to work to save his life. (Sealed 47 RT 9646-9647.)

Cocounsel Quandt discussed an incident in the jail the previous weekend during which appellant got into a physical confrontation with some of the guards and suffered physical injuries. (Sealed 47 RT 9647-9649.) Quandt offered his opinion that appellant's motivation for the *Marsden* motion was frustration that his attorneys were not doing enough to protect him in the jail and fear that the abuse would increase during the penalty phase. (Sealed 47 RT 9650-9651.) In Quandt's opinion, the situation in the jail was "causing a major distraction in his ability to prepare and make rational decisions about how to proceed in this case." (*Ibid.*)

The court denied the motion for substitution of counsel, finding that Downing's cast did not affect her performance at the guilt phase. (Sealed 47 RT 9657.) On the issue of appellant's objection to the proposed penalty phase, the court acknowledged appellant's concern, but deemed it a question of trial tactics over which the attorneys had control. (Sealed 47 RT 9658.)

The court also noted that the motion was untimely because the trial was a unitary proceeding and denied the motion. (Sealed 47 RT 9658-9659.)

Appellant told the court that he was not going to file a *Faretta* motion until he had a chance to confer with counsel. (Sealed 47 RT 9659.) He expressed concern, personally and through counsel, that there be no mention on the public record of evidence that defense counsel planned to introduce, but that appellant would not present if he requested and was granted the right

to represent himself. (Sealed 47 RT 9960.) The court reserved appellant's right to make whatever motions he wished. (Sealed 47 RT 9662.)

2. On the First Day of the Penalty Trial, Appellant Asserted His Right to Represent Himself

On July 31, 2006, appellant filed a handwritten *Faretta* motion. (6 CT 1873-1876.) Under penalty of perjury, appellant stated that he intended to represent himself; that he was aware of the dangers of proceeding without counsel and that he would receive no special consideration acting as his own counsel; and that his decision to represent himself was voluntary, knowing, intelligent and timely. (6 CT 1873-1874.) After hearing additional in limine motions and before the prosecutor made his opening statement to the jury, the court held a hearing on appellant's motion without the prosecutor being present. (6 CT 1866.)

At the outset, the court found the motion not timely. (Sealed 48 RT 9792.) It noted the prosecution was "a unitary case, consisting of two parts, both the guilt phase and the penalty phase" and that the motion was made "after a substantial amount of trial time has been invested" and the penalty phase was about to start before the jury. (Sealed 48 RT 9792-9793.) The court explained that "under the case law this is not timely, so I do have to consider that. It's not the end of the considerations, but I have to consider it." (*Ibid.*)

Appellant explained that his request to represent himself was not based merely on the ineffective representation in the guilt phase, but because the trial court excluded evidence of third party culpability and DNA evidence that excluded him as the donor, his counsel were precluded from arguing that he was not guilty. (Sealed 48 RT 9794.) Appellant understood that the penalty phase was not for rearguing the guilt phase. (*Ibid.*) Rather,

appellant sought self-representation because he disagreed with the mitigation theme his counsel planned to present. (Sealed 48 RT 9794.) He criticized counsel's proposed evidence "promoting the theory that I'm a product of a dysfunctional family while projecting images of maternally-deprived apes is likely to be considered by the jury as pure monkey business rather than mitigating factor." (*Ibid.*) In appellant's view, "[w]hile video images of motherless monkeys might be cute, it does not even come close to reflecting accurately how I was raised." (Sealed 48 RT 9795.)

Instead, appellant would opt for a different type of mitigation case: "I don't consider the jury so heartless that they would silently reject hearing how my friends and loved ones will be affected if they decided to have me executed. What I mean to only one other person is a mitigating factor." (Sealed 48 RT 9795.) Appellant assured the court that if his *Faretta* motion were granted, he would not anticipate "any delays or disruptions which will take this final phase beyond the time frame that defense counsel has already estimated." (Sealed 48 RT 9796.)

Defense counsel Downing opposed appellant's motion. She told the court that this was one of the most complex cases she had ever prepared because of appellant's organic brain dysfunction and the severe and numerous psychiatric symptoms he showed from a very young age. (Sealed 48 RT 9796.) Some of appellant's psychiatric illnesses, like bipolar disorder, resulted from genetic factors, and others resulted from maternal abandonment, childhood abuse and neglect, along with substance abuse and possible brain damage. (Sealed 48 RT 9798-9799.) Downing described appellant's psychiatric symptoms as including:

> recurrent depression, mood instability, intermittent psychotic episodes, grandiosity with underlying poor self-esteem, racing thoughts and speech hyperactivity, problems with concentration, a lot of impulsive behavior, ideas of reference,

> which means he sees people do things and somehow relates them to himself when they don't relate to himself at all.[23]

(Sealed 48 RT 9799.) In her view, it would be impossible for appellant to look at and present such evidence about himself. (*Ibid.*) In addition, defense counsel had just learned from tests done that appellant suffered from organic brain dysfunction (Sealed 48 RT 9797), and an MRI scan showed he has a "highly unusual brain structure" resulting in a "less than five percent" probability "that his brain is normal" (Sealed 48 RT 9800).

Downing outlined some of the other mitigating evidence she had prepared to explain appellant's background, including his prior incarceration in Illinois, in a sympathetic and true way, "so the jury understands who he became and who he is today." (Sealed 48 RT 9797-9800.) She also asserted that appellant had no idea of how to mitigate whatever aggravation would be presented. (*Ibid.*) In her view, for appellant to represent himself would result in "a severe injustice" and "a tragedy." (Sealed 48 RT 9797, 9800.)

In response, appellant said that given counsel's description of his brain damage, "I'm surprised I could have remembered anything she said, sir." (Sealed 48 RT 9800.) Appellant then returned to his dispute with counsel's mitigation case:

> It's not an expert's opinion to say that I'm not capable of discerning what mitigation is most beneficial for me in this case. It doesn't have to be about the why. The absence of a mitigating factor is not aggravation. You've instructed the jury yourself on that. And if I'm allowed to call my choice of witnesses, I believe I could effectively represent myself.

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[23] Downing also noted that appellant experiences "instances of effective violence" which is emotional and comes quickly in contrast to "predatory violence" which is more sophisticated, deliberate and planned. (Sealed 48 RT 9799.)

(Sealed 48 RT 9800-9801.)

The court denied appellant's *Faretta* motion. (Sealed 48 RT 9805.) The court noted that appellant had a constitutional right to represent himself provided it could make certain findings: (1) that appellant was "mentally competent and makes his request knowingly and intelligently" (Sealed 48 RT 9801); (2) that his request was unequivocal (Sealed 48 RT 9802); and (3) that his request was made a reasonable time before trial (*ibid.*). The court addressed all three requirements.

The court commented on appellant's mental competence in light of the representations made by Downing about the proposed expert testimony regarding appellant's mental health history, observing "I'm not a hundred percent convinced that he meets that test." The trial court noted that its comments were based on counsel's offer of proof, since the court had not yet heard the experts' opinions.[24] (Sealed 48 RT 9801-9802.)

The court found that the motion was not made "a reasonable time before trial." (Sealed 48 RT 9802.) Without reciting the history of the trial, the court noted the case took five to six weeks to pick a jury, five to six weeks to try the guilt phase followed by an interval of five weeks, and extensive preparation by defense counsel. (*Ibid.*)

Finally, the court found that appellant's request was not unequivocal. The court explained, "I was listening carefully to you, Mr. Frazier, when you told me of your personal assessment of your satisfaction with the way that the defense would intend to proceed. And this to me reflects the fact that

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[24] At a later in camera hearing at which the court considered releasing to the prosecutor portions of the transcripts of the in camera hearings from which he had been excluded, the court referred to that comment and noted that "I mentioned I hadn't heard the testimony that's been set forth." (Sealed 52 RT 10513.)

this is not an unequivocal decision by you." (Sealed 48 RT 9802-9803.) The court understood that appellant was angry, upset and frustrated by some of the proposed evidence, but explained that appellant had "skilled, competent, experienced counsel assessing the need to do certain things, your own individual need – at your own individual sentiment and expressions, which I have to weigh upon your ability to do those things. So I don't find that this request is altogether unequivocal." (*Ibid.*)

In addition, the court considered defense counsel Downing's response to appellant's *Faretta* motion, which indicated her devotion and work on appellant's behalf and her wish to proceed as counsel, as "fairly important" to its decision. (Sealed 48 RT 9803.)

Finding that appellant did not meet "all three of these tests," the court denied his request for self-representation. (Sealed 48 RT 9804; see also Sealed 6 CT 1871-1872.) Appellant moved for a mistrial, stating that his *Faretta* motion was not made in "passing anger or frustration" and that he gave notice of a possible *Faretta* motion in June, but did not file it with his *Marsden* motion because he wanted to see what other evidence would be admitted. (Sealed 48 RT 9804.) The court responded that although appellant claimed his request would not delay or disrupt the case, the court could not agree and thought, based on all the defense preparation, it would be "absolutely inevitable" that appellant would be confronted with decisions "that would, of necessity, require delays in this proceeding." (Sealed 48 RT 9804-9805.) Appellant again moved for a mistrial on the grounds his Sixth Amendment rights were being violated, and the court denied the motion. (Sealed 6 CT 1871-1872; Sealed 48 RT 9805.)

3. Appellant Renewed His Request to Represent Himself Repeatedly Throughout the Penalty Trial

Appellant continued to renew his *Faretta* motion throughout the penalty trial. It was denied each time. On August 1, 2006, appellant asked the trial court to reconsider his *Faretta* motion, arguing that the court had failed to conduct a sua sponte inquiry. Appellant argued that the court's failure to conduct the inquiry left the court unaware that appellant had considered possible defenses and led the court to conclude that the motion was untimely and would cause delay due to unpreparedness. (Sealed 49 RT 9916.)

Appellant made three points. He explained that although defense counsel's preparation dealt with complicated issues, appellant knew the facts more intimately than his counsel. Appellant explained that his strategy would not have included such complicated issues that, appellant believed, would only anger the jury and cost him his life. (Sealed 49 RT 9916-9917.) He also argued that he did not need to show his counsel was being ineffective in order to represent himself under the Sixth Amendment. Finally, he asserted that his motion was voluntary and intelligent, timely, not for the purposes of delay and unequivocal. (Sealed 49 RT 9917-9918.)

Incorporating its ruling made on July 31, the court denied the motion for reconsideration. (Sealed 49 RT 9919.) Appellant moved for a mistrial based on his Sixth Amendment rights, which was also denied. (*Ibid.*; Sealed 7 CT 1888.)

On Thursday, August 3, 2006, the parties and the court met to discuss the defense case, which was scheduled to begin the following Monday. (49 RT 10054-10055.) During the course of the discussion, in connection with discovery compliance, trial counsel listed several defense witnesses who

were scheduled to testify. (49 RT 10056-10059.) At the end of the session, appellant again moved for reconsideration of his *Faretta* motion. (Sealed 7 CT 1922; Sealed 49 RT 10087 ["I'm reasserting my unequivocal desire to proceed pro per"].) Appellant said that he had objected to being represented by counsel since before the start of the penalty phase, and he continued to dispute the veracity of various pieces of the mitigating evidence presented by his counsel, in particular that, as a child, he was sexually molested by an uncle, had a genetic brain abnormality, and had not finished high school. (Sealed 49 RT 10087-10088.) Appellant stated that if the motion were granted, he would anticipate a delay of no more than "72 hours from this moment in time." (Sealed 49 RT 10087.) He also would not object if the court granted the motion with the condition that "stand-by counsel participate in the trial proceedings so long as that participation does not seriously undermine the appearance before the jury that I'm representing myself." (*Ibid.*)

The court denied the motion and incorporated its remarks in ruling on appellant's original *Faretta* motion and renewed motion on August 1, 2006. The court acknowledged the need for a brief delay and appellant's offer to accept stand-by counsel, but reiterated that "this is late in the proceedings" and "time would be required for a new person to get up to speed in this if I were to use stand-by counsel," and "you would not be well equipped to take the laboring oar on many of the professional matters that I have been told are going to be presented." (Sealed 49 RT 10090-10091.)

In an attempt to accommodate the court's concerns, appellant agreed to accept his present counsel as stand-by counsel in order "to take care of any delay" and explained that the "72-hour delay" would be over the weekend when there were no proceedings, so there actually would be no

delay. (Sealed 49 RT 10091.) The court did not change its mind.[25] (*Ibid;* Sealed 7 CT 1922.)

On August 9, 2006, in a public session with the prosecutor as well as defense counsel present, appellant objected to the next defense witness[26] and reiterated his "desire to proceed pro per at this portion of the penalty phase" and assured the court "[t]here would be no delays." (51 RT 10271.) Appellant noted that the trial court repeatedly denied his right to self-representation on the grounds that "it would cause delays and it was ambivalent." (51 RT 10272.) The court added, "And that it was late." Appellant responded, "Well, right. That it wasn't timely based on the delay it would cause." (*Ibid.*) The court remarked, "Those are two separate concepts. Timeliness is one. Possible delay is another. They're not related." (*Ibid.*) The court held that for the reasons previously stated, the motion was denied. (*Ibid.*) Because the prosecutor had not been present at the in camera hearings on the previous *Faretta* motions, the court summarized its reasons for denying appellant the right to represent himself:

> I found, first of all, this is not timely since the penalty phase is but one part of a continuing trial. So I found the motion not being made prior to trial is untimely and, therefore, ruling that I make as [sic] a discretionary rule and not a mandatory one. And I also found that despite Mr. Frazier's promises of no

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[25] On August 7, 2006, appellant was suffering from an abscessed tooth which caused visible swelling as well as pain and interfered with his ability to listen to the testimony. (50 RT 10094.) The trial proceeded with one prosecution witness and then recessed for the day. (50 RT 10095-10096, 10126-10128.) On August 8, 2006, the proceedings were postponed in the morning, while appellant's tooth was pulled, but resumed that afternoon with appellant present. (50 RT 10132, 10136-10137, 10142.)

[26] The witness was Dr. Stephen Seligman, whose testimony would include a showing and discussion of the videos of the monkey studies to which appellant had objected at the July 26 hearing. (51 RT 10285-10288.)

> delays, that based on the witness list I had and the expected professional witnesses and so forth, that I felt that the delay was inevitable . . . [¶] Also, the – I indicated to him that at the time he made his motion . . . it was equivocal.

(51 RT 10273-10274.)

Later the same day, during the testimony of Jeff Triolo, appellant's childhood friend, the bailiff seized a note written by appellant addressed to the prosecutor telling him to object on the ground of lack of personal knowledge to the testimony of appellant's allegation of sexual abuse by his uncle. (51 RT 10377; Sealed 51 RT 10378, 10381.) At an in camera hearing, appellant voiced his objections to that evidence and to what he described as his attorneys' attempt to make appellant look like he was suppressing childhood mental illness which the jury would view "as nothing more than people trying to help me because they like me." (Sealed 51 RT 10381.) He requested that the court reconsider his *Faretta* motion: "I could have avoided all of this. There would have been no delay. And now my life is on the line, and I'm more likely to get executed now with appointed counsel than if you would have granted my Sixth Amendment right in the first place." (Sealed 51 RT 10380.)

The court noted appellant's disagreement with his counsel's strategies and tactics. (Sealed 51 RT 10383.) It once more denied the *Faretta* motion, finding that appellant was receiving competent representation and that the motion continued to be late, and once more denied appellant's motion for mistrial. (Sealed 51 RT 10383-10384.)

The next day, August 10, before the court proceedings resumed, the prosecutor expressed concern that, on the previous day, defense expert Gretchen White had raised a question about appellant's competence to assist

counsel.[27] (52 RT 10491-10493.) Downing explained that defense counsel had looked extensively at the issue and concluded that under the controlling legal standards they could not declare a doubt about appellant's competency under section 1368. (52 RT 10495-10496.) The court pressed whether it had a responsibility to order a section 1368 hearing. The prosecutor noted that much of the relevant information probably occurred at in camera hearings outside of his presence. (52 RT 10501.) The court stated that he would release to the prosecutor the portions of the hearings relating to appellant's *Faretta* motion, but would consider eliminating other information. (*Ibid.*)

At an in camera hearing later that day, with the court and defense counsel, the court addressed the confidential and work-product information that would be redacted from the *Faretta*-hearing transcripts. (52 RT 10502; Sealed 52 RT 10504-10505.) In discussing the July 31 hearing on

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[27] The testimony in question was as follows:

Q. [Ms. Downing]	Now, I'm not asking you whether you think Robert is or was competent to stand trial, I want to make that clear. [¶] I just want to know if you think based on the problems he has that you know about if you believe he has a diminished capacity to assist his attorneys in his defense?
A. [Dr. White]	Based on my experience, I would say definitely yes. He had a diminished capacity to assist me.

(51 RT 10480.) The prosecutor initially moved to strike this testimony as unreliable because Dr. White did not conduct a proper competency assessment (52 RT 10491-10493), but later withdrew the motion (52 RT 10526).

appellant's *Faretta* motion, the court noted that "one of the *Faretta* issues is to determine whether or not the defendant is, for the purposes of that motion, mentally competent in making a request knowingly and intelligently. And that – I found that that part *wasn't* an issue with me." (Sealed 52 RT 10510, italics added.) Ultimately, the trial court decided not to release the in camera *Faretta* transcripts to the prosecutor, but gave the prosecutor appellant's filed *Faretta* motion. (Sealed 52 RT 10512-10513, 10523-10524.) It also ruled there was no doubt about appellant's mental competence to continue to stand trial. (52 RT 10535.)

At the in camera hearing, appellant addressed the court. Downing requested "that he not speak to the Court at this time." (Sealed 52 RT 10514.) The court asked appellant if he was making a further *Faretta* motion, and appellant replied, "In part, yes." (Sealed 52 RT 10515.) Downing twice again advised appellant not to speak, and defense counsel conferred with appellant. (*Ibid;* Sealed 52 RT 10516.) In response to questions from the court, appellant stated he was seeking complete self-representation and asking the court to reconsider its denial of his *Faretta* motion. (Sealed 52 RT 10517-10518, 10520.) Appellant continued to disagree with the mitigation case presented by his counsel and asked to be allowed to read a statement to the jury. (Sealed 52 RT 10518-10520.) The court ruled that appellant could testify, but was not allowed to make a statement to the jury and denied the *Faretta* motion. (Sealed 52 RT 10521; Sealed 7 CT 1940-1942.)

Appellant was persistent. Later that day, when the court and counsel discussed an evidentiary matter, the prosecutor remarked, "I get to now prove to the jury that he does have that ability to assist his lawyers." (52 RT 10564.) Appellant interjected, "If that's the case, I would move for a mistrial for you denying my *Faretta* motion." (52 RT 10564-10565.)

On August 14, 2006, at an in camera hearing before the noon recess, appellant made a "*Marsden* or *Faretta* motion." (Sealed 53 RT 10790; see 53 RT 10785.) The court denied the *Marsden* motion, and after the lunch recess, heard the *Faretta* motion. (Sealed 53 RT 10796; Sealed 7 CT 1945-1946; 7 CT 1948.) Appellant explained that his decision not to testify

> would have been moot if I was allowed to go pro per with my present team as my stand-by counsel. I would not take the stand but would make the closing argument and would not be subject to cross-examination as I had originally intended to do before the denial of this motion at the onset of the penalty phase.

(Sealed 53 RT 10798.) The court stated, as a preliminary matter, that "I've always found and will continue to find that Mr. Frazier is making these motions in a state of knowing and intelligent conduct." But the court denied the *Faretta* motion for two reasons: it was"extremely late," which was a strong factor, and not unequivocal because it was conditioned on appellant's attorneys accepting the responsibility of serving as advisory counsel, which the court could not be assured would happen. (Sealed 53 RT 10799-10800.)

On August 15, 2006, in the midst of an in camera hearing on appellant's wish to testify against his counsel's advice, he again asked the court to grant his *Marsden* or *Faretta* motion based on all previously submitted information and the fact that his counsel did not think it was in his best interest to take the stand and that, in his view, he had been given an ultimatum to take the stand without adequate preparation. (Sealed 54 RT 10881, 10885.) Appellant reiterated that he had no objection to standby counsel, reminded the court of his ability to present arguments, and answered the court's questions as to whether he intended to testify if the court granted the motion or not. (Sealed 54 RT 10866, 10888-10890.) Appellant stated, "And with pro per status and without presenting . . . things

not already in evidence, I'm confident that I can handle the one witness I would intend to call as already scheduled for today and be prepared for closing arguments by the morning of August 17, 2006 at 8:30 a.m." (Sealed 54 RT 10888-10889.) Denying both motions, the court found the *Faretta* motion was still late, and thus was a discretionary call for the court, and also was equivocal because, as the court told appellant, "you are going to prepare one way if you have counsel and one way if you don't have counsel, which again I referred to as an equivocal motion in this regard." (Sealed 54 RT 10890-10891.)

The next day, August 16, 2006, at an in camera hearing, appellant explained that his decision not to testify was "made under duress, which is augmented by an ultimatum the Court created when it denied my *Faretta* and *Marsden* motions . . .." (Sealed 55 RT 11239.) The court responded that it was "not in agreement" that its actions "legally compel you, as a matter of law, not to take the stand in this case." (*Ibid.*) The court added that the *Faretta* motions were denied the previous day because "the request was equivocal" and it "was late." The court stated that "if this is construed by anybody as a renewed *Faretta* motion, it is denied." (Sealed 55 RT 11240; 7 CT 1982; Sealed 7 CT 1984-1985.)

B. A Criminal Defendant Has A Constitutional Right To Self-Representation As Long As His Assertion Of That Right Will Not Unjustifiably Disrupt The Trial Or Otherwise Obstruct The Administration Of Justice

Appellant had the right under the Sixth and Fourteenth Amendments to proceed at trial without counsel (*Faretta, supra*, 422 U.S. 806), including, according to this Court, at the penalty phase of a capital trial (*People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *People v. Clark* (1990) 50 Cal.3d 583, 617-618).

A trial court *must* grant a defendant's request to proceed without counsel if three conditions are met: (1) the defendant is competent and made the request knowingly and intelligently, having been apprised of the dangers of self-representation; (2) the request is made unequivocally; and (3) the request is timely. (*People v. Jackson* (2009) 45 Cal.4th 662, 689; *People v. Stanley* (2006) 39 Cal.4th 913, 931-932.)

Although the court in *Faretta* did not explicitly state the reasons a defendant may be refused self-representation, the court recognized that this "unconditional right" to self representation could be subject to termination in only a limited set of circumstances. (*Faretta, supra,* 422 U.S. at p. 820.) In *Faretta*, the court stated that a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Id.* at p. 834, fn. 46.) Logically, the grounds for denying the right in the first place must be, and until very recently have been, similarly circumscribed. Thus, a defendant can be denied self-representation only when it is shown that proceeding pro se will seriously and unjustifiably disrupt or obstruct the trial. (See *Indiana v. Edwards* (2008) 554 U.S. 164, 71 [*Faretta* does not include the right to abuse the dignity of the courtroom, avoid compliance with rules of procedural and substantive law, and engage in serious and obstructionist misconduct].)[28]

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[28] As Justice Scalia has stated:

> The only circumstance in which we have permitted the State to deprive a defendant of this trial right [self-representation] is the one under which we have allowed the State to deny *other* such rights: when it is necessary to enable the trial to proceed in an orderly fashion.

(*Indiana v. Edwards, supra,* 554 U.S. at p.185 (dis. opn. of Scalia, J.).)

1. Invocation of the Constitutional Right to Counsel Identified in *Faretta* Is Not Dependent on the Timing Of the Assertion

Nothing in the holding or rationale of *Faretta* made the constitutional right of self-representation subject to a timeliness requirement. (See *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 265 (conc. opn. of Fernandez, J.).) The court in *Faretta* did not have occasion to consider the timeliness of a defendant's assertion of the right because Faretta had requested to represent himself well in advance of trial. (*Faretta, supra*, 422 U.S. at p. 807.) Although jurisdictions, including California, have read a timeliness requirement into the invocation of the right to self-representation, as this Court has explained, "the purpose of the [timeliness] requirement is 'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'" (*People v. Lynch* (2010) 50 Cal.4th 693, 721, citations omitted.) The timing of the motion in and of itself is not dispositive; it is merely a factor to be considered in assessing whether granting the motion would likely disrupt the trial or obstruct the orderly administration of justice.

Shortly after *Faretta* was decided, this Court first addressed the "procedural implementation of a constitutionally based right to self-representation" in *Windham, supra*, 19 Cal.3d at p. 127. It held that to invoke this "constitutionally-mandated unconditional right to self-representation," a defendant had to do so "within a reasonable time prior to the commencement of trial." (*Id.* at p. 128.) *Windham*'s timeliness rule has two significant consequences. First, when the request is made within a reasonable time before the commencement of trial, the trial court must permit the defendant to represent himself if he has voluntarily and intelligently waived his right to counsel. (*Ibid.*) However, if the request for

self-representation is untimely, the decision to grant or deny the demand is within the trial court's discretion. (*Ibid.*) Second, the erroneous denial of a timely *Faretta* motion is a matter of constitutional magnitude requiring reversal per se (*People v. Tyner* (1977) 76 Cal.App.3d 352, 356), whereas the erroneous denial of an untimely *Faretta* motion is subject to review under the state harmless error standard (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1051).

This Court has identified the timeliness requirement as the tool that prevents a defendant from misusing a *Faretta* motion "'to delay unjustifiably the trial or obstruct the orderly administration of justice.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 809, quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1110 [categorizing the assertion of a right to self-representation made prior to the start of trial as the "constitutionally mandated unconditional right of self-representation"].)

Notably, *Windham* made clear that the "reasonable time" requirement for asserting the right to self-representation should not be used to limit a defendant's constitutional right to self-representation. Rather, it was only to be used to ensure that a defendant not misuse the *Faretta* mandate as a means to unjustifiably delay, i.e., to disrupt a scheduled trial or to obstruct the orderly administration of justice. (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) A fair reading of *Windham* is not that the federal constitutional right to self-representation somehow evaporates at the point at which a request for self-representation becomes untimely, but rather that the timing of the request for self-representation affects the evaluation of the factors that may legitimately limit the right – the disruption or obstruction of the trial. This is the only reading that makes sense, since the right of self-representation for a criminal defendant in California has its source only in the federal

Constitution.

This concern with unjustifiable delay and obstruction is consistent with *Faretta*, where the United States Supreme Court noted that "[w]e are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46.) Thus, while the assessment of the factors identified by the high court that lead to disruption of a trial – obstruction of justice and, possibly, delay – may vary depending upon the stage of the trial at which the defendant asserts the right to self-representation, the factors themselves remain the same, and these are the only factors that can be considered under the federal Constitution. To the extent that this Court has held that concerns other than these should be factored into a trial court's assessment of whether to grant a *Faretta* motion, such holdings are without foundation.

2. This Court's Interpretation of the Timeliness Requirement for the Assertion of the Sixth Amendment Right to Counsel Is Not Supported by State Law and Violates the Federal Constitution

This Court views the *Faretta* right as being unconditional if asserted a reasonable time prior to trial and discretionary if asserted after trial has begun. (*Windham*, *supra*, 19 Cal.3d at p. 128.) Yet no opinion of the Court discusses why this is the case, either legally or logically. There is nothing in *Faretta* itself that warrants such a distinction, and a reading of *Windham* that is consistent with *Faretta* does not warrant such a distinction. Apart from the aspect of a knowing and voluntary relinquishment of the right to counsel,

there is no logical or legal reason why the federal constitutional right to self-representation should be dependent upon anything more than an unequivocal request and a determination by the trial court that granting the request will not result in an unreasonable delay or affect the orderly administration of justice.

The impetus for the *Faretta* decision was this Court's ruling in *People v. Sharp* (1972) 7 Cal.3d 448, which erroneously held that there was no right to self-representation under either the state or federal Constitutions. Since *Faretta*, the decisions from this Court and the Courts of Appeal that have addressed a defendant's right to self-representation have centered on the proper application of that decision, both when the right is asserted before trial and after the trial starts. Consequently, to say – as this Court has said – that a request that is not asserted a reasonable time prior trial does not have a constitutional basis is perplexing. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1220.)[29] There simply is no basis in California for the right to self-representation other than a federal constitutional basis. (*People v. Johnson* (2012) 53 Cal.4th 519, 528 [California law provides neither a statutory nor constitutional right of self-representation].) And the Sixth Amendment right to represent oneself, which applies to the states through the Fourteenth Amendment, is not transmuted into a non-constitutional right based on when in the proceedings it is asserted.

Apart from its illogic, holding that the federal constitutional right to self-representation can evaporate based on when in the proceeding the right

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[29] It is possible that this statement worked its way into the opinion because Bloom based his argument upon a supposition that he did not have a constitutional right to self-representation after the trial began, and this Court merely accepted that statement as correct. (See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1220.)

is asserted impinges on a defendant's Sixth Amendment rights in a manner not condoned by the federal Constitution itself. As stated above, the right of self-representation recognized in *Faretta* finds support in the structure of the Sixth Amendment and its fundamental nature. (*Faretta, supra*, 422 U.S. at. p. 818; *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 161.) Because this Court has established a rule that significantly interferes with the exercise of a fundamental constitutional right, the validity of that rule must be assessed by applying the strict scrutiny standard, which applies when there is a real and appreciable impact on, or significant interference with, the exercise of a fundamental right. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 783-784; *People v. Ramos* (2004) 34 Cal.4th 494, 512; see Winnick, *New Directions in the Right to Refuse Mental Health Treatment: the Implications of Riggins v. Nevada* (1993) 2 Wm. & Mary Bill Rts. J. 205, 225-226 & fn. 117 [citing *Faretta* for proposition that a criminal defendant's right to control his or her defense is a fundamental constitutional right, the infringement of which warrants heightened scrutiny].)

Under the strict scrutiny standard, the state must establish a compelling interest which justifies the rule at issue, and must establish that the distinctions drawn by the rule are necessary to further the purpose of that interest. (*Lucas v. Superior Court* (1988) 203 Cal.App.3d 733, 738.) To the extent that *Windham* changes the equation for determining whether a defendant can exercise his or her right to self-representation based solely upon the fact that the right is asserted close to or after the start of the trial, it does not meet this test. Any compelling interest for regulating the assertion of the right to self-representation is encompassed by the *Faretta* standards themselves. As discussed previously, the concerns about disruption of the trial and obstruction of justice are interests that can be given proper effect at any point in the trial; consequently, establishing a different, and

discretionary, test merely because of the proximity of the assertion of the right to the start of the trial does not reflect a purpose or interest that withstands strict scrutiny.

To be sure, the discretionary aspect of the *Windham* decision essentially has been adopted by all federal jurisdictions when applying *Faretta* to a self-representation request that is made after the start of trial. (See, e.g., *United States v. Mayes* (10th Cir. 1990) 917 F.2d 457, 462; *United States v. Wesley* (8th Cir. 1986) 798 F.2d 1155, 1155-1156; *United States v. Brown* (2d Cir. 1984) 744 F.2d 905, 908.) But the federal courts have long recognized the right of self-representation by dint of federal statute. (See 28 U.S.C. § 1654.) With regard to federal cases, *Faretta* only made clear that self-representation was a fundamental constitutional right when asserted before the start of trial. Thus, federal courts simply continued to follow their same practice, based on a statutory rather than a constitutional right, regarding self-representation requests asserted after the start of trial.

This state was in a different posture when *Faretta* was decided, however, because it did not recognize the right of self-representation. Consequently, *Faretta* was not a clarifying holding that confirmed an accepted practice; it was a revolutionary holding that created new law for this state. *Windham*, therefore, was a case that did not – as the post-*Faretta* federal cases did – say that *Faretta* had no effect on existing law interpreting the right of self-representation at a later stage of trial. Rather, *Windham* was a case that said the United States Supreme Court in *Faretta* was making a doctrinal distinction between an assertion of a self-representation right made pretrial as opposed to during trial. That is an unreasonable interpretation of the *Faretta* decision and should not be followed.

In short, *Faretta*'s clear constitutional doctrine is that a criminal defendant has a fundamental Sixth Amendment right to represent himself.

(*Faretta, supra*, 422 U.S. at pp. 833-834.) This right can be denied only when its assertion will unjustifiably disrupt or obstruct the trial. The fact that this rule arose from a case in which the demand was made pretrial is not in and of itself constitutionally significant. In *Windham*, this Court was simply incorrect to ascribe doctrinal meaning to this fact.

C. The Trial Court Erroneously Denied Appellant's *Faretta* Motion in Violation of the Sixth and Fourteenth Amendments

The erroneous denial of the Sixth Amendment right to self-representation is reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8; *People v. Dent* (2003) 30 Cal.4th 213, 217.) In contrast, this Court reviews claims analyzed under *Windham* for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 961.) Under either standard, the trial court erroneously denied appellant's motion to represent himself because to grant the request would have neither unjustifiably delayed the trial nor obstructed the administration of justice.

On the day the jury returned the verdicts at the guilt phase, appellant, through his attorney, alerted the court that he might want to represent himself at the penalty phase. (46 RT 9452; Sealed 46 RT 9456.) Two days later, after hearing counsel list the experts she planned to call at the penalty phase, appellant again told the court he might file a *Faretta* motion. (47 RT 9513.) On July 26, 2006, five days before the penalty phase was scheduled to begin, during a proceeding to determine the admissibility of evidence at the penalty phase, appellant informed the court that he wanted to file a *Marsden* motion alleging his counsel's ineffectiveness and registered his disagreement with the proposed penalty phase presentation. If the *Marsden* motion was denied, appellant said he intended to file a *Faretta* motion. (47 RT 9632, 9635-9636; Sealed 47 RT 9656.) By the end of the session,

appellant stated he would not file a *Faretta* motion until after he had consulted his attorneys. (Sealed 47 RT 9659.)

Appellant's actions leading up to filing the *Faretta* motion reflect his growing discomfort and disagreement with the penalty phase case his attorneys were preparing. His willingness to consult with the attorneys before moving to represent himself appears to reflect his hope that they could agree on a penalty phase that would satisfy appellant's concerns. When it became clear that this was not possible, appellant felt compelled to act.

On the first day of the penalty phase, appellant filed a written *Faretta* motion. (6 CT 1873-1876.) After hearing from trial counsel and appellant, the trial court denied the motion, finding that the motion was untimely because it was not made before the guilt phase of trial began and because the request was not unequivocal. (Sealed 48 RT 9801-9805.) The court's decision was erroneous.

1. The Request Was Unequivocal

Appellant's initial request to represent himself, as well as each subsequent request, was unequivocal, and the trial court's contrary findings are unsupported. The law on this point is well established. A defendant must unequivocally assert the right of self-representation. (*People v. Marshall* (1997) 15 Cal.4th 1, 21; see *Faretta*, *supra*, 422 U.S. at pp. 835-836.) The requirement serves two purposes: it guards against the possibilities that "the right of self-representation may be a vehicle for manipulation and abuse" and that "the right to effective assistance of counsel . . . that secures the protection of many other constitutional rights" is not inadvertently or unintentionally waived. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 23.) "Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or

words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion." (*Ibid.*; accord, *People v. Roldan*, *supra*, 35 Cal.4th at p. 683.)

a. Appellant unequivocally asserted his right to represent himself in his initial motion on July 31

On July 31, appellant filed a formal motion to represent himself at the penalty trial. This was not a sudden or unexpected decision. A showdown with his attorneys had been brewing. On June 21, immediately after the guilt and special circumstance verdicts made clear that the case would proceed to a penalty phase, both defense counsel and appellant had informed the court that he was considering such a *Faretta* motion. (Sealed 46 RT 9456 [June 21 hearing]; 49 RT 9513 [June 23 hearing].) During in limine motions a month later, on July 26, when counsel outlined her mitigation case portraying appellant as "severely damaged" by his emotionally abusive upbringing, appellant requested appointment of new counsel because he objected that the "cheap emotionalism" of his attorneys' penalty-phase strategy would misrepresent him. (Sealed 47 RT 9644.) When the court denied appellant's *Marsden* motion, he told the court he would not file a *Faretta* motion until he had an opportunity to confer with counsel. (Sealed 47 RT 9659.) Whatever discussion appellant and counsel may have had did not resolve their differences. Appellant filed a formal *Faretta* motion. (6 CT 1873-1874.)

At the July 31 hearing on his motion, appellant's reason for seeking self-representation came as no surprise. He disagreed with counsel's mitigation case, in particular the dysfunctional-family theory, as inaccurately reflecting his upbringing, and he derided counsel's plan to show "images of maternally-deprived apes" as likely to be perceived by the jury as "pure

monkey business rather than mitigating factor." (Sealed 48 RT 9794.) Appellant did not simply object to counsel's strategy, but also explained the mitigation case he would present – showing the jury what he meant to his friends and loved ones. (Sealed 48 RT 9795.)

Appellant's written motion, filed under penalty of perjury, stated "It is my intention to represent myself in this case." (6 CT 1874.) In addition to waiving his right to counsel, appellant acknowledged "the dangers of proceeding without court appointed counsel and that I will be given no special consideration for acting as my own attorney[.]" (*Ibid.*) At the hearing, appellant affirmed his request and explained the reasons for his decision in some detail. (Sealed 48 RT 9793-9796.) The written motion and oral explanation presented "an articulate and unmistakable demand for self-representation." (Cf., *People v. Valdez* (2004) 32 Cal.4th 73, 99 [defendant's use of conditional language in his sole statement – "'[I]f I want to go pro. per. in this case I could do that'" – was ambivalent and equivocal, not articulate and unmistakable].)

Appellant's motion was a deliberate, rational attempt to achieve his clearly stated goal of presenting the mitigation case he wanted and not counsel's mitigation case to which he strenuously objected. (See *People v. Dent* (2003) 30 Cal.4th 213, 220 [defendant's motion was "a practical and not entirely emotional response" to trial court's sua sponte removal of counsel with whom defendant had worked for over two years].) Appellant's request was unambivalent and unambiguous. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 431-434 [no question raised that defendant's statement – "'a new trial, a complete new trial. That would require a pro per status'" constituted an unequivocal request]; *People v. Joseph* (1983) 34 Cal.3d 936, 941 [no question raised that defendant's assertion – "'Your Honor, I request that the court would allow me to go pro per so I can defend

myself'" – was unequivocal]; *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1529 ["There was nothing ambivalent about Moon's request for self-representation" where "he repeatedly told the magistrate he wanted to 'go pro per[]'" and "explained the basis for the request, namely that he believed he could do a better job than his court appointed attorney"]; *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1390 [reversing trial court's finding that *Faretta* request was equivocal where defendant had filled out a written petition to proceed in propria persona and signed it under penalty of perjury and counsel told court defendant's "'position right now is quite unequivocal, that he wants to represent himself, period'"].) During the July 31 hearing, appellant sparred with counsel over their disagreements about strategy for the penalty phase, but ended up where he began – asking to be allowed "to call my choice of witnesses" so he "could effectively represent myself." (Sealed 48 RT 9800-9801.)

When the court denied his motion, appellant immediately moved for a mistrial, stating that his motion was not made "in passing anger or frustration" and that he had told the court about filing a possible *Faretta* motion in June, but waited before filing it to see what evidence the court would admit. (Sealed 48 RT 9804.) The court denied the mistrial motion, and appellant promptly reasserted it, stating that his Sixth Amendment rights were being violated. (Sealed 6 CT 1871-1872; Sealed 48 RT 9805.) Appellant's rapid and emphatic response, which gave the court further proof that he arrived at his decision in a deliberate and thoughtful manner, was fully consistent with his certainty and sincerity about the request to represent himself.

Any doubt, which would have been unfounded, that on July 31 appellant was not sure or serious about representing himself would have been dispelled by his subsequent motions. Beginning the very next day, he

asked the court to reconsider the denial of, and/or renew, his original motion six times – on August 1, 3, 9, 10, 14, 15, 2006 – during the penalty phase. Appellant's dogged pursuit of self-representation confirms that his original request was unequivocal. (See *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 431-434 [no challenge to unequivocality of assertion where defendant raised request more than three times after initial motion was denied].) He never wavered or reconsidered his position. (See *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441, 1445 [request for self-representation was unequivocal where defendant "took one position and stuck to it: If the court would not order substitute counsel, he wished to represent himself"]; *People v. Carlisle*, *supra*, 86 Cal.App.4th at p. 1390 ["defendant's four-month long self-representation quest" was unequivocal, not resulting from "'temporary whim'" or "'passing anger or frustration'"].) In this way, "[t]he clarity and forcefulness of [appellant's] request demonstrates that he unequivocally articulated his decision to proceed pro se." (*United States v. Arlt* (9th Cir. 1994) 41 F.3d 516, 519 [request was unequivocal where defendant told court he wanted to represent himself, listened to court's warnings, discussed wish with counsel, and persisted in demanding self-representation after his motion was denied].)

Appellant's request stands in sharp contrast to those found to make no assertion or an equivocal assertion of the right to self-representation. First, appellant's request contained no ambivalence or inconsistency about representing himself. (Cf., *Stenson v. Lambert* (9th Cir. 2007) 504 F.3d 873, 883, 884 [equivocal assertion where defendant stated he did not really want to represent himself, but felt he was being forced to do so because although he did not want to proceed without counsel, he did not want to proceed with the counsel he had]; *People v. Boyce* (2014) 59 Cal.4th 672, 704 [no *Faretta* assertion where defendant raised possibility of representing himself, but in

response to questioning by the court explicitly stated three times that he did not wish to represent himself].)

Second, appellant did not seek self-representation as a means to a different, unrelated purpose. (Cf., *People v. Marshall*, *supra*, 15 Cal.4th at p. 26 [equivocal assertion where *Faretta* request, inter alia, was a means to avoid court order to supply blood and tissue samples, rather than a sincere desire to represent himself].)

Third, appellant's request was not an impulsive or tangential comment that he failed to pursue. (Cf., *Jackson v. Ylst* (9th Cir.1990) 921 F.2d 882, 888-889 [impulsive response to denial of substitute counsel was not unequivocal]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1087 [single reference to "making motion to proceed pro se," which was not reasserted when court asked defendant if he had motion about substituting counsel or representing himself, was impulsive response to the court's initial refusal to immediately consider his *Marsden* motion and not an unequivocal demand for self-representation].)

Finally, appellant's request was not simply a hypothetical question or tentative musing about the possibility of self-representation. (Cf., *People v. Marlow* (2004) 34 Cal.4th 131, 147 [defendant's statement – "'Is it possible that I just go pro per in my own defense and have someone appointed as co-counsel?'"—made in an attempt to get counsel of his own choice was a request for information, not a *Faretta* motion]; *People v. Hines* (1997) 15 Cal.4th 997, 1028 [defendant's assertion – if the *Marsden* motion was denied, "I would like to proceed in pro per if possible" – was not an unequivocal request where the next day defendant indicated only that the self-representation "thought is deep in my mind" and did not correct the trial court's statement that no *Faretta* motion was before it].)

Unlike the defendants in those cases, appellant was clear, definite, unwavering and persistent in his quest to represent himself. Nevertheless, the trial court found appellant's request was not unequivocal. The court's complete discussion of its finding is as follows:

> THE COURT: Next, and last I should say, as to my considerations is to determine whether this request is unequivocal. I was listening carefully to you, Mr. Frazier, when you told me of your personal assessment of your satisfaction with the way that the defense would intend to proceed. And this to me reflects the fact that this is not an unequivocal decision by you.
>
> THE DEFENDANT: Your Honor.
>
> THE COURT: Well, wait a minute. I don't want to argue with you, sir. I listened to the facts you gave me and I respectfully did so, I need you to respectfully listen to me.
>
> THE DEFENDANT: Sorry.
>
> THE COURT: The point is here that I feel that given – you're angry. I could tell that you were upset in some of the stuff that you read, and somewhat frustrated by the things that you were concerned about, and I understand there can be room for differences of opinion in assessing things. On the other hand, you have skilled, competent, experienced counsel assessing the need to do certain things, your own individual need – at your own individual sentiments and expressions, which I have to weigh upon your ability to do those things. So, I don't find that this request is altogether unequivocal.
>
> The attorneys- -- I've had many *Faretta* motions over the years where attorneys stand back and just have really nothing to say in response to *Faretta* motions. Ms. Downing has gone to some extent to indicate to me the devotion and intensity and work that she has done in your interest in this case and that they wish to proceed. That's fairly important.

(Sealed 48 RT 9802-9803, bold omitted.)

The trial court's reasoning does not support its conclusion. To the extent that the court found that appellant was satisfied with the way his counsel intended to proceed at the penalty phase, it was plainly wrong. Even before his *Faretta* motion on July 31, appellant's objection to his attorneys' approach was manifest. At the in limine hearing on July 26, appellant voiced his opposition to his counsel's mitigation case as soon as Downing mentioned Dr. Seligman's testimony about attachment theory and appellant's emotionally abusive upbringing. (47 RT 9632, 9635.) He tried to prevent even the description of the evidence from becoming public by requesting that it "remain in camera," stated that he would file a *Faretta* motion so he could represent himself "from this point forward," and moved for a mistrial. (47 RT 9635-9636.) Certainly, both his words and his actions show he was *not* satisfied with counsel's plan. As the proceeding moved to an in camera hearing, appellant further detailed his objection to his counsel's penalty-phase defense, which he considered "cheap emotionalism" that misrepresented him. (Sealed 47 RT 9644, 9655.) Downing confirmed that appellant disagreed with counsel's strategy. (Sealed 47 RT 9646-9647.)

Appellant's position did not change in the week between the in limine motions on July 26 and his *Faretta* motion on July 31. He still opposed counsel's strategy, which prompted his unsuccessful *Marsden* motion (Sealed 47 RT 9658) and was the reason he sought self-representation (Sealed 48 RT 9794). He mocked counsel's evidence as providing the jury with "monkey business" rather than mitigating factors and distorting his background. (Sealed 48 RT 9795.) After listening to Downing's proffer about his psychiatric problems and unusual brain structure, appellant again derided counsel's evidence, wondering how given counsel's description of his brain damage, he could remember anything she said. (Sealed 48 RT 9800.) And he was adamant in his disagreement about "what mitigation is

most beneficial for me in this case." (Sealed 48 RT 9800-9801.) In light of this record, the court's finding that appellant conveyed his "satisfaction with the way that the defense would intend to proceed" and that this purported satisfaction renders his decision to represent himself "not unequivocal" is not just unsubstantiated, but is flatly contradicted by the record.[30]

Moreover, the court's reference to appellant's anger and frustration at hearing the evidence counsel planned to present does not justify its finding that his decision was not unequivocal. To be sure, an impulsive comment made in a fit of anger may not be an unequivocal request for self-representation. (*People v. Marshall, supra*, 15 Cal.4th at p. 21 ["a motion made out of a temporary whim, or out of annoyance or frustration, is not unequivocal – even if the defendant has said he or she seeks self-representation"].) But, as noted above, that is not what happened here. Although appellant was upset with his counsel's approach to the penalty phase, his decision to represent himself was not made from fleeting whim or momentary anger. Appellant plainly told the court as much. (Sealed 48 RT 9804 ["I didn't make it [his *Faretta* motion] in passing anger or frustration"].) He thought about whether to make a *Faretta* motion throughout the month-long hiatus between the guilt phase and the penalty

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[30] Perhaps the trial court misspoke and meant to say "dissatisfaction" instead of "satisfaction." But even this change, which neither the court nor the parties requested during the record correction proceedings, would not save the court's finding. Given appellant's vociferous objection to counsel's mitigation case, it is baffling, and completely unreasonable, to conclude that appellant's dissatisfaction with counsel's strategy, which was the very reason he wanted to represent himself, somehow transformed his otherwise forceful and unambiguous *Faretta* motion into something equivocal. Even an improperly revisionist reading of the record would not justify the trial court's finding that appellant's *Faretta* motion was "not unequivocal."

phase, and he requested self-representation only when, during the in limine motions, it became clear that counsel would present the mitigation case he found offensive and after the court would not provide substitute counsel. Self-representation was the remedy of last resort – one that appellant did not assert casually or cavalierly. And when he took that final step, he did so in clear and unequivocal terms. Thus, appellant's request is readily distinguishable from the impulsive responses of defendants to denials of *Marsden* motions that, although asking to proceed "pro per," were found not to assert clearly and unequivocally the right to self-representation. (See, e.g., *Jackson v. Ylst*, *supra*, 921 F.2d at pp. 888-889; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1087; *People v. Wright* (1990) 52 Cal.3d 367, 409 and *People v. Skaggs* (1996) 44 Cal.App.4th 1, 4-9.)

In sum, appellant's *Faretta* motion on July 31, comprised of both his written motion and oral request, was clear and unequivocal, and the trial court's contrary finding is wholly unsubstantiated.

b. Appellant unequivocally asserted his right to represent himself each time he renewed his motion

Appellant remained adamant about his request to represent himself as he sought reconsideration of the trial court's ruling and renewed his motion throughout the penalty trial. On August 1, 2006, appellant outlined the reasons the trial court's denial of his *Faretta* motion was wrong (Sealed 49 RT 9916-9918) and plainly stated his motion "most certainly is unequivocal" (Sealed 49 RT 9918). In denying the motion, the court made no new findings but incorporated the reasons stated in its ruling on July 31. (Sealed 49 RT 9919.)

In his motion on August 3, appellant did not equivocate. He plainly stated, "I'm asserting my unequivocal desire to proceed pro per" and noted,

"My objection to being represented by appointed counsel in the penalty phase has been made known to the Court prior to [its] commencement." (Sealed 49 RT 10087.) The court denied the motion, again incorporating its prior rulings, without saying anything further about the equivocal or unequivocal nature of appellant's request. (Sealed 49 RT 10089-10091.)

On August 9, appellant said he "just wanted to reiterate my desire to proceed pro per at this portion of the penalty phase." (51 RT 10271.) When appellant noted that the court denied his original motion because the court "said it would cause delays and it was ambivalent," the court responded to the considerations of timeliness and possible delay, but was silent about whether appellant's request for self-representation had been ambivalent or equivocal. (51 RT 10272.) Immediately thereafter, in summarizing his original ruling for the prosecutor, the court could not remember what it had said on this point.[31] (51 RT 10272-10274.)

On August 10, at a hearing to discuss the prosecutor's concern that the question of appellant's competence to assist counsel had been raised by defense expert Gretchen White, appellant again asked for the court's permission to represent himself and reconsideration of the denial of his original *Faretta* motion. (Sealed 52 RT 10517-10518, 10520.) He moved for a mistrial when his motion was denied. (Sealed 52 RT 10564-10565.) The court made no additional findings about whether appellant's request was unequivocal. However, the court ruled that appellant's "basic and continued disagreement" with counsel's penalty-phase presentation was "not a ground

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[31] The court told the prosecutor, "Also, the – I indicated to him [appellant] that at the time he made his motion, it wasn't in your presence, I felt that it was – I have forgotten the word that Mr. Frazier just used a moment ago, it was equivocal, and I'm – without – I'll have to go back and see what I said in response to that." (51 RT 10274.)

for a *Faretta* motion." (Sealed 52 RT 10520.)

The court was wrong as a matter of law. A defendant need not provide a "permissible" or "acceptable" reason for wishing to represent himself so long as his request is timely (i.e. will not disrupt or delay the proceedings), unequivocal, and he knowingly, intelligently and voluntarily waives his right to counsel. (Cf., *People v. Salazar* (1977) 74 Cal.App.3d 875, 888 [*Faretta* right exists "because the defendant has a personal right to be a fool"].) Self-representation is the only remedy for a defendant who disagrees with his attorneys' mitigation defense and has been denied substitute counsel. (*People v. Clark* (1992) 3 Cal.4th 41, 97; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1368.)

In addition, the court's erroneous ruling, which acknowledged appellant's fundamental and longstanding objection to his attorneys' strategy, tends to undercut its own finding that the *Faretta* request was not unequivocal. The very fact that appellant voiced "basic and continued disagreement" with counsel's approach would, as a practical matter, be inconsistent with the conclusion that his repeated requests for self-representation were tentative, uncertain, ambivalent or anything but unequivocal. (See, e.g., *Faretta*, *supra*, 422 U.S. at p. 811, fn. 5 [defendant "three times moved for the appointment of a lawyer other than the public defender"].)

On August 14, appellant again made a *Faretta* motion, and the trial court denied the motion in part as equivocal. (Sealed 53 RT 10798-10800.) Some context is necessary to understand the motion and the ruling. Appellant renewed his motion after he decided he would not testify. As appellant explained, the question of testifying would not have arisen "if he had been allowed to go pro per with my present team as my stand-by counsel" because he would have been able to address the jury in closing

argument without being subject to cross-examination. (Sealed 53 RT 10798.) The court denied the motion in part as "not unequivocal" because it was conditioned on appellant's attorneys accepting the responsibility of serving as advisory counsel, which the court could not be assured would happen. (Sealed 53 RT 10799-10800.)

As a preliminary matter, because counsel was never asked about their willingness to serve as advisory counsel, it was unreasonable for the court to base its finding that appellant's request was equivocal based on the lack of assurance that they would agree. More fundamentally, the court misconstrued appellant's position. He did not request advisory counsel or condition his *Faretta* motion on the appointment of his current attorneys as advisory counsel. All along appellant's request was direct and unqualified – he wanted to represent himself. He raised the possibility of accepting advisory counsel only after the court denied his request to represent himself and only as a way to address whatever concerns the court had about his going "pro per." (Sealed 49 RT 10087-10088.) Appellant's offer was a reasonable attempt at a compromise given the court's refusal to grant self-representation. It did not render his unequivocal request equivocal.

The following day, August 15, appellant moved again for pro per status in order to complete the case and address the jury in closing argument. The finding that appellant's request was equivocal was based on the court's "understanding . . . that you are going to prepare one way if you have counsel and one way if you don't have counsel." (Sealed 54 RT 10890-10891.) Appellant did not want to testify, but was pointing out to the court that his attorneys – who did not want him to testify – were not prepared in the event he did decide to testify. His statements on this point had no bearing on whether his repeated and consistent requests for self-representation were unequivocal. In the end, appellant reiterated his core

position: "My appointed counsel who portrays me as an [sic] exceptionally retarded and this honorable Court that keeps denying my motions is underestimating my ability to effectively represent myself without causing unnecessary delays and without advisory counsel." (Sealed 54 RT 10886.)

Appellant's motions were no more equivocal than those of the defendant in *Adams v. Carroll, supra*, 875 F.2d 1441. There, the Ninth Circuit reversed the conviction where the trial court had denied a self-representation motion that was paired with a motion for substitute counsel. "Here, Adams made his preference clear from the start: He wanted to represent himself if the only alternative was representation by Carroll. Although his two self-representation requests were sandwiched around a request for counsel, this was not evidence of vacillation." (*Id.* at p. 1444.) The court found that "each of these requests stemmed from one consistent position: Adams first requested to represent himself when his relationship with Carroll broke down . . . throughout the period before trial, Adams repeatedly indicated his desire to represent himself if the only alternative was the appointment of Carroll. While his requests no doubt were *conditional*, they were not equivocal." (*Id.* at pp. 1444-1445, fn. omitted, original italics.) Appellant's persistent and consistent efforts to persuade the court to allow him to represent himself were as genuinely and firmly held as those in *Adams*.

c. The request was timely

The trial court denied the initial *Faretta* motion, made on the first day of penalty phase, finding that, consistent with decisions of this Court, it was untimely because the trial was a unitary proceeding. (Sealed 48 RT 9792.) Thereafter, in response to the multiple requests for reconsideration of the *Faretta* request and additional motions made by appellant throughout the penalty phase, the trial court consistently reiterated its finding that the

motion was untimely because it was not brought before the beginning of the guilt phase.

As appellant has argued *ante* in section B.2., this Court's interpretation of the timeliness requirements for a self-representation motion, as set forth in *Windham* and its progeny, lacks support in the federal Constitution. Because neither *Faretta* nor *Windham* was a capital case, the question of determining the timeliness of a motion for self-representation at a penalty trial was not addressed in either decision. Appellant urges the Court to reconsider the strict application of the unitary-capital-trial rule in evaluating the timeliness of motions for self-representation at the penalty phase of a capital case without consideration of the totality of the circumstances of each case.

i. The automatic application of the unitary-capital-trial rule to a determination of the timeliness of a *Faretta* motion unreasonably and unjustifiably undermines the right to self-representation at the penalty phase of a capital case.

This Court has recognized a criminal defendant's Sixth Amendment right to self-representation at the penalty phase of a capital case. (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1222; *People v. Clark*, *supra*, 50 Cal.3d at pp. 617-618.) However, for purposes of determining whether a request for self-representation is timely in a capital case, the Court has held that the guilt and penalty phases of trial are not separate trials, but stages of a "unitary capital trial." (*People v. Hamilton* (1988) 45 Cal.3d 351, 369; accord, *People v. Doolin* (2009) 45 Cal.4th 390, 454; *People v. Hardy* (1992) 2 Cal.4th 86, 193-195.) Thus, to be timely, a motion for self-representation at the penalty phase must be raised a reasonable time before the start of the guilt phase. (See *Windham*, *supra*, 19 Cal.3d at p. 128.) The Court has found self-

representation motions made after the guilt phase verdicts have been returned to be untimely. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1006.)

The concern underlying the Court's unitary-capital-trial rule is the potential for disruption of an ongoing trial before the same jury. (See, e.g., *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 434 [erroneous denial of *Faretta* motion because penalty retrial would take place before a different jury, so "the rationale behind the rule giving the trial court discretion to deny an untimely *Faretta* motion – to avoid disruption of an ongoing trial – thus is not implicated in this case"].) The effect of the automatic application of the rule to the question of timeliness of a *Faretta* motion is to render *every* motion for self-representation at the penalty phase, raised after the start of the guilt phase, untimely and thus subject to the trial court's discretion rather than an unconditional constitutional right.

In *People v. Hamilton*, *supra*, 45 Cal.3d 351, the defendant made a series of motions to relieve counsel, or in the alternative to represent himself, throughout the course of the guilt phase of trial. (*Id.* at pp. 366-367.) On the day the jury returned its guilt phase verdicts, defendant filed a motion asking for counsel to be relieved, or to represent himself at the penalty phase. (*Id.* at p. 367.) The court summarily denied the motion. At a hearing five days before the start of the penalty phase defendant renewed the motion, which the court again denied. (*Id.* at pp. 367-368.) This Court held the motion was untimely because it was made after the start of the guilt phase and upheld the trial court's exercise of discretion under *Windham* in denying the motion. (*Id.* at pp. 368-369.)

Relying on the unitary-capital-trial rule, the Court rejected defendant's argument that the motion was timely because the penalty phase is a separate proceeding and his motion was made a reasonable time prior to

the start of that phase. (*People v. Hamilton*, *supra*, 45 Cal.3d at p. 369.) In support of its holding, the Court cited the nature of the penalty phase as "a stage in a unitary capital trial," and more importantly, the "substantial" connection between the guilt and penalty phases, based on the fact that the same jury sits at both phases of the trial, and considers evidence from the guilt phase at the penalty phase. (*Id.* at p. 369, citing section 190.4, subds. (c) & (d).)

While these aspects of a capital trial may be supportive of the designation of the proceeding as "unitary" for certain purposes, they do not constitute a rational basis for determining that in all cases a self-representation motion made after the guilt verdict is timely.

In delineating procedural requirements for asserting the right of self-representation, "courts must consider the fundamental nature of the right and the legitimate concern for the integrity of the trial process. Particular requirements can be justified only insofar as they are functionally related to reconciling those interests." (*Chapman v. United States* (5th Cir. 1977) 553 F.2d 886, 895.) The automatic application of the unitary-capital-trial rule to the determination of the timeliness of a penalty phase *Faretta* motion does not meet this test because it not only renders every penalty phase motion for self-representation per se untimely, but it also fails to reflect the true nature of a capital trial, which is not unitary in any literal sense, but is rather a bifurcated proceeding made up of two conceptually separate actions.

Application of the unitary-capital-trial rule to support a finding of the untimeliness of a penalty phase *Faretta* motion was challenged in *People v. Hardy*, *supra*, 2 Cal.4th 86, in which this Court rejected appellant's reliance on the Supreme Court's holding in *Bullington v. Missouri* (1981) 451 U.S. 430, that the penalty phase of a capital trial is a "separate trial" for purposes of double jeopardy. This Court found *Bullington* was "not on point."

(*People v. Hardy*, *supra*, at p. 194.) Although the issue presented in *Bullington* was not the same as that presented here and in *Hardy*, the analytic approach of the high court in *Bullington*, comparing the penalty phase with the guilt phase, is relevant to the issue of whether the penalty phase should be considered a separate proceeding for purposes of determining the timeliness of a motion for self-representation. Structurally, California's capital statutory scheme, just like the Missouri statute at issue in *Bullington*, provides for a separate adversarial proceeding on the issue of punishment at which the parties may present evidence and argument and the jury is instructed, deliberates and determines the appropriate punishment. (*Bullington v. Missouri*, *supra*, 451 U.S. at p. 437 [presentence hearing "was itself a trial on the issue of punishment"].) Thus, the basic outline of the penalty phase resembles the guilt phase and describes a separate and distinct portion of the trial.

Conceptually, however, the two phases of a capital trial are different in ways that should bear on the determination of the timeliness of a request for self-representation. As this Court has explained, the purpose of the penalty phase contrasts sharply with that of the guilt phase: the focus of the penalty phase is "more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267.) To that end, under California's capital case scheme, like many of the death penalty schemes upheld by the United States Supreme Court, at the penalty phase, the parties present unique categories of evidence, which are governed in part by special rules, and the jury's sentencing decision is guided in part by different legal principles than at the guilt phase. (See, e.g., Pen. Code, § 190.3, factors (b), (c) & (k); CALJIC No. 8.85; CALCRIM No. 763.)

Moreover, the mitigation case – the case for life – is an entirely different type of defense than that designed to obtain a not-guilty verdict or a conviction on a lesser-included offense at the guilt phase. With the defendant's life literally on the line, it is the highest-stakes defense imaginable. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) It is a most personal presentation, focusing on the defendant's background and character. (*Lockett v.* Ohio (1978) 438 U.S. 586, 608; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *People v. Bacigalupo* (1993) 4 Cal.4th 457, 466; *People v. Lucero* (1988) 44 Cal.3d 1006, 1030.) It is a defense that often lays bare the life of the defendant (and his family) before the jury, revealing sordid, painful experiences, long-hidden secrets and trauma as well as positive qualities and kindnesses. At this point of total vulnerability, a defendant's dignity and autonomy – and his right to control his own defense by representing himself – matter as much as they do at the guilt phase. (See *People v. Blair*, *supra*, 36 Cal.4th at p. 738 [defendant's autonomy interests are no less compelling at the penalty phase of a capital trial than at the guilt phase].) A defendant may be satisfied to be represented by counsel at the guilt phase, but then, like appellant, decide that counsel's plan for pleading for his life is unacceptable and seek to represent himself at the penalty phase. His request to be the master of his own fate should not automatically lose its constitutional protections simply because it was not raised before the start of the guilt phase. (See *Indiana v. Edwards*, *supra*, 554 U.S. at p. 186, disn. opn. of Scalia, J. ["the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State – the dignity of individual choice"].)

Given the nature and purpose of the penalty phase, this Court's automatic application of the unitary-capital-trial rule to declare untimely any self-representation motion made after the guilt phase of trial is unreasonable

and unjustified. It renders the *Faretta* right illusory because in order for a capital defendant to exercise his *constitutional* right to self-representation at the penalty phase, a motion would have to be brought in a "reasonable time" before the start of the guilt phase – a time at which there is no certainty a penalty trial will happen.

The automatic application of the rule is even more problematic with regard to a defendant's ability to make an informed decision about self-representation at the penalty phase, especially one that is compelled by a fundamental disagreement about what mitigation evidence will be presented. Under the unitary-capital-trial rule, the cutoff for a timely assertion of the unconditional constitutional right to self-representation – well before the start of the guilt phase – sets a deadline when few, if any, defense counsel have completed their investigation and preparation for the penalty phase. This Court has recognized that under the prevailing professional norms for capital defense prior to petitioner's trial, "defense counsel should secure an independent, thorough social history of the accused well in advance of trial." (*In re Lucas* (2004) 33 Cal.4th 682, 708; see also *Wiggins v. Smith* (2003) 539 U.S. 510, 522-523.) However, neither this Court nor the United States Supreme Court has found counsel ineffective for failing to finish their penalty phase investigation and finalize their mitigation case well in advance of trial. Thus, this Court requires a defendant in a capital case to decide whether to seek self-representation before he may have the basic information necessary to make that decision – before he knows whether he will agree or disagree with his attorneys' mitigation case.

This case illustrates the point. Although counsel apparently began work on the penalty phase investigation before the end of the guilt phase (see, e.g., 54 RT 10931-10938 [testimony of defense investigator M.E. Greenberg]), counsel's investigation and preparation continued throughout

the guilt phase and into the penalty phase (see, e.g., 52 RT 10551 [mitigation expert conducted interviews with appellant well after voir dire began]; 48 RT 9729 [at July 31, 2006 hearing, counsel states that test for organic brain damage conducted week before]; Sealed 52 RT 10695 [counsel requested permission from the court on August 10 to conduct test on appellant in courtroom to provide to defense expert]).

Thus, it was not until counsel's case in mitigation was substantially revealed during the in limine motions at the penalty phase, that appellant was able to make an informed decision regarding self-representation. Appellant's request for self-representation was clearly prompted by the description by counsel of their proposed evidence at the July 26 hearing. At the in camera hearing, appellant stated, "I don't understand this. I haven't discussed it with them. I don't think it's a good idea." (Sealed 47 RT 9644-9645.) Counsel noted appellant's disagreement with their penalty phase strategy, and did not dispute his statement that they had not discussed it with him. (Sealed 47 RT 9646-9647.)

To insist that a defendant move to represent him or herself at a penalty phase well before the guilt phase has even begun, and before the nature of the proposed penalty phase – should one occur – is known, in order to avoid a finding of untimeliness defies reason and logic. To hold a motion for self-representation made by a defendant untimely when the "earliest opportunity" to make the motion arises at a time when an interpretation of the law would make it already tardy "would effectively thwart defendant's constitutional right to proceed in propria persona as established in *Faretta v. California* (1975) 422 U.S. 806." (*People v. Herrera* (1980) 104 Cal.App.3d 167, 174.) Yet this is precisely what the automatic application of the unitary-capital-trial rule does.

The application of the unitary-capital-trial rule to a determination of the timeliness of a *Faretta* motion, without consideration of the totality of the circumstances of each case fails to reconcile the competing interests of the constitutional right to self-representation and the concern for the integrity of trials. As discussed, *post*, in section C.1(c)(ii), under existing law, a trial court has the means to ensure that *Faretta* motions made before the start of a penalty phase do not disrupt or delay an ongoing trial. Thus, the broad application of the unitary-capital-trial rule in this context is neither necessary nor warranted.

ii. The Court's existing jurisprudence supports assessment of a motion for self-representation at the penalty phase by considering the totality of the circumstances under which the motion is made rather than under the automatic application of the unitary-capital-trial rule.

Assessing the timeliness of a motion for self-representation made at or before the penalty phase of a capital trial without the automatic application of the unitary-capital-trial rule finds support in the Court's existing jurisprudence on the question of timeliness of *Faretta* motions.

In *Windham*, the landmark California case applying *Faretta*, this Court ruled that "when the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." (*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) Thus, under *Windham*'s "reasonable time prior to the commencement of trial" rule, a criminal defendant's constitutional pretrial *Faretta* motion is timely and not subject to the trial court's discretion, even if it is late, when the record contains "some showing of reasonable cause for the lateness of the request." (*Ibid.*; cf., *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791 [finding pretrial *Faretta*

motion untimely where "[a]ppellant's motion was unaccompanied by any showing of reasonable cause for its lateness"].)[32]

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[32] The Court in *Windham* was unmistakable on this point as its full explanation shows:

> Our imposition of a 'reasonable time' requirement should not be and, indeed, must not be used as a means of limiting a defendant's Constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice. For example, a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for trial and needs further time for preparation. Thus if the reason why a defendant makes a request for self-representation in close proximity to trial is because he disagrees with his appointed counsel's desire for a continuance, some delay may be necessary whether or not the defendant's motion is granted. In such a case the very reason underlying the request for self-representation supplies a reasonable justification for the delayed motion. Furthermore, as defense counsel himself seeks a continuance for the purpose of further trial preparation it would be illogical to deny a motion for self-representation under such circumstances simply because the motion is made in close proximity to trial. There may be other situations in which a request for self-representation in close proximity to trial can be justified. When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly processes of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by reasonable standards.

(continued...)

In *People v. Lynch* (2010) 50 Cal.4th 693, this Court made clear that timeliness is a flexible and functional inquiry made with an eye to the purposes that evaluations of "timeliness" are meant to serve. "*Faretta* nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case," nor do this Court's "prior cases preclude a trial court from considering the totality of the circumstances in assessing the timeliness of a request for self-representation." (*Id.* at p. 724.) "Timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*Ibid.*) An analysis based on these considerations "is in accord with the purpose of the timeliness requirement, which is 'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'[Citation.]" (*Ibid.*)

Echoing *Windham*, in *Lynch* this Court held that one of the factors that the trial court should consider when evaluating the timeliness of a *Faretta* motion is "whether the defendant had earlier opportunities to assert his right of self-representation." (*People v. Lynch*, *supra*, 50 Cal.4th at p. 726 [defendant's failure to offer justification for delay in making request to represent himself was a factor supporting trial court's determination that motion was untimely].)

The approach taken in *Windham* and *Lynch* provides an adequate and workable measure of whether a defendant's motion for self-representation at the penalty phase was timely. It both safeguards the constitutional right to self-representation and guards against the unjustifiable use of *Faretta*

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[32](...continued)
(*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.)

motions to delay and disrupt trials. In this case, until the jury found appellant guilty of first degree murder and found true the special circumstances, there was no guarantee that a penalty phase would occur. Moreover, it was not until after appellant was made fully aware of his attorneys' intended mitigation case that the conflict between them over control of the penalty phase case became clear. Appellant tried to resolve the conflict without success and sought substitute counsel before seeking the only remedy remaining open to him – self-representation – on the first day of the penalty trial. Surely this is "some showing of reasonable cause," for the timing of the request. (*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5; see *People v. Herrera*, *supra*, 104 Cal.App.3d at p. 174 [motion made on the eve of trial timely where reason for requesting self-representation arose at that point].)

The approach appellant urges does not mean there are no timeliness limits on motions for self-representation at the penalty phase. "Implicit in the requirement the defendant show reasonable cause for the lateness of the request is that the event(s) which brought about the defendant's current request for pro per status must not only be recent in origin but must also provide a reasonable basis for his dissatisfaction with his attorney's representation." (*People v. Hernandez* (1985) 163 Cal.App.3d 645, 654 [defendant's dissatisfaction with result of attorney's investigation and displeasure at conveyance of plea bargain not reasonable grounds for lateness of pro per request].)

Thus, the decisions in *Windham* and *Lynch* provide a framework for determining the timeliness of an assertion of the right of self-representation at the penalty phase that respects the fundamental nature of the right as well as the legitimate concern of this Court about the potential for disruption of a trial at which the same jury sits for both the guilt and penalty phases.

iii. Appellant's *Faretta* motion was timely under *Windham* and *Lynch*

As shown above, appellant presented a reasonable justification for filing his motion for self-representation on the first day of the penalty phase, a factor not considered by the trial court in ruling the request was untimely. The other *Lynch* factors, "whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings" (*People v. Lynch, supra*, 50 Cal.4th at p. 726) – which ultimately focus on the underlying purpose of the timeliness requirement – also do not support a finding of untimeliness, because appellant made clear that he was fully prepared to present his straightforward penalty phase case immediately and in the same amount of time allotted for trial counsel's case. Thus, none of the factors that may otherwise be a source of delay or disruption were present here.

Appellant was fully prepared to present his case in mitigation without the necessity of a continuance. While this fact may not be determinative (*People v. Jenkins, supra*, 22 Cal.4th at p. 963), because avoidance of disruption and delay underpins the entire *Windham* rationale (*People v. Burton, supra*, 48 Cal.3d at p. 852), it is obviously an important factor.

In denying appellant's July 31 *Faretta* motion, the trial court countered appellant's insistence that his request to proceed pro per would not delay or disrupt the trial by stating its belief that it would be "absolutely inevitable" that appellant would be confronted with decisions "that would, of necessity, require delay in this proceeding." (Sealed 48 RT 9804-9805.) The court made no attempt, however, to question appellant about whether he was ready or able to schedule necessary witnesses. The court's unfounded speculation that delay was "inevitable" has no basis in the record and should

be discounted.

The next day appellant asked the trial court to reconsider his *Faretta* motion, arguing that the court had failed to conduct the inquiry required by *Windham*, which left the court unaware that appellant had considered possible defenses and led the court to conclude that the motion was untimely and would cause delay due to unpreparedness.[33] (Sealed 49 RT 9916.)

Appellant acknowledged that the penalty phase case contemplated by defense counsel presented "very complicated issues," but also noted that he knew the basis for the issues better than anyone, being "the origin of those complicated issues." (Sealed 49 RT 9916-9917.) In addition, he told the court, "my defense strategy would not have included such complicated issues that I believe likely would only anger the jury, ultimately costing me my life . . . ." (Sealed 49 RT 9917.)

Again, the trial court did not question appellant about his planned penalty phase case, but instead merely "incorporate[d] by reference the remarks I made yesterday," and refused to reconsider the motion. (Sealed 49 RT 9918-9919.)

Despite the court's failure to make a complete record, even after appellant brought it to the court's attention on August 1, the record contains sufficient information about appellant's proposed penalty phase case to refute the trial court's speculation that he would "inevitably" encounter

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[33] Appellant stated, " I'm asking the Court to reconsider my *Faretta* motion, and I just wanted to make it clear to the Court that they [sic] didn't complete the minimum requirements set forth in the case law, which includes a sua sponte inquiry. [¶] And not doing so had the effect of causing the Court to be unaware that I had in fact considered possible defenses. And this lack of knowledge apparently influenced the Court to view my *Faretta* motion as untimely causing delays to – due to unpreparedness." (Sealed 49 RT 9916.)

situations that would necessitate delay. Appellant's family members and friends who testified at the penalty phase were obviously available as witnesses for appellant, just as they were for trial counsel. (See, e.g., 47 RT 6932; 50 RT 10145, 10221, 10367, 10482.)

Appellant repeatedly asserted his readiness and nothing in the record contradicts his statement. On Wednesday, August 2, 2006, the prosecutor announced that his last witness, were he to be called, would testify on Monday, August 7, after which the defense case would begin. (49 RT 10031.) On August 3, appellant reasserted his "unequivocal desire to proceed pro per." (Sealed 49 RT 10087.) At first, appellant stated that, because of the trial court's denial of his original *Faretta* motion on July 31, he "would anticipate a delay, but not in excess of 72 hours from this moment in time." (*Ibid.*) Later in the proceeding, appellant clarified his statement by noting the 72 hours included the following three days, during which court was not in session, thereby resulting in no delay at all. (Sealed 49 10091.)

Thereafter, in denying appellant's request for reconsideration of the motion on August 3, the court cited the delay necessitated by getting stand-by counsel prepared. (Sealed 49 RT 10090-10091.) As previously noted, appellant agreed to accept present counsel as advisory counsel, thereby eliminating any possible delay. (Sealed 49 RT 10087-10088.)

On August 9, 2006, appellant renewed his *Faretta* motion, noting that "there would be no delays." (51 RT 10271.) The court denied the motion, incorporating the reasons previously stated. (51 RT 10272.) When the prosecutor expressed concern because he had not been privy to the proceedings at which the court set forth the reasons, the court repeated its unfounded view about inevitable delay: "I found, first of all, this is not timely since the penalty phase is but one part of a continuing trial . . . And I also found that despite Mr. Frazier's promises of no delays, that based on the

witness list I had and the expected professional witnesses and so forth, that I felt that the delay was inevitable." (51 RT 10273-10274.)

Even though the court never asked appellant which witnesses he intended to call, based on statements by appellant and trial counsel, the court was aware that appellant would be presenting the testimony of friends and family members, but would not be calling the expert witnesses announced by trial counsel. (See, e.g., sealed 47 RT 9660 [trial counsel tells court if *Faretta* motion is granted "I'm assuming he would not present the evidence that we would present"]; 47 RT 9635 [appellant asks that evidence regarding proposed expert testimony remain in camera]; Sealed 48 RT 9795 [appellant describes mitigation as "hearing how my friends and loved ones will be affected if they decided to have me executed"].) The court, therefore, had no basis upon which to speculate that appellant's promise of no delays was incorrect.

In denying the initial *Faretta* motion and each of the subsequent motions and requests for reconsideration made throughout the penalty phase, the court cited its belief that the request was untimely, but made no finding that the purpose of the request was to delay the proceedings, nor that the court believed appellant intended to disobey the court's order or violate the rules of evidence. (Cf., *People v. Bradford*, *supra*, 15 Cal.4th at p. 1366 [defendant's motion to represent himself appeared to be motivated in part by an effort to create reversible error in the proceedings].)

The court never expressed any concern that if appellant were permitted to proceed pro per that he would provide additional excluded evidence or tell the jurors information that had been withheld from them. (Cf., *People v. Jenkins*, *supra*, 22 Cal.4th at p. 962 [trial court's discretion upheld under *Windham*, including consideration of threat by defendant to tell jurors information court had excluded].) On the contrary, appellant made

clear that he understood and was prepared to abide by the rules of evidence and procedure. During the course of outlining his disagreement with counsel's proposed penalty phase tactic, i.e., "mitigating the why of this sickening crime I've been convicted of," appellant also stated, "I'm fully aware of [sic] the penalty phase is not for arguing the guilt phase . . . ." (Sealed 48 RT 9794.) And while appellant said he "pray[ed] for the victim's family," and quoted the Bible during his statements to the court, he acknowledged "it's likely the Court will not allow me to recite that to the jury so as to confuse them in their decision-making process."[34] (Sealed 48 RT 9795.)

At one of the later hearings on appellant's renewed *Faretta* motion, appellant noted that the trial court repeatedly denied his right to self-representation on the grounds that "it would cause delays and it was ambivalent." (51 RT 10272.) The court added, "And that it was late." Appellant responded, "Well, right. That it wasn't timely based on the delay it would cause." (*Ibid.*) The court remarked, "Those are two separate concepts. Timeliness is one. Possible delay is another. They're not

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[34] Throughout appellant's repeated requests for reconsideration of his motion during the penalty phase, he agreed that if he were granted the right to represent himself, he would abide by the court's rules and procedures. When appellant asked to address the jury at a hearing on August 10, the court told him he could not make "an uncross-examined statement to the jury." (Sealed 52 RT 10519, 10521.) The court also noted that if appellant were representing himself he could argue to the jury, but that was "different than pronouncing evidence from the witness seat." (*Ibid.*) At a subsequent hearing when appellant again asked the court to grant him pro per status so that he could complete his case and address the jury through a closing argument, he assured the court, "And with pro per status and *without presenting . . . things not already in evidence*, I'm confident that I can handle the one witness I would intend to call as already scheduled for today and be prepared for closing arguments by the morning of August 17, 2006 at 8:30 a.m." (Sealed 54 RT 10888-10889, italics added.)

related." (*Ibid.*) Thus, the court's consideration of timeliness and possible delay as separate concepts further supports appellant's position, for while the court consistently found the motion to be untimely, at no time did the trial court find that appellant was attempting to use the motion to delay the proceedings.

The court made no finding that appellant intended to disrupt the proceedings, nor would the record support such a finding. While the court was aware throughout the trial of issues appellant was having with jail staff, the court made no reference to appellant's conduct in the jail as a basis for denying his *Faretta* motions. (Cf., *People v. Butler* (2009) 47 Cal.4th 814, 826-827 [court did not rely on defendant's conduct in jail in revoking *Faretta* right]; see also *People v. Carson* (2005) 35 Cal.4th 1, 11 [court must develop adequate record of basis for terminating self-representation when based on out-of-court conduct].) Nor did the court refer to appellant's in-court behavior, which was consistently reasonable and courteous, as a basis for denying his self-representation motion.

2. The Request Was Knowingly and Intelligently Made

The assertion of the Sixth Amendment right to self-representation must be knowing, intelligent and voluntary. (*Faretta, supra*, 422 U.S. at p. 835; *People v. Koontz* (2002) 27 Cal.4th1041, 1069-1070.) In the present case, the trial court's findings make clear that it considered appellant able to make such a waiver.

At the July 31 hearing on appellant's first *Faretta* motion, the court, referring to appellant's competence to represent himself commented, "I'm not a hundred percent convinced that he meets that test." (Sealed 48 RT 9802.) However, the court later disavowed this initial concern. First, at an in camera hearing about releasing to the prosecutor portions of the transcripts of the in camera hearings from which he had been excluded, the

court explained that its earlier statements were based on counsel's representations of the mental health evidence they planned to present before the court had personal knowledge of the experts' testimony. (Sealed 52 RT 10513.)

Second, as discussed previously (*ante* at pages 82-83) the issue of appellant's competence to stand trial arose during the testimony of defense witness psychologist Dr. Gretchen White. (51 RT 10480.) It was pursued by the prosecutor, and discussed by defense counsel and the court. (52 RT 10491-10496, 10499-10501, 10525-10527.) After reviewing the transcript of Dr. White's testimony and reading the relevant law, the court considered whether it had a duty to suspend proceedings and order a section 1368 hearing – whether substantial evidence of appellant's incompetence had been introduced. (52 RT 10531-10535.) The trial court had no doubt about appellant's competence:

> . . . I have been a percipient witness to Mr. Frazier's participation in this case. I have had extensive discussions with him, mostly not in the presence of the District Attorney about his case. And I'm not going to divulge what those conversations were, but it's imminently [sic] clear from those conversations he's well aware of what is going on. He is well aware of the legal propositions that are involved. I take note of the fact that he is constantly, which is his right, he's constantly chatting with his counsel, sometimes when they're both at the table, sometimes when one is questioning he'll talk with the other, certainly his right to do so. And the *Faretta* motion itself, executed and signed by Mr. Frazier under penalty of perjury, clearly states that he is intelligent, that he's making these decisions voluntary [sic]. He's obviously gone to some extent of research within his abilities, limited abilities at jail, quoting case laws. His issues are targeted at things that are of concern to him, and not wandering and ambivalent. [¶] And so I rule at this point in time that I do not have a doubt about his mental competence to continue with this trial under the grounds and the requirement of 1368 and 1369 and the *Ary*

case.

(52 RT 10535.)

Third, at the August 14 hearing on appellant's renewed *Faretta* motion, the court stated, "I've always found and will continue to find that Mr. Frazier is making these motions in a state of knowing and intelligent conduct." (Sealed 53 RT 10799.) At no time did the court express a contrary opinion. The court's comments make clear that the court harbored no concerns about the knowing and intelligent nature of appellant's pro per requests.[35]

D. Even Assuming the Motion Was Untimely, The Trial Court's Denial Of The Motion Was Error

The trial court abused its discretion even if appellant's motion is deemed to be untimely and evaluated under the *Windham* standard. The purpose of the *Windham* timeliness requirement is "to prevent the defendant from misusing the [*Faretta*] motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton*, *supra*, 48 Cal.3d at p. 852.)

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[35] The high court's decision in *Indiana v. Edwards*, *supra*, 554 U.S. 164, which held that states may, but need not, deny self-representation to defendants, who although competent to stand trial, lack the mental health or capacity to represent themselves at trial – persons the court referred to as "gray-area defendants" (*id.* at p. 174), does not apply to this case. "While *Edwards* makes clear states may set a higher or different competence standard for self-representation than for trial with counsel, California had not done so at the time of defendant's trial. In the absence of a separate California test of mental competence for self-representation, the trial court had no higher or different standard to apply to the question. In that circumstance, the court did not err in relying on federal and state case law equating competence for self-representation with competence to stand trial." (*People v. Taylor* (2009) 47 Cal.4th 850, 866.)

Under this Court's precedent, when a midtrial request for self-representation is made, the trial court has discretion to deny a *Faretta* motion. The trial court must ensure a meaningful record for its ruling by considering factors such as: 1) the quality of counsel's representation; 2) the defendant's prior proclivity to substitute counsel; 3) the reasons for the request; 4) the length and stage of the proceedings; and 5) the disruption or delay which might reasonably be expected if the motion were to be granted. (*Windham, supra*, 19 Cal.3d at p. 128.) Examination of these factors in light of the record made by the trial court reveal that the court abused its discretion in denying appellant's request for self-representation.

As this Court recognized in *Windham*, the rationale underlying the *Faretta* decision is that "the state may not constitutionally prevent a defendant charged with commission of a criminal offense from controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant." (*Windham, supra*, 19 Cal.3d at p. 130.) Yet, this is precisely what happened to appellant, who made every possible effort to control his own case.

1. The Reason for the Request

The "reason for the request" factor considers the legitimacy of the basis for the defendant's desire to proceed without counsel. In this case, appellant genuinely believed that the case his attorneys intended to present would anger the jurors who had found him guilty and that he had a better chance at a life verdict with the case he wanted to present.

Appellant understood that, because his attorneys were not able to argue at the guilt phase that he was not guilty, the proposed mitigation case was aimed at explaining how he became the person who committed the crime: "From what I've seen – or from what I've been allowed to see with regard to video testimony, it is my appointed counsel's intention to mitigate

the why of this sickening crime I've been convicted of."[36] (Sealed 48 RT 9794.) In his opinion, however, "promoting the theory that I'm a product of a dysfunctional family while projecting images of maternally-deprived apes is likely to be considered by the jury as pure monkey business rather than a mitigating factor." (*Ibid.*)

Instead of a case aimed at "mitigating the why," appellant proposed another basis for mitigation "worthy of the jury's consideration." (Sealed 48 RT 9795.) "I don't consider the jury so heartless that they would silently reject hearing how my friends and loved ones will be affected if they decided to have me executed." (Sealed 48 RT 9795.) He exhibited an understanding of how the penalty phase of a capital trial works and the significance of mitigating evidence. (Sealed 48 RT 9795 ["What I mean to only one other person is a mitigating factor"]; 9801 ["It doesn't have to be about the why. The absence of a mitigating factor is not aggravation"].)

At proceedings following the court's denial of the initial *Faretta* motion on July 31, appellant renewed his request based on his strongly-held view that the evidence counsel was presenting was false, subject to objection, inconsistent and detrimental to his cause.

On August 3, appellant contested certain statements made by counsel in her opening statement, including the fact that he was molested by his uncle, that he never finished high school and that he suffers from a genetic brain abnormality. (Sealed 49 RT 10088-10089.) At the August 9 hearing, appellant contested the truth of the testimony of Jeff Triolo that appellant

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[36] He attributed his counsel's inability to argue he was not guilty to the trial court's rulings on third-party culpability and the admissibility of the DNA evidence, and stated that he was "fully aware . . . . the penalty phase is not for arguing the guilt phase" and that those matters "are perhaps grounds for a new trial or an appeal." (Sealed 48 RT 9794.)

told him he had been molested by his uncle. (Sealed 51 RT 10381.) Appellant noted that the "the DA's objections . . . are pointing out that there's inconsistencies in this, which I knew there would be before this." (Sealed 51 RT 10382.) The next day, appellant expanded on these statements, contesting the testimony of Gretchen White as lacking "personal or accurate knowledge." (Sealed 52 RT 10519.)

As the record clearly demonstrates, appellant described a different and non-frivolous defense that he proposed to present to the jury in support of a life verdict, in contrast to the defendant in *Windham* itself, where, the "sole reason put forth by defendant to support his request was the claim that his admittedly competent counsel had been unable to present a stronger case on the theory of self-defense." (*Windham*, *supra*, 19 Cal.3d at p. 129.) Reviewing the overwhelming evidence undercutting this theory, the *Windham* court found it "no small wonder that defense counsel had a difficult task in presenting such a defense" and found the defendant's complaints about his attorney without basis. (*Ibid.*)

The present case is more like *People v. Herrera*, *supra*, 104 Cal.App.3d 167, in which the appellate court found the trial court abused its discretion in denying defendant's self-representation request. Considering this *Windham* factor, the Court observed that the record showed defendant "had conceived a well considered defense." (*Id.* at p. 174.)

Appellant's repeated efforts to represent himself were not the result of, as the court insisted, merely a disagreement about tactics, but reflected a profound dispute about the best way to save appellant's life. (Sealed 51 RT 10382 ["Counsel are entitled to their strategies and tactics"].) His beliefs were genuine and firmly held; this factor weighed heavily in favor of granting the *Faretta* motion.

2. Disruption or Delay

As discussed previously, the timeliness requirement for making a *Faretta* motion exists "'to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice.'" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 454, quoting *People v. Horton*, *supra*, 11 Cal.4th at p. 1110; see also *People v. Burton*, *supra*, 48 Cal.3d at p. 852.) As one Court of Appeal concluded: "Every case upholding a discretionary denial of a *Faretta* motion involves a request for a continuance (or some other delaying tactic) or a demonstrated proclivity to substitute counsel or both." (*People v. Nicholson*, *supra*, 24 Cal.App.4th at p. 592.) Appellant is unaware of any case decided since *Nicholson* that contradicts this finding.

Appellant's actions are unlike those of the defendant in *People v. Lawley* (2002) 27 Cal.4th 102, who sought to terminate his pro per status at the penalty phase, but who "allowed two weeks to elapse, from the jury's guilt phase verdict to the very day set for the commencement of the penalty phase, without making his request for appointment of counsel *or even mentioning his intention to advisory counsel.* The timing of the request thus strongly suggests, as the trial court found, an attempt to delay the trial." (*Id.* at pp. 150-151, italics added.) Here, of course, appellant alerted the court and counsel several times before he made the motion that he was considering it, but waited to see what his attorneys' intentions were as far as penalty phase evidence. Appellant's actions that preceded the filing of his *Faretta* motion are consistent with a good faith, non-dilatory assertion of his Sixth Amendment right.

As set forth above (see *ante* pages 121-125), there was no basis for a finding that granting appellant's *Faretta* motion would result in any delay, nor any evidence to suggest that the motion was made for the purpose of

delay or disruption. This factor, therefore, weighed heavily against the trial court's ruling.

3. Quality of Representation

At the July 31 hearing on appellant's motion, trial counsel opposed the motion, telling the court that this was one of the most complex cases she had ever prepared and outlining the extensive work done by the defense team. (Sealed 48 RT 9796-9800.) In its ruling denying appellant's motion, the court cited counsel's devotion and work on appellant's behalf and her wish to proceed as counsel as "fairly important" to its decision. (Sealed 48 RT 9803.) Again on August 9, in denying appellant's request for reconsideration of his motion, the court cited the fact that appellant was receiving competent representation from his attorneys as a basis for the court's decision. (Sealed 51 RT 10383-10384.) The relevance of this factor to the decision whether to grant a defendant's motion for self-representation in any case is questionable, but in a case such as the present one in which appellant had such a profound disagreement with what his attorneys proposed to do, its legitimacy, if any, is even more diminished.

Although obviously-deficient legal representation may support a defendant's *Faretta* motion, a silent record on the quality of counsel, or even evidence of competent representation, does not defeat a self-representation request. The *Faretta* right is not intended to guarantee effective representation, but to ensure "the inestimable worth of free choice" with regard to one's own defense. Indeed, the high court in *Faretta* warned that, in most cases, defendants would fare better with "counsel's guidance than by their own unskilled efforts" but nonetheless concluded that "[p]ersonal liberties" like the right to defend pro se "are not rooted in the law of averages." (*Faretta, supra*, 422 U.S. at p. 834; accord, *Godinez v. Moran* (1993) 509 U.S. 389, 400 [capital case] and *People v. Halvorsen, supra*, 42

Cal.4th at p. 433 [capital case].) Similarly, counsel's competence, although relevant to a *Marsden* motion, is irrelevant to a *Faretta* request, as appellant later reminded the court. (Sealed 49 RT 9917 [appellant stated "there's no requirement that a criminal defendant seeking to [re]present himself show that his or her appointed counsel is not providing effective representation before self-representation may be permitted"]; *People v. Percelle* (2005) 174 Cal.App.4th 164, 174.) The reason both factors are extraneous to the self-representation equation is simple. As discussed previously, the right of self-representation honors the defendant's dignity by respecting his autonomy in a criminal prosecution and is not meant to promote the fairness or reliability of the resulting verdict.

Thus, neither the court's concern with appellant's lack of skill in conducting his own penalty defense – "your ability to do those things" – nor its observations about counsel's devotion, competence, and experience justify its denial of appellant's self-representation request. (Sealed 48 RT 9803.) The court's comments may be understandable. Surely, it would be reasonable for the court to worry about the hazards for appellant if he represented himself in the penalty trial where his life, literally, was at stake, especially given its views about counsel's dedication and hard work. But under *Faretta* they simply do not matter.

The *Windham* factors exist to facilitate the efficient administration of justice, rather than to protect a defendant's rights. (*People v. Clark, supra*, 3 Cal.4th at p. 109.) Thus, the reason for assessing the quality of representation is not to compare the quality of a defendant's lawyers to the capabilities of other attorneys generally to see how well the defendant's lawyers are protecting the defendant's rights. Nor is it to compare the capacity of trial counsel to that of the client. Indeed, this Court has repeatedly stated that the capacity of the defendant to represent himself with

the skill of a trained professional is irrelevant under *Windham*. (*People v. Hamilton*, *supra*, 45 Cal.3d at p. 369 [defendant's lack of competence in law irrelevant consideration].)

The quality of the attorney's representation is relevant because it may shed light on the reasons underlying the defendant's request and, correspondingly, informs the ultimate purpose of the rule – avoidance of disruption and delay. If there is a genuine basis for the defendant's dissatisfaction with his legal representation, it supports the conclusion that the request is not made for purposes of delay. (See *Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5 [discussing hypothetical case in which defendant disagrees with attorney's desire for continuance].) On the other hand, if the attorneys are performing well and resolving disputes with their clients in good faith, this may support a finding that the request has the intent or effect of simply delaying or disrupting the proceedings. (See *People v. Roldan*, *supra*, 35 Cal.4th at p. 684 [court properly relied on finding that defendant's attorneys where "excellent" where it supported conclusion "that no irreconcilable rift had occurred between client and counsel, and that defendant was merely attempting to delay the trial"].)

In *People v. Marshall* (1996) 13 Cal.4th 799, the defendant expressed concern with the progress of the investigation and voiced a belief that "he alone could attempt an inquiry of certain witnesses that would elicit the truth for the jury." (*Id.* at p. 827.) In response, the trial court "noted trial counsel's competence did not appear to be in question, and observed that the sort of investigation defendant appeared to contemplate would be infeasible given defendant's custodial status." (*Ibid.*) In other words, the trial court in *Marshall* properly assessed trial counsel's performance in the context of determining that there was no legitimate reason for self-representation, which, as contemplated, would be "infeasible"—i.e. likely to cause

disruption and/or delay if the request was accommodated.

Here, however, there existed an irreconcilable disagreement between appellant and his attorneys. As the court in *People v. Herrera*, *supra*, 104 Cal.App.3d 167, noted in analyzing the *Windham* factors and finding the trial court abused its discretion in denying defendant's pro per request, "At least Herrera felt he was receiving poor representation." (*Id.* at p. 174.)

The reason for appellant's request was that he wanted to present a case for life that he felt would not anger the jury. (Sealed 49 RT 9917.) Unlike exaggerated or baseless disagreements with trial counsel addressed in other cases (see, e.g., *People v. Ruiz*, *supra*, 142 Cal.App.3d at p. 784 [defendant concerned that public defender collaborating with prosecutor and not investigating theory he had been framed by victim]), appellant's request centered upon a legitimate and undeniably valid concern: that "it's not an expert's opinion to say that I'm not capable of discerning what mitigation is most beneficial for me in the case . . .." (Sealed 48 RT 9800-9801; see *United States v. Adams* (2001) 252 F.3d 276, 288 [recognizing defendant has "unique perspective on the circumstances relevant to his sentence"].) Thus, the trial court's assessment of the professionalism of counsel during trial, as opposed to the bearing counsel's performance had on the basis of the *Faretta* request, focused on the wrong issue entirely and does not support its ruling.

4. The Defendant's Proclivity to Substitute Counsel

Appellant showed no proclivity to substitute counsel. He did not attempt to replace counsel before bringing his motions at the penalty phase. And he sought substitute counsel at the penalty phase for the same reason he then sought self-representation – to solve his fundamental disagreement about the mitigation case. This factor did not support the trial court's order.

5. The Length and Stage of the Proceedings

As noted, the trial court's denial of appellant's motion was based in large part on the fact that it came in the midst of a unitary proceeding, that is, after the guilt phase had concluded. Under this reasoning, the request came at a late stage of the trial.

Viewed with an eye toward the basis for the *Windham* factors, i.e., "primarily [to] facilitate efficient administration of justice, not protection of a defendant's rights," (*People v. Hill* (1983) 148 Cal.App.3d 744, 760; see *People v. Clark*, *supra*, 3 Cal.4th at p. 109), appellant's request at the beginning of the penalty phase weighed in favor of granting the motion. No witnesses had yet been called, and no continuance was needed. Thus, no disruption would occur as a result of appellant being permitted to present his own penalty phase case.

Windham is distinguishable. It is true that *Windham* addressed a request for self-representation late in trial, stating that "denial of the motion merely precluded defendant from presenting material to the jury while not under oath or subject to cross-examination." (*Windham*, *supra*, 19 Cal.3d at p. 130.) However, the distinctions between this case and *Windham* are critical. First and most importantly, unlike *Windham*, appellant had not "already presented his own version" at either guilt or penalty. (*Id.* at p. 130.) Thus, allowing self-representation at the penalty phase was not merely a redundant exercise in presenting the defendant's story in defendant's own voice an additional time. Second, unlike *Windham*, this was a penalty phase presentation in which appellant sought to address a normative question about whether he deserved to live, a question that he was surely in a position to answer. Courts and commentators have long recognized the value of a defendant personally addressing the sentencer and requesting lenience, unlike the understandable hesitance courts have shown to allow self-

representation during other trial proceedings. (See *Green v. United States* (1961) 365 U.S. 301, 304; Thomas, *Beyond Mitigation Towards a Theory of Allocution* (2007) 75 Fordham L.Rev. 2641, 2655-2657, 2666-2672 [allowing defendant to address sentencer directly serves to mitigate punishment and humanize defendant]; Myers, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity* (1997) 97 Columbia L.Rev. 787, 805-806 [allowing defendants to speak at sentencing reminds jury of responsibility toward defendant as fellow human being].)

Ultimately, the timing of the motion presented no threat of disruption or delay. Therefore, in the circumstances of this case, the timing supported granting the motion. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [trial court abused its discretion in denying mid-trial *Faretta* motion, where defendant did not request a continuance, was prepared to proceed with the trial, had profound disagreement with defense counsel about how case should proceed and did not show proclivity to substitute counsel, and where no indication that self-representation would obstruct orderly administration of justice]; *People v. Nicholson*, *supra*, 24 Cal.App.4th at pp. 593-594 [trial court abused its discretion in denying *Faretta* motion in a special circumstances murder case, where self-representation was requested for a legitimate reason, there was no request for a continuance, and there was no reason to believe there would be any delay or disruption].)

As the record in the present case makes clear, under the parameters of both *Windham* and *Lynch*, the trial court erroneously denied appellant's assertion of his constitutional right to self-representation.

E. The Erroneous Denial Of The Right Of Self-Representation Requires Reversal

The deprivation of a defendant's right of self-representation under *Faretta* is not subject to harmless error analysis and requires automatic

reversal. (*McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8; *Faretta*, *supra*, 422 U.S. at p. 806; *People v. Joseph*, *supra*, 34 Cal.3d at p. 948.) This is logical since the right of self-representation is embodied within the structure of the Sixth Amendment and structural error defies harmless error analysis. As stated by the court in *United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 150, the "erroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as 'structural error.' [Citation omitted]". Thus, the trial court's error in denying appellant's *Faretta* motion mandates reversal.

Because *Windham* holds that a defendant's untimely assertion of the right of self-representation is not a right based on the federal Constitution, intermediate appellate courts in this state have held that any error attendant to denying this right is subject to analysis under *People v. Watson* (1956) 46 Cal.2d 818. (See, e.g., *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050; *People v. Rogers*, *supra*, 37 Cal.App.4th at p. 1058.) As discussed below, however, this view is flawed, and automatic reversal should follow when a trial court errs in denying self-representation pursuant to *Windham*'s abuse of discretion standard.

This Court has held that the standard for review for assessing the prejudicial effect of state-law errors at the penalty phase of a capital trial is whether it is "reasonably possible" that a given error affected a verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Therefore, if appellant must prove a miscarriage of justice, he submits the proper standard is that articulated in *Brown* rather than *People v. Watson*, *supra*, 46 Cal.2d 818. Under either case, however, appellant submits that the view that the erroneous denial of a *Faretta* motion can be subject to harmless error review is flawed.

People v. Rivers, *supra*, 20 Cal.App.4th 1040, is the case most commonly cited for the rule that the *Watson* test applies to a denial of a self-representation request asserted after the start of the trial. In *Rivers*, the trial court denied a *Faretta* motion as untimely without engaging in any of the analysis required by *Windham*. Consequently, the record was devoid of any evidence which would have permitted a reviewing court to conclude that the trial court acted properly. Therefore, the appellate court found that the trial court erred in denying the request for self-representation. (*Id.* at pp. 1048-1049.) The court then concluded that because the right affected was not a constitutional right, but rather a right based on the case law, the rule of automatic reversal did not apply. The court analogized to this Court's holding in *People v. Crandell* (1988) 46 Cal.3d 833, addressing the erroneous failure to appoint advisory counsel, and utilized the harmless error standard of *Watson* rather than a reversible per se standard. (*People v. Rivers*, *supra*, 20 Cal.App.4th at pp. 1053-1053.)

It is difficult to understand how the *Rivers* court arrived at this conclusion given the nature of the *Faretta* error and the *Crandell* holding. First, the denial of self-representation is not the type of error that is a proper subject for harmless error analysis, which is why both the United States Supreme Court and this Court have held that reversal is automatic when a defendant's *Faretta* rights have been violated. Like the consequences resulting from denial of the right to counsel of choice, the harm resulting from the denial of self-representation is "necessarily unquantifiable and indeterminate . . . ." (*United States v. Gonzales-Lopez*, *supra*, 548 U.S. at p. 150.) Even if the right to self-representation is not unqualified if the request is untimely, the nature of the right itself is not altered by the juncture of the trial at which it is asserted. If the nature of the right has not changed, the type of harm analysis does not change, despite the fact that the way to

measure whether the error itself occurred may be different. In other words, the fact that the trial court may have the discretion to engage in an analysis of additional factors in determining whether to grant a mid-trial request for self-representation does not change the impact of its decision to grant or deny self-representation. The *Rivers* court was wrong to assume otherwise.

Second, the *Rivers* opinion is problematic in relying on *Crandell*, an inapt analogy, to arrive at its conclusion. In *People v. Crandell, supra*, 46 Cal.3d 833, the trial court had denied a request for advisory counsel based on the mistaken belief that such a right did not exist, and, therefore, the error was the trial court's failure to exercise its discretion to grant advisory counsel. This Court used a harmless error standard because it found the trial record contained sufficient facts to show that if the trial court had exercised its discretion and denied the defendant's motion, it would not have been an abuse of discretion. (*Id.* at p. 864.) In other words, the error on the part of the trial court was in believing that such a right did not exist, and the harmless error standard was not being applied to the result of that error – the impact of the failure to appoint advisory counsel – but to the fact that the trial court's erroneous belief was harmless because the trial record revealed facts such that even if the trial court understood the right existed, it still would have ruled against defendant.

The result in *Crandell* must be compared to the result in *People v. Bigelow* (1984) 37 Cal.3d 731, to fully understand the *Rivers* court's misperception. In *Bigelow*, the trial court also mistakenly believed there was no right to advisory counsel, but the record there contained enough facts for this Court to determine that if the trial court had denied the request on the record, rather than on its misperception of the law, it would have been an abuse of discretion. Because of that, the error was found to be reversible per se, based on this Court's acknowledgment of "the impossibility of assessing

the effect of the [error] upon the presentation of the case." (*Id.* at pp. 745-746.) In doing so, the court analogized the error to the denial of the right of self-representation. (*Id.* at p. 745.)

Indeed, appellant's formulation of the proper prejudice standard is the same as the one summarized by the *Crandell* court. It noted that the reversal per se standard applies if the trial court's denial of the defendant's request would have been an abuse of discretion. (*People v. Crandell*, *supra*, 46 Cal.3d at pp. 863-864.) This is the correct rule, and the rule set forth in *Rivers* is not. Under the correct standard, if the trial court erred by denying appellant's request for self-representation, the penalty phase verdict must be set aside.

This Court must presume prejudice when a criminal defendant is forced to proceed with counsel when he has consistently, and in a timely manner, sought to discharge counsel in favor of self-representation. As this Court has noted, it must not speculate as to the prejudicial effect of "'injecting an undesired attorney into the proceedings'." (*People v. Courts* (1985) 37 Cal.3d 784, 796.) Accordingly, as this Court concluded in the context of denying a defendant the right to counsel of his choice, "any standard short of per se reversal would 'inevitably erode the right itself' [citation], by relegating appellate review of a constitutional right to mere speculation." (*People v. Ortiz* (1990) 51 Cal.3d 975, 988, quoting *People v. Courts*, *supra*, 37 Cal.3d at p. 796, fn. 11).

Even if this Court chooses to apply a harmless error test which considers the result of the incorrect ruling, reversal is warranted, because there is a reasonable possibility that he would have done better representing himself at the penalty phase. (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

This analysis is supported by the decision in *People v. Nicholson*, *supra*, 24 Cal.App.4th 584. As noted above, the *Nicholson* court held that

the trial court abused its discretion in denying the defendants' mid-trial *Faretta* motion in a prosecution in which they were convicted of murder with a special circumstance. Despite apparently strong evidence of the defendants' guilt, the Court of Appeal found the error to be prejudicial under the *Watson* standard:

> Had Nicholson and Goldsberry been permitted to control their own fate, the evidence against them would have been no less overwhelming. But we simply cannot discount the fact that it might have been to their advantage to conduct voir dire and to present opening statements and closing arguments, thereby giving the jury an opportunity to hear from them (without the inconvenience of cross-examination). (Cf. *People v. Tyner*, *supra*, 76 Cal.App.3d at p. 356; *People v. Herrera*, *supra*, 104 Cal.App.3d at p. 175.)

(*Id.* at p. 595.) In the same way, this Court should find that in this case the erroneous denial of self-representation was not harmless and requires reversal of the guilt and penalty phase verdicts.

As the high court has recognized, the right of self-representation "exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." (*McKaskle v. Wiggins*, *supra*, 465 U.S. at pp. 176-177.) The mitigating value of a defendant directly addressing the jurors who will make the life or death decision, has been discussed above. This is especially true for a defendant like appellant, who did not testify at the guilt phase, and thus had no opportunity to make a humanizing connection with the jurors. Appellant had no intention of asking the jurors to reconsider their verdict; he acknowledged that issues that resulted in the guilt phase verdicts had to be addressed on appeal. Instead, he wanted to make a case to the jurors, through the words of his friends and family, and ultimately with his own voice, that his life was worth sparing. The force of such a plea cannot be

discounted.

F. Conclusion

The trial court's denial of appellant's unequivocal, knowing and timely request to put on the case he believed would save his life was error under any standard. The automatic application of this Court's unitary-capital-trial rule, which largely dictated the trial court's ruling, must be reconsidered, so that the error in denying this fundamental constitutional right to every defendant who chooses self-representation at the penalty phase of a capital trial without consideration of the circumstances of the request is not repeated.

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III.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION AT THE SECTION 190.4 AND SENTENCING HEARINGS

As set forth in Argument II, *ante*, appellant's motion to represent himself at the penalty phase of trial was denied, as were the several requests for reconsideration and reassertion of *Faretta* rights he made throughout the proceedings. At post-verdict hearings, appellant again moved to represent himself, and again the motion was denied as untimely.

The trial court's denial of appellant's motion to represent himself at the post-verdict proceedings was error and violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to self representation, due process, and a reliable sentencing hearing. Appellant is entitled to a new hearing pursuant to section 190.4, subdivision (e) and a new sentencing hearing.[37] (*Faretta*, *supra*, 422 U.S. at pp. 834-835; *Windham*, *supra*, 19 Cal.3d at pp. 128-129.)

A. Factual Background

Appellant moved to represent himself at the penalty phase of his trial. His initial motion made on the first day of the penalty trial, as well as his many subsequent requests for reconsideration, were denied by the trial court on the grounds that the motions were untimely and equivocal. (See Argument II, *ante*, pp. 69-143.)

The jury returned the death verdict on August 24, 2006. (58 RT 11671.) Sentencing was originally scheduled for October 27, but was later advanced to October 26 by the court. (58 RT 11678, 11682.) Appellant was

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[37] Appellant challenges only the denial of appellant's request to represent himself at the December 15, 2006 proceedings.

present on that date, at which time counsel moved to continue the hearing until December 15, 2006. (58 RT 11690.)

Before the proceeding ended, appellant asked to address the court about his right to a hearing under section 4007.[38] (58 RT 11699.) The court agreed that under the statute, appellant was entitled to a hearing. (58 RT 11709.) The hearing began that day and was continued for further proceedings until December 8, 2006. (58 RT 11741.)

When the hearing resumed on December 8, appellant told the court that he was "going to be making a motion to proceed pro per in this hearing." (58 RT 11750.) During the course of a discussion between the court and counsel regarding transportation of appellant for the next hearing date, he interjected to remind the court that he had not been given the chance to make the *Faretta* motion. (58 RT 11755.)

When the court allowed appellant to speak, he stated, "I no longer wish to be represented by this counsel. I haven't been wanting to be represented by them since the beginning of the penalty phase, and there are very important issues that can be preserved in this hearing that I don't want to just let rot away with me." (58 RT 11757.) The court asked if he wished to make a further *Faretta* motion, and appellant replied, "Yes, I do." (*Ibid.*)

The court conducted an in camera hearing outside of the presence of the prosecutor based on the court's belief that the issues appellant intended

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[38] Section 4007, a so-called "safekeeping" statute, allows county inmates to be housed in state prison facilities under certain conditions, pursuant to an order by the superior court. The statute also provides that once an order has been signed, the court "shall immediately calendar the matter for a hearing to determine whether the order shall continue or be rescinded. The hearing shall be held within 48 hours of the initial order or the next judicial day, whichever occurs later." Pursuant to this statute, the court signed an order presented by the sheriff on August 24, 2006, and appellant was transported that day to San Quentin. (58 RT 11712.)

to raise were in the nature of a *Marsden* motion. (58 RT 11758.)

Appellant initially discussed his concern about counsel's representation at the section 4007 hearing. (Sealed 58 RT 11762-11772.) When the court asked appellant, "Are you asking me to further address your desire to have them relieved for representation in the concluding aspects of this case next year [sic], or are you limiting it to the 4007 hearing?" appellant responded, "Well, I'm making an unequivocal request to proceed pro per." (Sealed 58 RT 11773.)

The court denied the *Marsden* motion "as to the 4007, and I'm denying it generally for their representation of you to the conclusion of this case today." (Sealed 58 RT 11774.) The court then addressed the *Faretta* motion by stating "this is just an overall observation I would make which reflects on the *Faretta* as well. We're very late in these proceedings." (Sealed 58 RT 11775.)

The court observed that the remaining issues in the case were the new trial motion and the section 190.4 hearing and asked appellant if he had anything further to say about the self-representation motion. (Sealed 58 RT 11775-11776.) Appellant responded, "I'm just of the opinion that I can get myself executed just as easily as they can. And I feel that I have enough knowledge about what I want to present in the 4007 hearing to proceed in a way that will be in accordance with the court rules, and I have a Sixth Amendment right to do that, and that's what I'm standing on." (Sealed 58 RT 11776.)

Referring to the *Faretta* motion made at the penalty phase of trial, appellant addressed the court: "And you denied it during the penalty phase. And this hearing is separate than the trial so [sic]. The reasons you denied my first *Faretta* motions were because you said they were untimely. [¶] But this is not an untimely request." (Sealed 58 RT 11777.)

The court noted that in ruling on appellant's previous motions, he found them to be equivocal.[39] (Sealed 58 RT 11788.) However, this time the court stated, "I will make a finding that you are making a [sic] unequivocal request today for that motion." (*Ibid.*) The court continued, "the second statement that I made in the past and I think it's still applicable today is it's not timely. This is quite late in the proceedings . . . [¶] Cases which I haven't [sic] read recently support the proposition that after the guilt phase you do not have a constitutional right to self-representation . . . ." (*Ibid.*)

The court found appellant's request was made voluntarily, that he was "an intelligent person," and that he was aware of the risks and consequences of representing himself at the "closing stage" of the trial. (Sealed 58 RT 11789.) However, the court found, based on appellant's background, experience and education, he was not "capable of representing [himself] in this closing stage of these proceedings with . . . these highly technical issues on reversal [sic]." (Sealed 58 RT 11790.) The court further stated, "But more than any other issue, I will find that this simply is not timely at this point, and the *Faretta* motion is denied." (*Ibid.*)

At the hearing on the motion for new trial and the sentencing held on December 15, 2006, appellant again moved to represent himself. After both sides had submitted the motion for new trial, appellant stated, "Your Honor, I object to these proceedings, and I want to make a pro per motion. I don't even want this motion read until that hearing takes place."[40] (58 RT 11801.)

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[39] The court misspoke when it said "they were in my opinion unequivocal," but agreed with appellant's correction, "You know *not* unequivocal." (Sealed 58 RT 11788, italics added.)

[40] Appellant also objected to the court's having held a *Marsden*

(continued...)

The court ruled,

> As to the . . . *Faretta* motion itself, I have in mind all of the things that you've told me in the past and the reasons that you've given to me, and I have in mind last Friday's discussion as well. And it appearing that other than the law you cited to me, nothing new in the way of factual information has come. I'm not prepared to disturb or revisit the ruling that I made in the past except to respond to your question about the law, which is that at this stage of the proceedings, post-trial, post two trials, the call is discretionary with me, not an absolute right with you as would be pretrial. And I incorporate the findings I made last time. And additional *Faretta* motion . . . is denied. But you have your record.

(58 RT 11804.)

B. The Trial Court Erred in Denying Appellant's Request to Represent Himself at the Section 190.4 and Sentencing Hearings

As set forth in Argument II, a trial court *must* grant a defendant's request to proceed without counsel if three conditions are met: (1) the defendant is competent and made the request knowingly and intelligently, having been apprised of the dangers of self-representation; (2) the request is made unequivocally; and (3) the request is timely. (*People v. Jackson*, *supra*, 45 Cal.4th at p. 689; *People v. Stanley*, 39 Cal.4th at pp. 931-932.) Appellant met each of these conditions; the trial court erred in denying his request to represent himself at the section 190.4 and sentencing hearings.

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[40](...continued)
hearing at the previous court session, noting that he was not required to show counsel were ineffective in order to be granted the right to represent himself. (58 RT 11801-11802.)

1. The Trial Court Erred in Denying Appellant's Motion on the Ground that He Was Not Qualified to Represent Himself

Despite finding that appellant's motion was made intelligently and with an awareness of the risks of self-representation, the court denied the request based on the belief that because of appellant's background, experience and education, he was not "capable" of representing himself in the closing proceedings of trial because they presented "highly technical" issues." (Sealed 58 RT 11790.)

As this Court has repeatedly held, a trial court may not measure a defendant's right to waive his right to counsel by evaluating his "technical legal knowledge." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 454, quoting *People v. Dunkle* (2005) 36 Cal.4th 861, 908; *Godinez v. Moran*, *supra*, 509 U.S. at pp. 399-400; see also *Peters v. Gunn* (9th Cir. 1994) 33 F.3d 1190, 1192 ["Lack of legal qualifications alone cannot be a basis for refusing a defendant's pro se request"].) Thus, the court's reason was invalid and cannot support its denial of appellant's motion.

2. The Request was Unequivocal

The trial court explicitly found that appellant's *Faretta* motion was unequivocal. (Sealed 58 RT 11788.) Nothing in the record contradicts the court's unambiguous finding.

3. The Request was Timely

i. The section 190.4 and sentencing hearings are separate proceedings from the trial for purposes of determining the timeliness of a *Faretta* motion.

This Court views the *Faretta* right as being unconditional if asserted a reasonable time prior to trial and discretionary if made after trial has begun. (*Windham*, *supra*, 19 Cal.3d at p. 128.) To be timely, a motion for self-

representation at the penalty phase must be raised a reasonable time before the start of the guilt phase. (*Ibid.*) The Court has found self-representation motions made after the guilt phase verdicts have been returned to be untimely. (*People v. Bradford, supra*, 15 Cal.4th at p. 1365; *People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1006.) The trial court deemed appellant's motion to represent himself at the sentencing proceedings untimely because it was made after the guilt phase had begun, just as it did in assessing the motions made by appellant at the penalty phase.[41]

As appellant pointed out, however, the sentencing proceedings are separate from the trial, and therefore the timeliness of the motion should not be determined in relation to the start of the guilt phase. (Sealed 58 RT 11777.)

This Court has not decided the issue of the timeliness of a request for self-representation made after the penalty phase verdict. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 810.) In *Mayfield*, the defendant's motion for self-representation made after the jury returned its penalty verdict was denied by the trial court as untimely because it was not made a reasonable time before the start of the guilt phase. (*Id.* at p. 809.) On appeal, the defendant argued that the trial court's ruling was erroneous because a capital sentencing proceeding is a phase separate from trial and granting a self-representation motion would not inconvenience jurors. (*Id.* at p. 810.) This Court did not decide the issue, but "assume[d] for the sake of argument that a postverdict self-representation motion may be timely if made a reasonable time before sentencing" and upheld the trial court's ruling that the motion was untimely. (*Ibid.*) All parties had agreed that at least a six-month delay

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[41] In Argument II, *ante*, at pp. 108-124, appellant challenges the court's ruling on the timeliness of the motion.

would result from granting of the motion, and even though a jury would not be affected, such a delay would "compromise the orderly and expeditious administration of justice." (*Ibid.*)

The Court similarly declined to decide the issue of timeliness of a post-death verdict *Faretta* motion in *People v. Doolin*, *supra*, 45 Cal.4th 390, because the court deemed the defendant's request "manifestly untimely." (*Id.* at p. 454.) On the day set for the sentencing hearing, the defendant in *Doolin* made a *Marsden* motion and asked for a two-week continuance. When the motions were denied, he moved to represent himself and for an assistant to prepare a motion for new trial. (*Id.* at p. 452.)

The Court noted that the defendant requested self-representation for the first time during the entire trial on the day set for sentencing, and then only after his *Marsden* motion and request for a continuance were denied. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 454.) The defendant asked for an assistant to help him draft the motion for new trial, he could provide the court with no specific information he expected to find in support of the motion and could not provide a reasonable estimate of how long it would take him to prepare for the hearing. (*Ibid.*) Under these circumstances, this Court found the trial court did not abuse its discretion in denying the motion for self-representation because of its "legitimate concern that defendant's request was untimely and would needlessly delay the proceedings." (*Ibid.*)

The Court contrasted the facts in *Doolin* with those in a Court of Appeal case that held that a motion for self-representation at a sentencing hearing is timely if made "a reasonable time prior to commencement of the sentencing hearing." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 455, citing *People v. Miller* (2007) 153 Cal.App.4th 1015, 1024.) In *Miller*, the defendant moved for self-representation after the guilt verdict and a new trial motion, but more than two months before the sentencing hearing. He told

the court he planned to conduct his own investigation and would be prepared at the scheduled sentencing date. (*Id.* at p. 1020.) The Court of Appeal held that the motion was not made during trial "for the simple reason that sentencing occurs posttrial." (*Id.* at pp. 1023-1024, citing *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 540 [noting posttrial proceedings include sentencing].) The concerns about delay or disruption of an ongoing trial do not apply to separate sentencing hearings, and thus a request for self-representation made a reasonable time before the commencement of the proceedings should not be subject to the trial court's discretion. (*People v. Miller, supra*, 153 Cal.App.4th at p. 1024.)

The holding of *Miller* – that a sentencing hearing is a separate proceeding from the trial and therefore the unconditional right to self-representation is available to a defendant who meets the *Faretta* conditions – should be applied to appellant's case. The reasoning of the *Miller* court, noting the lack of potential disruption of proceedings already in progress, is the same as that of this Court in *People v. Halvorsen, supra*, 42 Cal.4th 379, in which the Court held that the denial of a *Faretta* motion made before a penalty retrial before a different jury was erroneous because "the rationale behind the rule giving the trial court discretion to deny an untimely *Faretta* motion – to avoid disruption of an ongoing trial – thus is not implicated in this case." (*Id.* at p. 434.)

Moreover, under existing authority, a trial is distinguishable from sentencing proceedings. In *People v. Stuckey* (2009) 175 Cal.App.4th 898, the Court of Appeal rejected defendant's argument that he was entitled to the appointment of experts at sentencing under Evidence Code section 730, which provides for experts during "trial of an action." (*Id.* at pp. 909-910.) Citing state court precedent, the court observed, "Caselaw has long recognized that a 'trial' in a criminal case ends when a verdict is returned

and the jury is discharged." (*Id.* at p. 909, and cases cited therein.)

The court in *Stuckey* also cited *Mitchell v. United States* (1999) 526 U.S. 314, in which the high court held that a guilty plea waiver of the defendant's Fifth Amendment right to invoke the privilege against self-incrimination "at trial" did not waive the right to invoke the privilege at sentencing. (*Id.* at pp. 323-324.) The right expressly applies to any "criminal case," not "criminal trial," and "criminal case," includes sentencing. (*Id.* at p. 327.)

Finally, the court relied upon this Court's decision in *People v. Smith* (1983) 34 Cal.3d 251, in which the Court held that Proposition 8 did not apply to the appeal of a crime committed after its adoption. Referring to the provision's application to "any criminal proceeding," the Court held that that phrase "is plainly meant to ensure that section 28(d) will operate not only in criminal *trials* but also in other stages of a prosecution in which evidence is offered, such as . . . sentencing proceedings." (*Id.* at p. 259, fn. 3, original italics.)

Thus, for purposes of determining the timeliness of a *Faretta* motion, the sentencing proceedings must be deemed a separate proceeding, at which a defendant has an unconditional right to self-representation.

ii. Appellant's self-representation motion was timely under *Windham* and *Lynch*.

As noted, the trial court found appellant's motions for self-representation to be untimely based on this Court's decisions holding that a capital trial is a unitary proceeding for purposes of assessing the timeliness of a *Faretta* motion made after the start of the guilt phase. Appellant challenges the automatic application of the unitary-capital-trial rule in Argument II, *ante*, and incorporates by reference that argument here.

Under *People v. Lynch*, *supra*, 50 Cal.4th 693, one of the factors that the trial court should consider when evaluating the timeliness of a *Faretta* motion is "whether the defendant had earlier opportunities to assert his right of self-representation." (*Id.* at p. 726.) This factor echoes the ruling in *Windham*, that "when the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." (*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) Thus, under *Windham*'s "reasonable time prior to the commencement of trial" rule, a criminal defendant's constitutional pretrial *Faretta* motion is timely and not subject to the trial court's discretion, even if it is late, when the record contains "some showing of reasonable cause for the lateness of the request." (*Ibid.*; cf., *People v. Ruiz*, *supra*, 142 Cal.App.3d at p. 791 [finding pretrial *Faretta* motion untimely where "[a]ppellant's motion was unaccompanied by any showing of reasonable cause for its lateness"].)

After the jury's death verdict on August 24, 2006, appellant was first brought to court on October 26, 2006, at which time he insisted upon and was granted his right to a hearing under section 4007, which was continued until December 8, 2006. The *Faretta* motion made on that day was prompted by appellant's dissatisfaction with counsel's handling of the hearing. (See, e.g., Sealed 58 RT 11762-11767.) Thus, the motion was made at the earliest opportunity, i.e., once the basis for appellant's request to represent himself became clear, and should not be deemed untimely.

iii. The trial court abused its discretion by denying the self-representation motion.

If a motion for self-representation is found to be untimely, under *Windham*, the trial court must ensure a meaningful record for its ruling by considering factors such as: 1) the quality of counsel's representation; 2) the defendant's prior proclivity to substitute counsel; 3) the reasons for the

request; 4) the length and stage of the proceedings; and 5) the disruption or delay which might reasonably be expected if the motion were to be granted. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.)

In ruling on appellant's motion, the trial court failed to address any of the *Windham* factors, except the lateness of the request.[42] Appellant acknowledges that the trial court need not explicitly address these factors in making its ruling, as long as the record is sufficient to permit the reviewing court to determine if the ruling constituted an abuse of discretion. (*People v. Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6.) Appellant does not challenge the court's ruling because it is not explicit, but rather because neither the factors the court relied upon nor those the court did not articulate support the court's denial of the motion.

a. Quality of representation

After the first day of the proceedings on the section 4007 hearing, appellant expressed his unequivocal desire to represent himself from that point forward. The trial court's determination that counsel was adequately representing appellant does not render this *Windham* factor supportive of the trial court's denial of the *Faretta* motion. As previously noted in Argument II, *ante*, the relevance of this factor to the decision whether to grant a defendant's motion for self-representation in any case is questionable, but in a case such as the present one in which appellant had articulated such a profound disagreement with his attorneys' decisions about how to litigate the case, its legitimacy, if any, is even more diminished.

Evidence of competent representation does not defeat a self-representation request. The *Faretta* right is not intended to guarantee

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[42] As previously noted, the trial court also erroneously relied on appellant's lack of technical legal knowledge. (Sec. B.1., *ante*.)

effective representation, but to ensure "the inestimable worth of free choice" with regard to one's own defense. (*Faretta*, *supra*, 422 U.S. at p. 834.)

b. The Defendant's Proclivity to Substitute Counsel

Appellant attempted to replace counsel or represent himself at the penalty phase of trial. As set forth in Argument II, appellant's efforts, which were based on a genuine and fundamental disagreement with counsel's proposed case in mitigation, bear no resemblance to what has been referred to as "the *Faretta* game" – the manipulation by a criminal defendant of the judicial process in a criminal prosecution to delay or disrupt the proceedings by "juggling his *Faretta* rights with his right to counsel interspersed with *Marsden* motions." (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1170; see also *People v. Marshall*, *supra*, 15 Cal.4th at p. 22; *People v. Clark* (1992) 3 Cal.4th 41, 100.)

This factor cannot be considered a legitimate basis for denying appellant's request to represent himself at the section 190.4 and sentencing hearings.

c. Disruption or Delay of Proceedings

The other factors, as set forth in *Lynch* – "whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings" (*People v. Lynch*, *supra*, 50 Cal.4th at p. 726) – have limited relevance to a section 190.4 hearing or a sentencing hearing. In this case, the prosecutor was present when appellant made his *Faretta* motion on December 8, 2006. Except for offering his opinion that the motion was untimely, the prosecutor made no attempt to show that granting the motion would disrupt or delay the hearing scheduled for the following week because of evidence or witnesses he anticipated presenting at the

hearing.[43] (58 RT 11757-11758.)

Although the trial court made no attempt to determine what, if any, evidence appellant planned to present at the section 190.4 and sentencing hearings, nothing about appellant's request, nor anything in the record suggests that granting his motion would have caused any delay or disruption.[44] Appellant made the motion a week before the scheduled hearing, and he did not ask for a continuance or any other accommodation, unlike the defendants in *Mayfield* and *Doolin*. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 810 [granting defendant's motion would result in six-month delay]; *People v. Doolin*, *supra*, 45 Cal.4th at p. 452 [defendant requested assistant to prepare new trial motion and no estimate of date he would be ready to proceed].)

The timing of the motion presented no threat of disruption or delay and thus, appellant's request which was made a week before the scheduled section 190.4 and sentencing hearings weighed in favor of granting the motion.

Considering each of the factors set forth in *Windham* and *Lynch*, the trial court abused its discretion in denying appellant's motion for self-representation.

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[43] At the sentencing hearing on December 15, one relative of the victim testified. (58 RT 11836.)

[44] Appellant's only statement regarding the section 190.4 and sentencing hearings was that he could "get himself executed" as well as counsel could. (Sealed 58 RT 11776.)

C. The Erroneous Denial of the Right of Self-Representation Requires Reversal

As this Court has observed,

> The right to proceed pro se "is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process . . . . [¶] . . . Even if the defendant will likely lose the case anyway, he has the right—as he suffers whatever consequences there may be—to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case." (*United States v. Dougherty* [D.C. Cir. 1972] 473 F.2d 1113 at p. 1128; see also *Chapman v. United States* (5th Cir. 1977) 553 F.2d 886, 891–892.)

(*People v. Joseph*, *supra*, 34 Cal.3d at p. 946.)

As appellant argues in Argument II, *ante*, the deprivation of a defendant's right of self-representation under *Faretta* is not subject to harmless error analysis and requires automatic reversal. (*McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8; *Faretta*, *supra*, 422 U.S. at p. 806; *People v. Joseph*, *supra*, 34 Cal.3d at p. 948.) Appellant argues as well that the holdings of intermediate appellate courts in California that the error is subject to harmless error analysis are flawed and should not be followed. Appellant incorporates these arguments by reference here. (See Arg. II, *ante*, at pp. 137-142.)

Even if the Court were to apply a harmless error analysis, appellant is entitled to relief, for had he been permitted to argue to the court the theory that he proposed to present as a case in mitigation – that his family and friends wanted him to live – there is a reasonable probability that the court would have seen the worth in appellant's argument and granted the section 190.4 motion and imposed a sentence of LWOP rather than death.

D. Conclusion

The trial court's denial of appellant's unequivocal, knowing and timely request to represent himself at the section 190.4 and sentencing hearings was erroneous, and appellant is entitled to new hearings.

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IV.

THE CONVICTIONS AND DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY INSTRUCTED THE JURY TO CONSIDER APPELLANT'S PUTATIVE FLIGHT IN DECIDING HIS CULPABILITY

A. Factual Background

At the guilt phase, appellant admitted his identity as the perpetrator of the killing, but disputed the degree of murder, the completed commission of the alleged felonies and the special circumstance allegations. (46 RT 9347-9348.) At the guilt phase instructional conference, the prosecution requested the trial court to instruct the jury with CALCRIM No. 372, regarding "flight after crime." (45 RT 9145.) Trial counsel objected that the instruction was not applicable because there was no evidence that he left the scene "immediately" after the crime, because the victim was not discovered until some period of time after the assault. (45 RT 9146-9147.) The prosecutor argued that witnesses placed appellant at the scene of the crime, but he did not stay to talk to the police. (45 RT 9146.) The court took the matter under submission. (45 RT 5151.) The following day, the court and the parties continued their discussion. (45 RT 9232-9242.) The court stated its intention to give the instruction with the word "immediately" included.[45] (45 RT 9242.)

Accordingly, the jury was instructed with CALCRIM No. 372 that, "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the

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[45] After stating its intention to give the instruction, the court told defense counsel it would "entertain" argument the following day, if she wished. (45 RT 9242.) No further argument was made.

defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." (6 CT 1700; 46 RT 9292.)

B. The Trial Court Erred in Instructing the Jury to Consider Appellant's Putative Flight in Deciding His Culpability

1. There Was No Factual Basis for the Flight Instruction

Under state law, a flight instruction is proper where the jury could reasonably infer that the defendant's flight reflected consciousness of guilt. (§ 1127c; see *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021; *People v. Abilez* (2007) 41 Cal.4th 472, 521-522.) However, "[e]vidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

In this case, the evidence showed only that appellant was not at the scene of the crime when the police officer arrived at least an hour and a half after the victim was assaulted. That evidence was insufficient to show that appellant's decision to leave was motivated by a desire to avoid detection or apprehension for the killing. (*People v. Bonilla, supra*, 41 Cal.4th at p. 328.) Accordingly, the trial court erred in giving the flight instruction because there was no factual basis for that instruction. (*Ibid.*)

2. The Flight Instruction Unduly Favored the Prosecution, and Was Argumentative and Unnecessary

The flight instruction given here unduly favored the prosecution by highlighting and emphasizing the weight of a single piece of the prosecution's circumstantial evidence; the instruction was an improper "pinpoint" instruction. This Court has rejected this claim. (See *People v.*

Howard, supra, 42 Cal.4th at p. 1021; *People v. Morgan* (2007) 42 Cal.4th 593, 621; *People v. Mendoza* (2000) 24 Cal.4th 130, 180.) Appellant respectfully urges this Court to reconsider its previous decisions, and conclude that the flight instruction is an improper pinpoint instruction.

Moreover, the instruction was argumentative. A trial court must refuse to deliver argumentative instructions (*People v. Panah* (2005) 35 Cal.4th 395, 486; *People v. Sanders* (1995) 11 Cal.4th 475, 560), defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if neutrally phrased, an instruction is argumentative if it "ask[s] the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "impl[ies] a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9). Judged by this standard, the flight instruction was impermissibly argumentative. Here, the instruction asked the jury to consider flight where there was none and consciousness of guilt based on flight, which was clearly to the benefit of the prosecution.

Except for the party benefitted by the instructions, there is no discernible difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"], vacated on other grounds, *Bacigalupo v. California* (1992) 506 U.S. 802) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence" (*People v. Wright* (1988) 45 Cal.3d 1126, 1137). Accordingly, appellant respectfully urges this Court to reconsider its prior decisions, and conclude that the flight instruction was impermissibly argumentative.

In *People v. Nakahara*, *supra*, 30 Cal.4th 705, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *Mincey*, *supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" (*Id.* at p. 713.) However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not. To ensure fairness and equal treatment (see *Wardius v. Oregon* (1973) 412 U.S. 470, 474 [the due process clause is meant to protect the balance of forces between the accused and the state]), this Court should reconsider its decisions and hold that the flight instruction given here was impermissibly argumentative.

Moreover, the instruction on flight was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455, disapproved on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Lewis* (2001) 26 Cal.4th 334, 362-363.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALCRIM Nos. 223, 224, and 704. (6 CT 1751, 1752, 1778 ; 45 RT 9282-9284, 9299.) These instructions informed the jury that it may draw appropriate inferences from the circumstantial evidence. There was no need to repeat this general principle in the guise of a permissive inference of consciousness of guilt.

3. The Flight Instruction Should Not Be Given When, As Here, Identity Is Conceded

The flight instruction was also improper because the defense conceded that appellant was responsible for the killing, but disputed the degree of murder, the rape and sodomy charges and the special circumstance allegation. (46 RT 9347-9348.) The dispute was based primarily on the integrity and interpretation of the physical evidence, and its utility in proving the truth of the charges and special circumstances. Because any putative flight by appellant following the crimes had no logical tendency to resolve those issues, the instruction allowed the jury to infer, on an arbitrary basis, that the killing was first degree murder, and that the rape and sodomy charges and the special circumstance allegations were true.

This Court has repeatedly rejected this claim. (See *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) Appellant respectfully urges this Court to reconsider its prior decisions, and conclude that the flight instruction should not be given when identity is conceded and when the disputed issues are in no way related to a defendant's alleged flight.

4. The Flight Instruction Permitted the Jury to Draw an Impermissible Inference Concerning Appellant's Culpability

The flight instruction suffers from an additional defect: by permitting the jury to infer one fact, appellant's guilt, from another fact, flight, it created an improper permissive inference.

The due process clause of the Fourteenth Amendment "demands that even inferences -- not just presumptions -- be based on a rational connection

between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313; see also *People v. Roder* (1983) 33 Cal.3d 491, 503-504.) For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Id.* at pp. 165-167 & fn. 28.) This test is applied to judge the inference as it operates under the facts of each specific case. (*Id.* at pp. 156, 162-163.)

In this case, the defense conceded that appellant was guilty of murder; the issues at the guilt phase were the degree of murder, whether there was sufficient evidence of the rape and sodomy charges, and the truth of the special circumstance allegations. (46 RT 9348-9349.) Thus, the instruction, which permitted the jurors to use the fact of his absence from the scene of the crime as *some* evidence of "his guilt," could only have been construed to mean "his guilt" as presented by the prosecution.

Although consciousness-of-guilt evidence, such as flight, may bear on a defendant's state of mind after a killing, such evidence is not probative of his state of mind immediately prior to or during the killing. (See *People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) In particular, "[c]onduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing." (2 LaFave, Substantive Criminal Law (2d ed. 2003), § 14.7(a), pp. 481-482, original italics; see also *Wong Sun v. United States* (1963) 371 U.S. 471, 483, fn. 10 ["we have consistently doubted the probative value in criminal trials of evidence that the accused

fled the scene of an actual or supposed crime"].)

This Court has previously rejected the claim that the flight instruction creates unconstitutional permissive inferences concerning the defendant's mental state. (See, e.g., *People v. Loker* (2008) 44 Cal.4th 691, 705-707; *People v. Howard, supra*, 42 Cal.4th at p. 1021; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439.) Appellant respectfully asks this Court to reconsider those cases and hold that the flight instruction given here permitted the jury to draw an impermissible inference, and thereby violated his state and federal constitutional rights.

5. The Error Violated Appellant's State and Federal Constitutional Rights

The flight instruction given here deprived appellant of his rights to due process, equal protection, a fair jury trial, and a fair and reliable jury determination of the special circumstance allegations and penalty. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) The instruction also violated state law by presenting the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright, supra*, 45 Cal.3d at pp. 1135-1137.) The instruction unduly favored the prosecution by highlighting and emphasizing the weight of a single piece of the prosecution's circumstantial evidence. This unnecessary instructional benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment, and the parallel provisions of the California Constitution. (See *Wardius v. Oregon, supra*, 412 U.S. at p. 479 [holding that state rule that defendant must reveal his alibi defense without having a fair opportunity to discover prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary

preference to particular litigants violates equal protection]; *People v. Moore* (1954) 43 Cal.2d 517, 526-527 ["There should be absolute impartiality as between the People and defendant in the matter of instructions"].) The error also constituted an arbitrary and unfair deprivation of appellant's state-created liberty interest in legally-correct and applicable jury instructions, in violation of the due process clause of the Fourteenth Amendment. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970.)

By creating an impermissible inference, the instructional error lessened the prosecution's burden of proof and, as a result, violated appellant's rights under the state and federal constitutions, which "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; see also *Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 157; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Roder*, *supra*, 33 Cal.3d at pp. 503-504; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 298-300 (en banc); Cal. Const., art. I, §§ 7, 15 & 16; § 1096.)

Further, the instructional error violated appellant's rights under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution, which require that the procedures that lead to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) By instructing the jury with an unfairly partisan and argumentative instruction that permitted the jury to draw an irrational permissive inference about the

truth of the allegations, the trial court diminished the reliability of the deliberations, and created a substantial risk that those findings were unfair and unreliable. Neither is acceptable when life is at stake. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).)

6. Reversal of the Convictions and Ensuing Death Judgment Is Required

Because the erroneous instruction permitted conviction on a standard of proof less than proof beyond a reasonable doubt, the error was structural and requires reversal of the convictions and death judgment. *(Sullivan v. Louisiana, supra,* 508 U.S. at pp. 280-282.) Even if the error is not reversible per se, because the instruction violated appellant's federal constitutional rights, reversal of the convictions is required unless the state can show that the error was harmless beyond a reasonable doubt. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 6; *Chapman v. California* (1967) 386 U.S. 18, 24.)

The state cannot make that showing in this case. The prosecution-favored flight instruction could have tipped the balance for a wavering juror by transforming a fact that had no rational relationship to the issues before the jurors into evidence of "his guilt." Under these circumstances, the instructional error was not harmless beyond a reasonable doubt.

Moreover, even if the error is assessed as state law error, there is a reasonable probability that the outcome would have been more favorable in the absence of the instruction. (*People v. Watson, supra,* 46 Cal.2d 818.) The defense called into question the significance of the physical evidence as it related to proof of the degree of murder, and the truth of the rape and sodomy charges and the special circumstances. By permitting the jurors to use the fact of appellant's putative flight – evidence that bore no relation whatsoever to the disputed issue of the physical evidence – as evidence of

his guilt, there is a reasonable probability that the jurors used it to resolve any doubts they might have had in favor of the prosecution. Accordingly, the convictions and death judgment must be reversed.

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V.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

On February 2, 2006, prior to jury selection, defense counsel filed a written motion requesting individual, sequestered death qualification voir dire to be conducted by counsel. (2 CT 449-475.)

The trial court denied the motion, ruling that it would follow Code of Civil Procedure section 223, and conduct voir dire in open court. (3 RT 522-523, 525.)

As explained below, the trial court's failure to conduct individual sequestered death-qualification voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated appellant's federal and state constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 16.) It also violated appellant's right under California law to individual juror voir dire where group voir dire is not practicable (Code Civ. Proc., § 223); the trial court's failure to exercise that discretion resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

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A. A Voir Dire Procedure That Does Not Allow Individual Sequestered Voir Dire On Death-Qualification Violates A Capital Defendant's Constitutional Rights To Due Process, Trial By An Impartial Jury, Effective Assistance Of Counsel, And A Reliable Sentencing Determination[46]

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Morgan v. Illinois* (1992) 504 U.S. 719, 726; Cal. Const, art. I, §§ 7, 15 & 16.) Whether prospective capital jurors are impartial within the meaning of these rights is determined, in part, by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or substantially impair their ability to judge in accordance with the court's instructions are not impartial and constitutionally cannot remain on a capital jury. (See generally, *Witt, supra*, 469 U.S. 412; *Witherspoon, supra*, 391 U.S. 510; see also *Morgan v. Illinois, supra*, 504 U.S. at pp. 733-734; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois, supra*, 504 U.S. at p. 729.) To that extent, the right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at pp. 735-736, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37.) A trial

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[46] Appellant acknowledges that his contention that the federal Constitution requires sequestered death-qualification voir dire of every prospective juror in a capital case has been frequently rejected by this Court. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 101; *People v. Stitely* (2005) 35 Cal.4th 514, 536-537; *People v. Box* (2000) 23 Cal.4th 1153, 1180.) Appellant believes it necessary to include this claim to ensure federal review.

court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v. Superior Court, supra,* 28 Cal.3d at pp. 74-75.) When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at p. 74.) By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey v. Superior Court, supra,* at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.)

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered voir dire on death-qualifying issues – including that imposed by Code of Civil Procedure section 223, which abrogates this Court's mandate that such voir dire be done individually and in sequestration (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 80; *People v. Waidla* (2000) 22 Cal.4th 690, 713) – is inconsistent with constitutional principles of jury impartiality. (See, e.g., *Morgan v. Illinois, supra,* 504 U.S. at pp. 736, citing *Turner v. Murray,*

supra, 476 U.S. at p. 36 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"].) Nor is such restriction consonant with Eighth Amendment principles mandating a need for the heightened reliability of death sentences. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of appellant's death sentence. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at p.739; *Turner v. Murray*, *supra*, 476 U.S. at p. 37.)

B. The Trial Court Erred In Denying Appellant's Request For Individual Sequestered Voir Dire

Even assuming that individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case, the trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors still violated appellant's constitutional rights to an impartial jury and due process

of law.

Code of Civil Procedure section 223 vests trial courts with discretion to determine the feasibility of conducting voir dire in the presence of other jurors. (*People v. Box, supra,* 23 Cal.4th at p. 1180; *People v. Waidla, supra*, 22 Cal.4th at p. 713; *Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1184.) Under that code section, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223.) However, as this Court has held, individual sequestered voir dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court, supra*, 28 Cal.3d at pp. 80, 81.) The proper exercise of a trial court's discretion under section 223, therefore, must balance competing practicalities. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 ["exercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue."].)

The trial court gave no explanation of its decision to overrule appellant's request for individual sequestered voir dire about the death penalty. The record thus does not reflect an exercise of discretion in which the trial court "engaged in a careful consideration of the practicability of . . . group voir dire as applied to [appellant's] case." (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1183 [trial court's comments that Proposition 115 had effectively overruled *Hovey* did not reflect an exercise of discretion]; cf., *People v. Waidla, supra*, 22 Cal.4th at pp. 713-714 [trial court set out "reasonable" reasons for denying sequestered voir dire].) There is simply no "reasoned judgment" here which can be deemed an exercise of judicial discretion. (See *People v. Superior Court (Alvarez), supra*, 14 Cal.4th at p. 977 ["'a ruling otherwise within the trial court's power will

nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law'"].) Therefore, in denying appellant's motion for individual, sequestered voir dire, the trial court erred in failing to exercise its discretion under Code of Civil Procedure section 223. (Cf., *People v. Romero* (1996) 13 Cal.4th 497, 532 [remanding case where trial court did not set forth reasons for its exercising discretion to strike prior conviction under section 1385]; *People v. Bigelow*, *supra*, 37 Cal.3d at p. 743 [failure to exercise discretion about appointing advisory counsel]; *People v. Green* (1980) 27 Cal.3d 1, 24-26 [failure to exercise discretion to determine whether prejudicial impact outweighed probative value of evidence]; *In re Brumback* (1956) 46 Cal.2d 810, 813 [failure to exercise discretion regarding bail on appeal].)

C. The Trial Court's Unreasonable And Unequal Application Of The Law Governing Juror Voir Dire Requires Reversal Of Appellant's Death Sentence

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in a "a miscarriage of justice, as specified in section 13 of article VI of the California Constitution." The state law prejudice standard for errors affecting the penalty phase of a capital trial is the "same in substance and effect" as the federal test for reversible error under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Ashmus, supra,* 54 Cal.3d at p. 965.) Accordingly, the trial court's unreasonable application of section 223 in appellant's case must be assessed under the *Chapman* standard of federal constitutional error. In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that contributed to appellant's death verdict (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the trial court's

failure to conduct individual, sequestered juror voir dire on death penalty issues requires reversal of appellant's death sentence.

The group voir dire procedure employed by the trial court created a substantial risk that appellant was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty (*Hovey v. Superior Court, supra*, 28 Cal.3d at p. 80, fn. 134), and who had become "desensitized to the intimidating duty" of determining whether appellant should live or die (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1173) because of their "repeated exposure to the idea of taking a life" (*Hovey v. Superior Court, supra* at p. 75). Therefore, the trial court's failure to carefully consider the practicability of group voir dire as applied to appellant's case led to a voir dire procedure that denied appellant the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that appellant was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process. (See *Hovey v. Superior Court, supra,* at pp. 74-75.)

These hazards infringed upon appellant's rights to due process and an impartial jury (see *Morgan v. Illinois, supra*, 504 U.S. at p. 729), and cast doubt on whether the Eighth Amendment principles mandating a need for the heightened reliability of death sentences is satisfied in this case. By their very nature, these rights are so important as to constitute an "essential part of justice" (*People v. O'Bryan* (1913) 165 Cal. 55, 65) for which the risks of deprivation must be regarded as a miscarriage of justice. Indeed, errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial)[.]" (*People v. Cahill* (1993) 5

Cal.4th 478, 501; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 699 ["The denial of the right to trial by a fair and impartial jury is, in itself, a miscarriage of justice"].)

The trial court's refusal to conduct sequestered death-qualification voir dire cannot be dismissed as harmless. (*People v. Cash* (2002) 28 Cal.4th 703, 723.) Because the group voir dire procedure employed by the trial court was inadequate to identify those jurors whose views on the death penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or impaired their ability to judge appellant in accordance with the court's instructions. Stated simply, the jurors' exposure to death qualification of other jurors leads to doubt that appellant was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles, and that doubt requires reversal of appellant's death sentence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

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VI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 21 circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider Stanley and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Appellant's challenge to the state death penalty scheme on this ground was denied in the trial court. (2 CT 534-542 [motion]; 3 RT 595 [ruling].)

B. The Broad Application Of Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 57 RT 11481.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant's challenge to the state death penalty scheme on this ground was denied in the trial court. (2 CT 543-544 [motion]; 3 RT 595 [ruling].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

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C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.85, 8.86 & 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. More specifically, appellant's jury was not told that it had to find beyond a reasonable doubt that the crime proffered as factor (b) evidence involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (11RT 2619.)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604-605, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 11RT 2636-2637.) Because these additional findings were required before

the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant's challenge to the state death penalty scheme on this ground was denied in the trial court. (2 CT 551-564 [motion]; 3 RT 596-597 [ruling].)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Blakely*, *Ring* and *Apprendi*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the

appropriate penalty. (*People v. Blair, supra,* 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jurors, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court has "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital

defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant's challenge to the state death penalty scheme on this ground was denied in the trial court. (2 CT 551-564 [motion]; 3 RT 596-597 [ruling].)

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

The jury was instructed that unanimity was not required before unadjudicated criminal activity could be considered in aggravation. (CALJIC No. 8.87; 57 RT 11486.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This

Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant, and the jury was instructed that each juror could decide for him or herself whether appellant had committed the alleged crime. (CALJIC No. 8.87; 7 CT 2079.)

The United States Supreme Court's decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

3. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (57 RT 11489.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v.*

Cartwright, *supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

4. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain

when an LWOP (life without the possibility of parole) verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

5. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury of the Lack of Need for Unanimity as to Mitigating Circumstances

The lack of instruction regarding jury unanimity foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was

prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

6. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law, his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner, and his right to the equal protection of the laws. (U.S. Const., 8th & 14th Amends.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the

consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That The Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; [Pen. Code, § 190.3, factors (d) and (g)]) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. at p. 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., factors (e) [whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act] and (f) [whether the defendant reasonably believed the circumstances morally justified or extenuated his conduct].) The trial court refused appellant's requested instruction to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. (7 CT 1968; 53 RT 10846.) Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

Appellant's requested special instruction advising the jury that only certain of the sentencing factors in CALJIC No. 8.85 are aggravating, was denied. (7 CT 1952; 56 RT 11359.) In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289).

Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.)

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

G. California's Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101; see also *People v. Cook, supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

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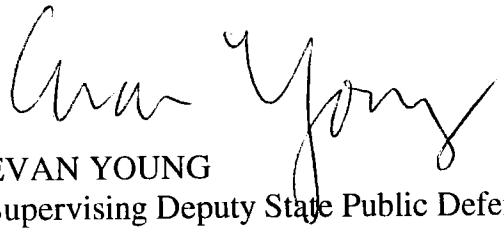
CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: October 27, 2014

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



EVAN YOUNG
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Attorneys for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Robert Ward Frazier**
Case Number: **Supreme Court Crim. No. S148863**
Contra Costa County Superior Court No. 041700-6

I, Neva Wandersee, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing it in envelopes and

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The envelopes were addressed and mailed on **October 27, 2014,** as follows:

Office of the Attorney General
Department of Justice
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San Quentin, CA 94974

Each said envelope was then, on October 27, 2014 sealed and deposited in the United States Mail at Oakland, California, Alameda, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.
Signed on October 27, 2014, at Oakland, California.

DECLARANT