

SUPREME COURT COPY

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No. S051968

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VALDAMIR FRED MORELOS,

Defendant and Appellant.

(Santa Clara County
Superior Court No.
SC169362)

SUPREME COURT
FILED

JUL 26 2013

APPELLANT'S OPENING BRIEF

Frank A. McGuire Clerk

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Clara

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
) **Plaintiff and Respondent,**) **No. S051968**
)
) **v.**) **(Santa Clara**
) **County, Sup. Ct.**
) **No. SC169362)**
)
) **VALDAMIR FRED MORELOS,**)
)
) **Defendant and Appellant.**)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of death following a trial and is authorized by Penal Code section 1239, subdivision (b).¹

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

INTRODUCTION

Appellant confessed to the October 19, 1992, murder of Kurt Alton Anderson numerous times, starting with statements to appellant's sister Michelle Salas within a few hours of the early morning murder; his friend Neal Picklesimer that evening; police officers after his arrest as well as on video and audio tape to two different teams of police interrogators the following day; and at the guilt and penalty phases of trial.

When his attorneys would not agree to help him plead guilty and obtain a death sentence, appellant sought to represent himself. After appellant obtained pro se status, he and the prosecutor consulted frequently about the conduct of the subsequent legal proceedings, with the prosecutor often speaking for appellant. For instance, after extensive off-the-record discussions with appellant, the prosecutor announced appellant's waivers of significant rights, e.g., trial by jury and the presentation of penalty phase witnesses. The prosecutor prepared appellant to testify at the guilt phase to fill in evidentiary gaps the prosecutor had identified. The prosecutor continued to take unfair advantage of appellant's death wish and pro se status throughout the trial by, for example, eliciting unreliable testimony on the special circumstances.

The court, which should have acted as a neutral guardian to assure a fair trial in a fair tribunal, did not. Because of its abdication of its responsibility to ensure the integrity of the proceedings and apparent embrace of appellant's desire for a death sentence, appellant's trial was neither fair, nor appeared to be fair. The denial of appellant's request for

advisory counsel contributed to the lack of reliability of the proceedings.

The court characterized the trial as a “slow plea,” noting that appellant had offered no defense, no mitigation and testified, admitting all charges and giving testimony to justify a death sentence. (2 RT 533.²) Following this train wreck of a trial, appellant was sentenced to death.

Appellant’s capital sentencing proceeding bore the trappings of an adversarial proceeding, but was actually a facade. In essence, appellant was allowed to plead guilty to death. This is unacceptable. The overwhelming interest of California and its citizens in ensuring fair trials and reliable death sentences transcends the preferences of individual defendants.

Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed are constitutionally beyond reproach. To allow a defendant to choose his own death sentence – as essentially occurred here – introduces unconscionable arbitrariness into the capital punishment system.³ The prosecutor and the

² “CT” refers to the Clerk’s Transcript, preceded by volume number. “SCT” refers to the supplemental Clerk’s Transcript. “RT” refers to the superior court Reporter’s Transcript as originally filed, preceded by the volume number. Other shorter transcripts that are not part of a Reporter’s Transcript volume are referred to by the date of the proceeding, followed by the page number.

³ “It is of vital importance to the defendant *and to the community* that any decision to impose the death sentence be, and appear to be, based on reason[,] rather than caprice or emotion.” (*Gardner v. Florida* (1977) 430 U.S. 349, 358, italics added.)

court permitted appellant to decide whom the State would execute. If this is not regarded as “wanton” and “freakish,”⁴ it is hard to imagine what would be.

The adversary system broke down at appellant’s trial. The resulting proceedings were so unreliable that the conviction, special circumstance findings and death verdict cannot stand.

STATEMENT OF THE CASE

The First Amended Complaint, filed October 30, 1992, charged appellant in Count 1 with the first degree murder with malice aforethought of Kurt Alton Anderson on October 19, 1992, in violation of section 187. (2 CT 344-345.) It further alleged that appellant personally used a firearm, i.e., a handgun, under sections 1203.06 and 12022.5, subdivision (a). (2 CT 345.) Three special circumstances were alleged under section 190.2: subdivision (a)(17), murder in the course of a felony, robbery, in violation of sections 211 and 212.5; subdivision (a)(17), murder in the course of a felony, sodomy and oral copulation in violation of sections 286 and 288; and subdivision (a)(18), murder with infliction of torture. (2 CT 345-346.)

On October 23, 1992, the Santa Clara Public Defender was appointed to represent appellant and he waived arraignment. (1 SCT 101; 4 SCT 160.) On November 30, 1992, appellant entered a plea of not guilty as to all charges and enhancements. (4 SCT 160.) On January 16, 1993,

⁴ *Furman v. Georgia* (1972) 408 U.S. 238, 310 (conc. opn. of Stewart, J.) [wanton, freakish imposition of the death penalty violates the Eighth Amendment of the United States Constitution].)

appellant, through his counsel Mary Fukai, requested a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). (1 SCT 102, 114.) The court denied the *Marsden* request on February 22, 1993, after a hearing. (1 SCT 102, 116.) A second *Marsden* hearing took place on June 14, 1993. (1 SCT 122.) The matter was continued when the court appointed Dr. Robert C. Burr to evaluate appellant to determine whether there was “any evidence of any mental incompetence that might lead to a doubt pursuant to section 1368.” (1 SCT 121-122; 4 SCT 157, 165; 8/23/93 RT 3-4.)

On August 23, 1993, based upon Dr. Burr’s recommendation and the representations of defense counsel, the court declared a doubt as to appellant’s competency. (8/23/93 RT 3-4.) The court then suspended proceedings, appointed Dr. David Echeandia to evaluate appellant, and certified appellant to superior court. (1 SCT 134-135; 4 SCT 137; 8/23/93 RT 4.) On September 22, 1993, that court found appellant competent and he was remanded back to municipal court. (1 SCT 137; 9/22/93 RT 1-2.)

On October 4, 1993, appellant asked the court whether he could withdraw his *Marsden* motion. (10/4/93 RT 3.) Defense counsel explained to the court that appellant wanted to withdraw the *Marsden* motion, waive his right to a preliminary hearing, plead guilty and proceed to the penalty phase. (10/4/93 RT 3-4.) Counsel pointed out that under section 1018, a defendant faced with capital charges cannot plead guilty without defense counsel’s consent, and she refused to consent. (10/4/93 RT 4.) The court requested that counsel brief the issue. (10/4/93 RT 4-5.) The court granted appellant’s request to respond as well, as long as it went through defense

counsel. (10/4/93 RT 6-7.) Appellant's *Marsden* motion was withdrawn. (1 SCT 138.)

Defense counsel submitted her own briefing arguing that under section 1018 and *People v. Chadd* (1981) 28 Cal.3d 739, a defendant is barred from pleading guilty in a capital case unless defense counsel submits. (1 SCT 139-142.) She also submitted a document on behalf of appellant. (1 SCT 142-149.) On October 27, 1993, the court ruled that appellant could not plead guilty because counsel would not consent. (10/27/93 RT 3-4.) Appellant agreed to proceed to preliminary hearing. (10/27/93 RT 4.)

The preliminary hearing began on December 13, 1993, and on December 16, 1993, appellant was held to answer on Count I, the enhancements and the three special circumstances. (1 CT 3; 2 CT 336, 342.) An Information filed on December 27, 1993, again charged appellant with the murder of Anderson pursuant to section 187 and an arming enhancement under sections 12022.5, subdivision (a) and 1203.6. (2 CT 351-352.) Three special circumstances pursuant to section 190.2 were alleged: subdivisions (a)(17), murder in the course of robbery; (a)(17), murder in the course of sodomy and oral copulation; and (a)(18), intentional murder involving the infliction of torture. (2 CT 351-353.)

An Amended Information filed September 6, 1995, alleged, in addition, two prior convictions. (2 CT 443-446.) These were felonies brought and charged separately within the meaning of sections 667, subdivision (a) and 1192.7: assault with a deadly weapon (knife) in

violation of section 245, subdivision (a), by means of force likely to produce great bodily injury pursuant to section 12022.7; and robbery in violation of sections 211 and 212.5, subdivision (a). (2 CT 445.) It was also alleged that appellant served prison terms within the meaning of section 667.5, subdivisions (a) and (b) respectively, for prior convictions for assault with a deadly weapon in violation of section 245 and burglary in violation of sections 459 and 460.1. (2 CT 445-446.)

Appellant then waived arraignment, pled not guilty and denied the prior conviction allegations. (2 CT 355; 12/27/93 RT 1.)

On May 18, 1994, Mary Fukai was replaced as counsel of record and replaced by another public defender, John Aaron. (2 CT 360; 5/18/94 RT 1.) On December 14, 1994, trial was set for March 13, 1995 (2 CT 368), but later was continued and put on standby in May and June of 1995. (2 CT 377, 381, 384-387, 393, 396; 5/22, 5/30, 6/5, 6/12, 6/14, 6/28/95 RT 2-12.) On June 9, 1995, public defender Francis Cavagnero, who had replaced Aaron, requested a continuance. (2 CT 388-392.) A trial date of August 14, 1995, was eventually set. (2 CT 403; 6/28/95 RT 20.)

On July 19, 1995, appellant filed a petition to proceed In Propria Persona pursuant to *Faretta v. California* (1975) 422 U.S. 806 (2 CT 404-409), which was heard and granted on the same date. (2 CT 416; 7/19/95 RT 3-14; see also 7/5/95 RT 2-3 [appellant informs court he wants to represent himself].)

Appellant again indicated his wish to plead guilty but the prosecutor did not “feel comfortable” proceeding with a guilty plea. (7/27/95 RT 29-

30.) The prosecutor announced that both parties wished to waive a jury for both phases of trial, but the court refused to accept a waiver for the penalty phase. (7/27/95 RT 30-31.) A judge was then found who would accept a jury waiver for both phases of trial, and that judge was assigned to the case. (2 CT 427; 8/9/95 RT 46 [court understands Judge Creed is the only judge willing to accept both waivers].)

Appellant thereafter waived a jury for both phases of trial. (2 CT 427, 3 CT 528-530, 552-553; 8/11/95 RT 48-50; 1 RT 1-2, 2 RT 329.)

On December 8, 1995, appellant filed an ex parte application for appointment of assistant counsel (3 CT 479-482), which the court denied. (12/20/95 RT 3; see also 3 CT 523 [minute order indicating appellant withdrew the motion].)

The court trial began on January 3, 1996, with appellant waiving opening statement. (3 CT 528; 1 RT 23.) He also waived cross-examination of all of the prosecution's witnesses. (1 RT 76, 105, 128, 150, 169, 173, 186, 251, 260.) On January 9, 1996, the prosecution rested and at the court's suggestion, appellant "place[d]" a motion under section 1118.1, which the court denied. (3 CT 537; 2 RT 263-264.) The prosecution presented evidence of appellant's prior convictions (2 RT 266-268), appellant testified (2 RT 269-317), waived closing argument (2 RT 324), and then rested as well. (2 RT 318.)

The court found appellant guilty of first degree murder with malice aforethought on Count 1 and found true the special allegations (the arming allegation under section 12022.5, subdivision (a) and personal use of a

firearm under section 1203.06); and the three special circumstances: section 190.2, subdivisions (a)(17), murder in the course of a felony, robbery, in violation of sections 211 and 212.5; (a)(17), murder in the course of a felony, sodomy and oral copulation in violation of sections 286 and 288; and (a)(18), murder with infliction of torture. (3 CT 537-538; 2 RT 324-325.) The court also found true the prior conviction allegations, i.e., convictions for both robbery and assault with a deadly weapon under sections 667, subdivision (a) and 1192.7; and that appellant served prison terms for each, pursuant to sections 667.5, subdivisions (a) and (b), respectively. (3 CT 537-538; 2 RT 325.)

The penalty phase began the following day, January 10, 1996. (3 CT 552-553; 2 RT 329.) Appellant again waived opening statement. (2 RT 329.) After presenting its witnesses, the prosecution rested on January 17, 1996. (3 CT 567; 2 RT 454.) Appellant questioned one prosecution witness, eliciting additional aggravating evidence (2 RT 454-456), and then testified. (2 RT 463-517.) Appellant again did not make a closing argument, but requested immediate transfer after a speedy sentence. (3 CT 569; 2 RT 532.) The court found that death was the appropriate sentence. (3 CT 569; 2 RT 533-540.)

Appellant did not file a motion for new trial or for reconsideration of sentence and on February 21, 1996, the court sentenced appellant to death plus a total determinate sentence of 15 years. (3 CT 638, 645-647, 658; 2 RT 543-551.)

STATEMENT OF FACTS

Guilt Phase - The Prosecution's Case

Kurt Alton Anderson had lived in San Jose with his lover, James Hehnke, for about a year. (1 RT 106-107.) Anderson left their home at about 3:00 p.m. on Sunday, October 19, 1992, to run errands, including getting gas for Hehnke's jeep. (1 RT 112.) When Anderson had not returned by 10 p.m., Hehnke became alarmed and called a couple of bars they frequented in San Jose. (1 RT 117-118.) The bartender at the Renegades bar indicated Anderson had left a half an hour earlier. (1 RT 117-118.) Hehnke continued calling people Anderson might be with if he became intoxicated. (1 RT 123.) On Tuesday morning he reported Anderson missing and the jeep stolen. (1 RT 123-124, 127.)

Appellant had rented a room in Santa Clara from a friend, Neal Picklesimer, from about December 1991 to August 1992. (1 RT 27-29, 32.) Appellant was working and doing well (1 RT 179-180), but then had a dispute with Jaime Cota over an antique clock appellant was selling. (1 RT 35, 179-180.) As a result of the run-in over the clock, appellant went to jail. (1 RT 179-180.) Appellant lost his steady job and got behind on the rent. (1 RT 29-31.) Picklesimer let it slide because appellant had a few odd jobs and they were getting along. (1 RT 31.) In July of 1992, appellant told Picklesimer he had made a decision, which he did not explain, and moved out in August. (1 RT 30, 31, 33.) Appellant gave his car to his sister Michelle in San Jose and left for Oregon to give away his belongings to his mother and sister Susan. (1 RT 32-33, 175, 183-184.)

Appellant returned to California and called Picklesimer Saturday evening, October 17, 1992. (1 RT 37-38.) Picklesimer picked him up at the Arena Hotel where appellant was staying and they went to a few bars that evening. (1 RT 38-39.) The next day, Sunday, October 18, they attended an air show together in the afternoon, then went to a movie and out to dinner with another friend. (1 RT 41-44.) Picklesimer dropped appellant off that evening at the Arena Hotel. (1 RT 45.)

On October 19, 1992, at 5:30 or 6:00 a.m., appellant unexpectedly visited his sister, Michelle Salas, in San Jose. (1 RT 174-175.) Appellant told her he had shot a guy behind the head up in the hills and had the guy's jeep. (1 RT 179-180.) He went into some detail about what he had done to the man in a motel, but Michelle did not believe him. (1 RT 185.) He showed her a handgun and said he had two guns. (1 RT 178-179.) Appellant indicated he wanted to shoot it out with the cops and was not going to live through it. (1 RT 185-186.) Michelle, who was expecting a visit from the probation department that day, asked appellant to leave, and he did. (1 RT 177, 181.)

The same day, appellant called Picklesimer mid-day and asked to stay at his house, as appellant was running out of money. (1 RT 45-46.) Appellant still had a key to the house and was there when Picklesimer returned home from work about 6:00 p.m. (1 RT 46-47.) Appellant was spray-painting a jeep black in order, he told Picklesimer, to disguise it. (1 RT 47.)

In a calm and matter-of-fact manner, appellant then told Picklesimer

about picking up a man at a bar the previous night and taking him to appellant's motel room, where they "fooled around" and apparently had sex. (1 RT 48-49.) Appellant then described tying the man up and obtaining only a little bit of money using the man's ATM card. (1 RT 48-50.) The next morning, appellant took the man to the hills and, despite the man's pleas, shot him in the head. (1 RT 51-52.) Appellant showed Picklesimer a semi-automatic pistol, a black .357 revolver and a small revolver, as well as some of the victim's property. (1 RT 54-55.)

The next morning, Picklesimer contacted the police, ultimately speaking to Sergeant Zaragoza of the Santa Clara Police Department. (1 RT 56, 59, 61.) Zaragoza quickly learned through the jeep license plate number Picklesimer supplied that it was associated with a missing person, Anderson. (1 RT 153-154.) Zaragoza also determined that appellant was a parolee at large subject to arrest. (1 RT 152-153.)

Zaragoza requested a SWAT team to arrest appellant. (1 RT 154-155.) Appellant was working on the jeep in Picklesimer's driveway when arrested mid-day on Tuesday, October 20, 1992. (1 RT 157-159, 170.) A SWAT team supervisor saw appellant make a move in the direction of the house and a blue bag on the fender of the jeep. (1 RT 170, 172-173.) The blue bag contained a fully loaded .45-caliber semi-automatic handgun, which was found in a half-cocked position. (1 RT 211-212.)

When the police searched Picklesimer's house, they found a loaded pistol and loaded .38-caliber Smith and Wesson revolver in appellant's bedroom, along with 34 rounds of ammunition for a .38 special. (1 RT 53,

69-70, 206-207, 221-224, 235.) Also found were a folding knife with a three-and-a-half inch blade, a holster, 40 rounds of .45 ammunition and 11 rounds of ammunition for a .38 special. (1 RT 228, 231-232.)

Anderson's Halston watch was found in Picklesimer's house, and Anderson's ATM card in appellant's possession, when he was arrested. (1 RT 113-117, 215-216, 144-146.)

During the booking process, appellant referred to "the 187 [he had] just done" and said he could take the police to the body "right now." (1 RT 149-150.) He also offered to tell Zaragoza "about a 187 I did yesterday and I'll give you two more that occurred in Oregon." (1 RT 160-161.)

Shortly after his arrest, appellant signed a waiver of his rights under *Miranda*⁵ and Zaragoza began to interview appellant at 2:25 p.m. (1 RT 162-163.) In a period of about one and one-half hours, appellant gave a detailed videotaped confession. (1 RT 163-165, 188; see also 164, 188 [Exhibit 11, videotape, admitted] and 202-203 [Exhibits 11A and B, "fairly accurate" transcripts of video tape and 1 RT 187-188 [video played].)⁶ There was a break to recover Anderson's body, with appellant directing the police to the location on the road that went up Mt Hamilton outside the San Jose city limits. (1 RT 165.) In the process of going there, appellant continued to make incriminating statements. Among other things, he told

⁵ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁶ The court excluded appellant's statements on the tape regarding his prior record and misconduct. (1 RT 188.)

Zaragoza that “[t]his society is so fucked up. Here I killed a guy in cold blood . . . and they’re not even going to give me the death penalty.” (1 RT 167.) Appellant went on to repeat portions of his videotaped statement. (1 RT 167-168.)

Appellant led the officers to Anderson’s body (1 RT 195-196), which was 100 to 150 feet off the road, covered with dried leaves. (1 RT 169, 198.) Anderson’s wrists were tied in front of his chest with material circling the wrists. (1 RT 79-81.)

Next, two San Jose detectives interviewed appellant, who again confessed to killing Anderson. (1 RT 168, 189, 197-198, 251-252; see also 198 [Exhibits 12A, 12B and 12C, one ninety-minute and two sixty-minute audiotapes of interrogation admitted]; 256, 259, 260 [Exhibits 12A, 12B and 12C played] and 251-254 [Exhibits 12AA, 12BB and 12CC, transcripts, admitted].)

The cause of death was two gunshot wounds to the head. (1 RT 105.) One bullet, probably fired from two or three feet away, entered in back of the left ear, caused massive destruction in the brain, and exited through the right temple. (1 RT 94-96.) The gun causing the other wound was fired from less than an inch away, entered behind the right ear and exited on the left cheek and caused extensive fracturing at the base of the skull. (1 RT 97-99; Exhibit 7E.) Either wound would have rendered Anderson unconscious instantaneously and each was sufficient to cause death within ten to 20 minutes. (1 RT 99-101.)

There were linear bruise marks on the penis shaft, scrotum and part

of the glans and apparent circular bruising on the shaft. (1 RT 88.) It was possible that the bruise marks were caused by ligatures, but the medical-examiner had no formal opinion in that regard. (1 RT 89.) Because the area has soft skin, a relatively small amount of pressure should be able to cause the discoloration observed and should be painful. (1 RT 91.) Based on the location of the bruising, one could assume the possibility of the purposeful application of pressure for the production of pain. (1 RT 92.) There was a very superficial cut on the left breast area. (1 RT 85-86.)

Based on testing of Anderson's blood, the medical-examiner concluded that Anderson was under the influence of methamphetamine and alcohol at the time of death. (1 RT 103-104.) Occasionally Anderson used methamphetamine both to work and to socialize. (1 RT120-121.)

Appellant waived cross-examination of all of the prosecution's witnesses. (1 RT 76 [Picklesimer], 105 [medical examiner], 128 [Hehnke], 150 [Martini], 169 [Zaragoza], 173 [Henry], 186 [Salas], 251 [Gracie], 260 [Sterner].)

Appellant's Testimony

Appellant did not put on a defense case in the manner that such testimony is normally presented. Rather, appellant and the prosecutor had planned a line of questions to cover areas not already covered during the state's case-in-chief, but the court pointed out that the prosecutor had to question appellant via cross-examination. Appellant then testified in narrative form. (2 RT 268-269.) Appellant first addressed the issue of torture, which he stated had not yet been thoroughly covered. (2 RT 269.)

Appellant volunteered that he had put ligatures around Anderson's neck and scrotum both to keep him from escaping and to inflict fear and great bodily pain. (2 RT 270.) While tying Anderson up, appellant was upset and used extreme, perhaps excessive force, i.e., twisting his arm, punching and choking him. (2 RT 270.) Appellant had the intent to kill Anderson when he took him to Mt. Hamilton, though he initially told Anderson otherwise. (2 RT 270.) When appellant told Anderson that he was going to die right before he shot him, appellant perceived this as "an act of torture." (2 RT 270.) Appellant also testified that contrary to his earlier statements to the police, the sex was not consensual, but rape. (2 RT 270.)

The Court's Examination of Appellant

In response to the court's questions, appellant affirmed that the anal sex and oral copulation were against Anderson's will; that as soon as appellant showed Anderson his guns, Anderson "was going to die;" and that when he took Anderson from the bar to the motel, appellant's intent was to rob, kill and get a vehicle. (2 RT 271-272.)

Cross-Examination of Appellant

When questioned by the prosecutor, appellant testified to further details about, and aggravating aspects of, the crimes. Anderson had used "emotional tactics," i.e., talking about his family, good life, etc., in an attempt to persuade appellant to let him go. (2 RT 272-273.) When appellant saw Anderson, he thought of getting money and transportation to murder Cota, with whom he had had a dispute over an antique clock (1 RT 34-37), and Terry, his former roommate and lover. (2 RT 273, 410-412.)

Appellant described in detail what he now wanted to do to Jaime Cota, which was more sinister than killing him. (2 RT 274.) Appellant could no longer remember why he wanted to kill Harold Terry, but would still kill him. (2 RT 273.)

When he left the motel to go to the bars on Sunday evening, appellant intended to find someone to rob for money and transportation and then kill to prevent being caught. (2 RT 277.)

After encountering Anderson at the Renegades Bar, appellant took Anderson to an enclosed area and showed him his guns. (2 RT 278.) Appellant then moved Anderson to the street to find Anderson's vehicle. (2 RT 279-280.) Once in the jeep, Anderson drove and appellant had his weapon ready. (2 RT 281.)

At the motel, appellant put all his guns on a table, told Anderson to disrobe, tied Anderson's hands behind his back and gagged him with a hotel towel. (2 RT 283-284.) Appellant was upset that he had to look for the money owed to him⁷ and then kill Anderson to get it. (2 RT 286.) Appellant questioned, beat up and "tortured" Anderson a little bit to let him know appellant was serious. (2 RT 286.) To torture Anderson, appellant ran a knife along his throat, mouth, eyelids, sensitive areas and testicles and then pricked his skin a little on the chest. (2 RT 286-287.)

Appellant initially was not sure whether the sex happened before or

⁷ Appellant told the interrogating officers that Anderson owed him no more than \$60 for drugs appellant previously had given him. (2 CT 258-259, 286-286.)

after he went to the ATM; the time and chronology now was jumbled in appellant's mind. (2 RT 288, 291.) Appellant orally copulated Anderson and visa versa and appellant sodomized Anderson with anal penetration. (2 RT 289.) The sex acts took 45 minutes. (2 RT 290; see also 2 CT 273 [appellant told interrogating officers it was 20 minutes].) Appellant took a shower and may also have cleaned Anderson off and dried him. (2 RT 292.) Appellant slept in the room for two or three hours before going to the ATM at 3:00 or 4:00 a.m. (2 RT 288, 295, 300.) Appellant also ingested a "quarter" of crank he took from Anderson's wallet, though his testimony varied about whether he did this right after he tied Anderson up or a few hours later. (See 2 RT 279, 285.)

From the receipts in Anderson's wallet, appellant saw that \$1,300 had been deposited in Anderson's bank account the prior Friday. (2 RT 287.) Using torn-up sheets, appellant tied Anderson's hands and neck to his feet so Anderson would choke if he tried to loosen them. (2 RT 295-296.) Appellant blindfolded Anderson. (2 RT 287.) Appellant tied a piece of sheet around Anderson's neck and tied that to the ceiling fan. (2 RT 296.) If Anderson had struggled and fallen off the bed, he would have died. (2 RT 296-297.) Appellant purposely tied the ligature around Anderson's testicles to the ceiling fan tightly to inflict extreme pain and threatened Anderson that this was just the beginning if the ATM number was not correct. (2 RT 298-300.)

Appellant then turned on music, pretended to leave the motel room and waited a few minutes to see if Anderson would try to wiggle or escape,

but he did not. (2 RT 302.) Appellant believed he ran the knife on Anderson or slapped him anyway. (2 RT 303.)

Appellant went to a nearby ATM and discovered that Anderson had at most \$36 in his accounts; this was too little for appellant to waste his time on. (2 RT 300-301, 314.) When he returned to the motel, appellant slapped Anderson and thought that he yanked the bindings off Anderson's neck and testicles to hurt him a little bit, so Anderson would know appellant was upset. (2 RT 301-302.)

Appellant untied all the bindings except the wrist ligatures, put on Anderson's jeans, pulled the t-shirt over Anderson's arms and his jacket over that, and put Anderson's cigarettes and lighter in the jacket pocket. (2 RT 305-306.) At about 4:00 a.m., appellant drove with Anderson up Alum Rock Road to Mount Hamilton, intending to kill Anderson. (2 RT 306.) Appellant took all three guns and extra ammunition in case he was pulled over by the police and had to shoot it out. (2 RT 306.) When they passed a police vehicle, appellant threatened to kill Anderson on the spot if he tried to tip off the officer. (2 RT 307.)

Appellant had Anderson go over a fence, telling him that he would be tied to a tree. (2 RT 307-308.) When they got to a tree, appellant told Anderson he was going to kill him after all. (2 RT 309-310.) Appellant already had his gun cocked and within seconds of explaining this, appellant shot Anderson from a couple of feet away, aiming for the head. (2 RT 310.) Appellant hoped to kill Anderson instantly, but saw that Anderson was still alive when he fell, so he put the gun very close to the back of Anderson's

ear and shot him again. (2 RT 310-311.)

On the way back to the motel, appellant stopped at his sister Michelle's residence to say goodbye, because once he "activated the plan," appellant was cutting off all communication with his family. (2 RT 312.) Appellant told Michelle he had killed someone so she would know he was serious and she would not see him again. (2 RT 312.)

Appellant returned to the motel, showered and changed. (2 RT 314.) Appellant had \$50 left and had to be out of the motel room in six hours. (2 RT 314-315.) He called his former roommate, Picklesimer and went to his house. (2 RT 314-315.) Either that day or the next, appellant purchased duct tape to disguise the jeep and looked for substitute license plates at a junk yard. (2 RT 223-225, 315.)

Appellant testified that when the officers came to arrest him, he was going for his gun and would have shot it out given the chance. (2 RT 316.)

The prosecutor questioned appellant about two of the charged prior convictions, which appellant admitted. He was convicted in 1982 of assault with a deadly weapon and infliction of great bodily injury for stabbing a CYA inmate and was sentenced to three years. (2 RT 317; 3 CT 538-Q, Exhibit 30.) On July 21, 1988, appellant was convicted of robbery and burglary stemming from an incident with John Epling. (2 RT 316; 3 CT 538-F & G, Exhibit 29.) Sentenced to five years and four months, appellant was released in June 1991. (*Ibid.*)

The Prosecutor's Argument

The prosecutor argued that appellant was guilty of first degree murder under two theories: premeditated and deliberate murder and felony murder based upon robbery, oral copulation and sodomy. (2 RT 319-321, 323.) Felony murder based on torture was not a viable theory for felony murder, as it requires that the torture be the cause of death. (2 RT 320-321.) The torture special circumstance, however, was established by the intentional infliction of extreme pain to persuade Anderson to give appellant his ATM pin number as well as during the time appellant was out of the motel room. (2 RT 323.) The two other special circumstances were established beyond a reasonable doubt. (2 RT 320-323.)

Appellant waived closing argument. (2 RT 324.) The court announced it believed every witness and found appellant guilty of first-degree [no hyphen] murder in Count 1, and found true all the arming allegations, the special circumstance allegations and the prior convictions. (2 RT 324-325.)

Penalty Phase - The Prosecution's Case

On July 7, 1977, when appellant was 16 years old, two San Jose police officers responded to a call regarding a family disturbance involving appellant. (2 RT 379-380.) After talking for a minute or two to appellant, who was inside a windowless garage, a shot came out. (2 RT 381-382.) Appellant fired additional shots as the situation went on and the officers fired back. (2 RT 382.) After appellant said he would come out, a rifle barrel pointed out the door at one of the officers, both of whom shot back.

(2 RT 382.) Appellant was shot in the leg and face and the officers found a .22 rifle. (2 RT 383.) Appellant was arrested. (2 RT 384.)

On August 21, 1987, Kenneth Money, a grocery store security officer in San Jose, saw appellant's sister shoplifting and followed her outside to the parking lot where she met up with appellant. (2 RT 422-424, 496.) Money identified himself to appellant's sister, Mary Serna, and asked her to return to the store with him. (2 RT 423-424.) She began to physically resist Money's efforts to detain her. (2 RT 424.) Appellant ran to a white Camero in the parking lot. (2 RT 424.) Appellant accelerated toward them at a high rate of speed. (2 RT 425.) To avoid getting hit, Money threw himself and appellant's sister against a pole. (2 RT 425.) A co-worker then took custody of her and Money maced appellant through an open passenger window. (2 RT 425-426.) Appellant sped away, cursing Money and calling him something like gay, fag or queer. (2 RT 426.) Money called the police and, shortly after their arrival, he identified appellant at a nearby location. (2 RT 426-427.)

On cross-examination, appellant asked only if Money recalled testifying at a preliminary hearing; he did not. (2 RT 429-430.)

John Carl Epling was in a relationship with appellant, who moved into Epling's trailer with him. (2 RT 330-331.) After a month or two, appellant asked whether someone appellant had seen previously, and who had just been released from jail, could move in with them. (2 RT 332.) When Epling said no during a telephone conversation, appellant cursed and threatened him. (2 RT 333.) Epling then moved appellant's belongings

outside, gathered his most valuable belongings, and went to stay with a friend. (2 RT 334-336.)

Later on that same night of March 9, 1988, appellant broke down the door to the friend's apartment, swearing. (2 RT 333, 336-338.) Appellant was with two others. (2 RT 343.) Appellant hit Epling such that Epling's upper lip was torn all the way across where the gum line meets the upper lip, requiring 300 stitches. (2 RT 338.) Epling also needed six stitches above his left eyebrow. (2 RT 340.) Appellant threatened to have Epling killed if he called the police. (2 RT 341.) Appellant took money from the wallet of Epling's friend. (2 RT 341-342.) Appellant took Epling's color television and Epling's crystal was also gone when appellant left after 20 or 30 minutes. (2 RT 342-343.) The two others with appellant did not participate in the assault. (2 RT 342.)

Epling reported the incident to the police the next day and later left the state for three years because he was scared. (2 RT 343-345.)

Harold Terry and appellant were in a relationship for six months in 1991. (2 RT 410-412.) They lived with appellant's sister Michelle but left because appellant could not stand the fact that Michelle was using drugs. (2 RT 412.) They then rented a room from Terry's uncle, Benny Salas (Benny), who was in prison, and Benny's wife, who had four teenage children. (2 RT 411-413.) Terry and appellant were not affectionate in front of the children. (2 RT 413-414.)

On November 29, 1991, Benny's brother, Thomas Hernandez Salas (Hernandez), got out of prison and went to Benny's house. (2 RT 414.)

Benny was upset at the idea that Terry and appellant were having a homosexual relationship in front of his children. (2 RT 349, 414.) After drinking some beer, Hernandez came to their bedroom and at Benny's request, explained to Terry and appellant that they had to leave within the week because it was disrespectful for them to be there because of their sexual preference. (2 RT 349-350, 415-416.) A fight broke out. (2 RT 416.) Appellant picked up a baseball bat he had hidden in the bed for protection and started whacking Hernandez over the head with it. (2 RT 415-416.) It was over in a minute. (2 RT 352, 417.) Hernandez suffered concussions, had migraines for six months and had eight different lacerations, including three that required from six to 14 stitches. (2 RT 350, 353.) The case was never prosecuted. (2 RT 353-354.)

The following morning, appellant and Terry left and moved into Neal Picklesimer's house. (2 RT 419.)

The incident with Hernandez was the only time Terry saw appellant violent. (2 RT 417.) However, once toward the end of their relationship they were eating ice cream and appellant told Terry he was thinking of what it would be like to kill him. (2 RT 418.) Appellant sat there "like the psychotic person he is" and laughed. (2 RT 418.) Another time when they were watching the movie "Ghost" together, Terry remarked that he wanted to visit church. (2 RT 418.) Appellant called Terry a hypocrite, said he should not go to Church, that Terry's "church was no prison, and he [appellant] was a Jehovah's Witness from being in prison before, so it was totally wrong and immoral" for Terry to want to go to church. (2 RT 418.)

After that, Terry moved out and the relationship was over. (2 RT 418.) Terry feared appellant and hid his whereabouts from him. (2 RT 419.) Appellant later wrote to Terry, saying they should get back together. (2 RT 420.) The last time Terry saw appellant was when he saw him in a bar. Appellant grabbed Terry like he wanted to talk to him and Terry left. (2 RT 420.)

James Cota, who also went by the name Jaime, met appellant through John Epling in the summer of 1992. (2 RT 432-433.) Cota and appellant entered into negotiation over an antique clock appellant was selling and socialized during the process. (2 RT 433-435.) As the final part of the deal, Cota went to appellant's room at Picklesimer's house to give decorating advice and help measure curtains. (2 RT 435, 442.) Appellant stripped Cota of his clothing and locked him in the bedroom for four to six hours. (2 RT 435-436, 439.) Appellant threw Cota around, put him in painful holds, struck Cota with the back of his hand and threatened him. (2 RT 436-437, 439-40.) Appellant forced Cota to perform oral copulation several times and, using condoms, forced anal intercourse on him as well at least four times. (2 RT 438-440.) Cota left the next morning. (2 RT 441.)

A few days later, on August 30, 1992, appellant came to Cota's door, threatened him and demanded the clock back. (2 RT 441-443.) Appellant yelled and Cota screamed and cursed him back. (2 RT 443.) Appellant threatened to kill Cota and kept screaming "fuck everybody" and made it sound like the world was out to get him. (2 RT 445-446.) Cota's lover closed the door between them and called the police. (2 RT 443-444.)

Timothy John Felker testified that on about October 9, 1992, he drove a friend from Alameda, California, to Grants Pass, Oregon, where they stayed in the home where appellant was living. (2 RT 359-361.) After arriving around midnight or 1:00 a.m., Felker, his friend, who seemed to know appellant, and appellant went out drinking. (2 RT 363-364.) Before leaving the house, appellant showed them a revolver and two handguns that needed a clip. (2 RT 362.) Felker got drunk that night, but recalled that at some point appellant said he had just gotten out of Folsom and had been screwed on a deal. (2 RT 365, 367.) Felker's impression was that appellant said he planned to kill someone. (2 RT 367-368.) Driving down the highway after drinking, appellant shot three or four rounds in the direction of the woods. (2 RT 368.)

After returning to appellant's house at 3:00 a.m., appellant showed Felker to a guest room and a while later, came in, fully clothed. (2 RT 369-370.) Felker explained he was straight when appellant came on to him. (2 RT 369-370.) Appellant then pulled out a knife, turned it over in his hand and said he had raped guys before and would do it again. (2 RT 372.) When Felker told appellant he would have to kill Felker first, appellant gave up and exited. (2 RT 374.) Felker left and stayed in a motel. (2 RT 375-376.)

On cross-examination, appellant elicited testimony that Felker believed that if appellant's mother wasn't home, appellant would have stabbed and raped him. (2 RT 377.) Felker also testified that it was possible that appellant would have shot him if Felker had agreed to go

shooting with appellant. (2 RT 377.) Through the court's examination, Felker testified that he was almost 22 years old at the time and, at 5'6" and 135 pounds, was much smaller than appellant, who was about 6'1" and a large man. (2 RT 377-378.)

Robert Alen Long was renting a room from appellant's mother in Grant's Pass, Oregon, in October 1992. (2 RT 398-399.) Appellant came from California to stay with his mother and invited Long to go shooting with him. (2 RT 399.) Appellant showed Long five or six guns and a lot of ammunition. (2 RT 400.) Appellant and Long went to a hill about five miles away and shot at trees and stumps using guns and ammunition supplied by appellant. (2 RT 402.) Appellant told Long he had a few people in California to "cap off," including an ex-lover named Anthony. (2 RT 408-409.)

After walking down from the hill, they drank beer and appellant started coming on to Long. (2 RT 403.) After Long walked away, appellant slammed Long on the hood of the car and had forceful anal intercourse against Long's will. (2 RT 403-404, 406.) Appellant slapped Long around a bit and had his hand on Long's neck, holding him down on the hood. (2 RT 406.) Long struggled and yelled but was 18 years old and smaller than appellant so was unable to get away. (2 RT 406-407.)

Long recalled that appellant left for California the next day. (2 RT 408.) Long did not go to the police but a week or more later, San Jose police officers found and interviewed Long. (2 RT 408-409.)

Appellant waived cross-examination except as otherwise indicated

above. (See 2 RT 354 [Hernandez], 384-385 [Garner], 410 [Long], 446-447 [Cota]; see also 2 RT 358 [no cross-examination of Najarro] and 421, 450, 520 [appellant reserved cross-examination of Terry, but never recalled him].)

Penalty Phase - Appellant's Presentation

Appellant recalled John Epling and elicited additional aggravating evidence from him. Epling's trailer was broken into after the incident. (2 RT 455.) Appellant had sold drugs at the Arena Hotel. (2 RT 455.) Once, when appellant and someone named Danger were slap fighting and boxing, appellant asked Epling to lock them in the garage and later told Epling he had forced himself on Danger. (2 RT 454-455.) However, on cross-examination, Epling explained that the side garage door could be opened from the inside (2 RT 456-458), and that court proceedings established that Danger and another kid broke into Epling's trailer and stole his television. (2 RT 457-458.) Epling took orders from appellant because otherwise appellant got angry and violent. (2 RT 458-459.)

Appellant's Testimony

Appellant testified that he was born on August 25, 1960, and had two younger sisters: Michelle, born in 1961 and Susan in 1964. (2 RT 463.) In 1970 or 1971, his mother fled from his alcoholic father, who had threatened his mother with a knife. (2 RT 463.) The following day she returned home and took appellant's sisters but not appellant, who was hiding on the patio of the house. (2 RT 463.) When his parents divorced in 1971, appellant's father got legal custody of him but at some time that

appellant did not specify, appellant ran away from his father. (2 RT 464.)

Appellant's mother married Harold Johnson and in March 1974, they had appellant's half-sister, Geri. (2 RT 464.) In April 1974, appellant was admitted to juvenile hall as a runaway, then placed with his mother and stepfather.⁸ (2 RT 464.) By May of 1974, appellant's mother and stepfather were having marital problems. (2 RT 464.) Appellant ran away to his maternal aunt's house. (2 RT 464.) In June of 1974 appellant returned to live with his mother and stepfather. (2 RT 464.) Appellant had behavioral and truancy problems in school and may have run away again that year to his father's house. (2 RT 464.)

Appellant was arrested in January 1975 for burglarizing a house with friends and released back to his mother. (2 RT 464.) That summer, his mother and Johnson divorced and appellant was sent back to his father's house, despite the alcoholism, because the probation department did not know his mother's whereabouts. (2 RT 464-465.)

In November 1975, appellant's father sent him to buy liquor. (2 RT 465.) Appellant was arrested and spent a month in juvenile hall before being released back to his father. (2 RT 465.) Over the next two years appellant also was placed with his mother (twice), his maternal aunt and a boys' home; he ran away from the latter two. (2 RT 465.) He also lived with his stepfather for a time. (2 RT 465.)

⁸ Appellant's testimony on the sequence of various events he described is not always clear, here and elsewhere.

After the 1977 incident in which appellant shot at, and was shot by, the police, appellant was sent to the California Youth Authority (CYA) for about 18 months. (2 RT 466.) He lived with his mother from his release in January 1979 until August 1980. (2 RT 466.) At that point he was arrested for violating sections 12020 (prohibiting possession, manufacture or sale of various weapons) and 12031 (misdemeanor violation for carrying loaded firearm in public), and sent back to CYA for probation violations. (2 RT 466.) In June 1982 appellant was convicted of stabbing another inmate and sent to the California Department of Corrections. (2 RT 466.) He was paroled in December 1984 but was sent to Folsom state prison the following month for reasons appellant did not describe, and stayed there until his release in December 1985. (2 RT 466.)

Appellant's mother and her side of the family moved to Oregon. (2 RT 466.) Appellant worked at his stepfather's roofing company in San Jose and at various jobs through temporary employment agencies from 1985 through 1988. (2 RT 466-467.) In 1988, appellant was sentenced to 64 months in prison for assaulting John Epling and was released on June 30, 1991. (2 RT 467.)

Appellant introduced the confidential reports of the three mental health professionals who were previously appointed to evaluate him: Exhibit 32, the December 14, 1992, report of Dr. Douglas M. Harper; Exhibit 33, the July 20, 1993, report of Dr. Robert C. Burr; and Exhibit 34, the September 18, 1993, report of Dr. David M. Echeandia. (2 RT 462-463; see also 1 SCT 107 [order appointing Dr. Douglas M. Harper, M.D., to

examine appellant pursuant to Evid. Code, § 1017]; 1 SCT 121 [order appointing Dr. Robert C. Burr, M.D., “to determine if there is any evidence of mental incompetence that might to lead to a doubt pursuant to § 1368; 4 SCT 150 [Dr. David Echeandia, Ph.D., appointed to evaluate appellant pursuant to § 1368].)

Court’s Examination of Appellant

Appellant spent one year at Old Folsom, a Level IV prison, when he went back for a parole violation in January 1985. (2 RT 470; see also 466.) When he went back to prison in 1988 after being convicted of assaulting John Epling, he was sent to a Level III yard in Solano. (2 RT 470; see also 467.) Appellant worked his way down to Level I classification and then requested a transfer to Pelican Bay so his family from Oregon could visit. (2 RT 471.) As a Level I prisoner, he was not behind the wall at Pelican Bay. (2 RT 471.)

Cross-Examination of Appellant⁹

Appellant could not recall why he ran away so much as a teenager; his father was an abusive alcoholic who beat him badly – black eyes, broken

⁹ Appellant waived his right not to testify about incidents not encompassed by his direct testimony. (2 RT 475.) However, in determining appellant’s sentence, the court declined to consider the two murders in Oregon appellant claimed to have committed or any incidents where an actual victim did not testify. (2 RT 540.) Therefore, appellant’s testimony claiming responsibility for numerous other alleged aggravating incidents during his direct and cross-examinations at the penalty phase are not included in this Statement of Facts.

notes, cuts on his face and the like – but appellant still wanted to live with him because he was his father. (2 RT 496-497.) Appellant did not want to call a psychologist to testify because nothing from his past had any current significance, nor was it directly related to why he committed his crimes. (2 RT 513.) Appellant believed he grew out of any impact such treatment leaves and insisted he had made his own negative adult life decisions. (2 RT 515.) Appellant denied that he heard voices as one of the reports had indicated. (2 RT 505.)

Appellant did not know why he shot at the officers in 1977, had not thought about them shooting back, and was amazed to see sunlight through the bullet holes in the garage wall. (2 RT 479.) During the shoplifting incident, appellant was attempting to hit the store detective so he would release his sister and they could get away. (2 RT 495-496.) Appellant was disappointed he did not kill the inmate he stabbed in CYA, but the knife bent. (2 RT 481-482.) When appellant assaulted Epling, he might have been trying to kill him. (2 RT 473.)

Appellant had no remorse about killing Anderson. (2 RT 504, 508.) He believed the court should give him the death penalty because the state has a right to retribution and because otherwise, it was only a matter of time before he killed a cellmate in prison. (2 RT 507-508.) Appellant requested the court to pass judgment that day or as soon as possible (2 RT 517), and later tried to waive preparation of a probation report. (2 RT 540.)

In ruling on the appropriate punishment, the court characterized the trial as a “slow plea,” and noted that appellant offered no defense and no

mitigation, testified admitting all charges and gave testimony to justify imposition of the death penalty. (2 RT 533.)

ARGUMENT

I.

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR ADVISORY COUNSEL

A. Introduction

Appellant requested advisory counsel after he began representing himself. The trial court found that appellant needed an attorney to help him, but because appellant's prior attorney, the public defender's office, would not act in a standby or advisory capacity, the court ruled that it did not have the authority to appoint either the public defender or another attorney to assist appellant. Under this Court's case law, the court's failure to exercise its discretion by either granting or denying the request was error. If a court's refusal to grant a request would not have been an abuse of discretion, prejudice is assessed under *People v. Watson* (1956) 46 Cal.2d 818, 836-837 (reasonable probability that error or misconduct contributed to the outcome). However where, as here, a ruling to deny advisory counsel would have been an abuse of discretion, per se reversal is required. For this reason, appellant's conviction must be reversed and sentence set aside.

B. Factual Background

Having received pro. per. status on July 19, 1995, appellant submitted an application for "assistant counsel" pursuant to *Keenan v. Superior Court* (1982) 30 Cal.3d 750, as well as for an in camera hearing on why one was needed. (3 CT 479-481.) Appellant sent the document to

Judge Hastings, who was handling his requests for ancillary services. (3 CT 482; 12/20/95 RT 3-4.) Judge Hastings sent the request to Judge Ball, who had granted appellant's *Faretta* motion, so that Judge Ball could hear the matter and explain to appellant "what's involved." (12/20/95 RT 4.) Judge Ball scheduled a hearing on the motion, with the prosecutor to be present, because he believed appellant's motion needed amplification (12/20/95 RT 1), and because neither he nor Judge Hastings was comfortable with "the situation."¹⁰ (12/20/95 RT 5.)

At the hearing, Judge Ball explained to appellant that an attorney could obtain *Keenan* counsel as additional legal help. (12/20/95 RT 1-2.) However, self-represented defendants instead got cocounsel or standby counsel. (12/20/95 RT 2.) As to the latter, the court believed it was bound by law to appoint appellant's prior attorney, the public defender's office, because the public defender could not claim a conflict in appellant's case. (12/20/95 RT 2.) The public defender, however, would not accept appointment as standby or cocounsel and was under no legal obligation to do so. (12/20/95 RT 2-3.) Thus, the court believed it did not have the ability to appoint a "conflict attorney" or another attorney in this role for appellant. (12/20/95 RT 2.)

Appellant clarified that what he wanted was someone in the capacity of an advisor. (12/20/95 RT 3.) In response, the court recognized that:

You probably and with understanding, so far as I'm

¹⁰ Judge Ball did not say what he meant by "the situation."

concerned, need a lawyer to tell you what to do, and that's the problem that I have, is that I don't have the legal ability to fill that need for you.

(12/20/95 RT 3.)

The court hoped that appellant had changed his mind and was in effect asking for reappointment of the public defender. (12/20/95 RT 3.) Appellant was not. (12/20/95 RT 3.) Throughout the hearing, the court continued to urge appellant to change his mind and accept the public defender as his attorney. (12/20/95 RT 3-6.) The court wanted appellant to think about this and considered calling in the public defender to discuss it. (12/20/95 RT 5.) The following exchange then took place:

The Defendant: I would like to have it withdrawn, then, withdraw the motion, if it's –

The Court: Well, I can do that, Mr. Morelos, I – again I'm trying to plead with you, I guess, to take advantage of what I believe to be fine representation that's ready, willing, and able to aid you in this.

(12/20/95 RT 5; see also 3 CT 523 [minute order indicating *Marsden* motion withdrawn].)

C. Applicable Legal Principles

The function of advisory counsel is to assist the self-represented defendant if and when the defendant requests help.¹¹ (*People v. Blair*

¹¹ In contrast, a court appoints standby counsel for its own benefit to step in to represent the defendant as needed, e.g., if the defendant's pro. per. (continued...)

(2005) 36 Cal.4th 686, 725.) “California courts have discretion to appoint advisory counsel to assist an indigent defendant who elects self-representation.” (*People v. Crandell* (1988) 46 Cal.3d 833, 861 (*Crandell*), abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.) They have had such discretion since at least 1954 and have “frequently exercised their discretion to appoint [such] counsel.” (*People v. Bigelow* (1984) 37 Cal.3d 731, 742 (*Bigelow*)). The federal courts also endorse the appointment of advisory counsel. (*Ibid.*, citing *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 467 (conc. opn. of Berger, J.); *Faretta v. California* (1975) 422 U.S. 806, 834, fn. 46.)

Similar to the principles applicable to a request for an expert under Evidence Code section 730, a defendant requesting appointment of advisory counsel “must make a showing of need and the decision to grant or deny the request rests in the sound discretion of the trial court.” (*Crandell, supra*, 46 Cal.3d at p. 862.)

Factors that a court may consider in a capital case when deciding whether to appoint advisory counsel include the defendant’s background, education (*Bigelow, supra*, 37 Cal.3d at pp. 743-744), “demonstrated legal abilities” (*Crandell, supra*, 46 Cal.3d at pp. 861, 863), and whether there are particularly complex legal issues. (*Bigelow, supra*, 37 Cal.3d at p.743.) If a defendant seeks advisory counsel to obstruct or delay proceedings, this

¹¹(...continued)
is revoked. (*People v. Blair, supra*, 36 Cal.4th at p. 725.)

weighs against granting such a request. (*Crandell, supra*, 46 Cal.3d at p. 863.)

A court's failure to exercise discretion in response to a request for advisory counsel is "serious error" and may constitute an abuse of discretion. (*Crandell, supra*, 46 Cal.3d at p. 861.) If the failure to grant the request would have been an error, the rule of per se reversal applies. (*Bigelow, supra*, 37 Cal.3d at p. 744.)

When a trial court errs in failing to exercise its discretion on a defendant's request for advisory counsel, but the refusal to grant the request would not have been an abuse of discretion, prejudice is assessed under the *Watson*¹² harmless error standard. (*Crandell, supra*, 46 Cal.3d at pp. 864-865.)

There is no federal constitutional right to advisory counsel. (*Crandell, supra*, 46 Cal.3d at p. 864.)

D. The Trial Court Erred When It Failed to Recognize That It Had Discretion to Appoint Advisory Counsel

The court below erroneously believed it had no authority to appoint advisory counsel for appellant both because the public defender would not accept such a role and because the court could not appoint private counsel instead. (12/20/95 RT 2-3.) The court's failure to recognize and exercise its discretion under these circumstances was error.

In *Bigelow, supra*, 37 Cal.3d at p. 740, the trial court refused to

¹² *People v. Watson, supra*, 46 Cal.2d 818 at pp. 836-837.

consider appointing advisory counsel, believing it was “not permitted under California law.” The People conceded this was error and this Court so ruled. (*Id.* at p. 742.) In *Crandell*, the self-represented defendant’s requests for advisory counsel also were summarily denied, with the trial court below stating at one point that “there is no such thing.” (*Crandell, supra*, 46 Cal.3d at p. 862.) Because none of the judges who considered *Crandell*’s requests acknowledged their discretion to appoint advisory counsel or engaged in a “reasoned exercise of judgment,” this Court found the failure to be error.¹³ (*Ibid.*) Similarly, the failure of the court below to engage in a reasoned exercise of judgement was error.

Under the foregoing authorities, the court’s failure to recognize that California law permitted it to appoint advisory counsel for appellant, or to consider the matter following appellant’s request, was “serious error.” (*Crandell, supra*, 46 Cal.3d at p. 861, citing *Bigelow, supra*, 37 Cal.3d at p. 743.)

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¹³ In *Crandell, supra*, 46 Cal.3d at pp. 853, 858, the defendant refused to accept the public defender as his attorney and opted to represent himself. He asked for advisory counsel and, as occurred in the case below, learned that the public defender refused to allow its attorneys to act as advisory counsel. (*Id.* at p. 853.) This Court noted that the issue of whether a trial court could appoint a public defender as advisory counsel despite such a policy was not presented in *Crandell*. (*Id.* at p. 853, fn. 3.) That issue is also not presented here.

E. Appellant Preserved His Right to Challenge the Court's Error

As described above, after the court ruled that it had no authority to grant appellant's request for advisory counsel (12/20/95 RT 3), it continued to urge him to accept the public defender as his attorney. (*Id.* at pp. 4-5.) The court then stated it wanted appellant to "think about it," and that it was considering calling appellant's former counsel to court, along with the prosecutor, because the court felt it was important that appellant have representation. (*Id.* at pp. 5-6.) Faced with another court hearing where the court would again urge appellant to give up his *Faretta* rights, appellant stated "I would like to have it withdrawn, then, withdraw the motion" (*Ibid.*) This statement does not keep this Court from reviewing the court's error in failing to recognize and exercise its discretion to appoint advisory counsel for appellant.

"Under the doctrine of waiver, a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error. [Citation.]" (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.) Here appellant took the proper steps to request counsel, and the court ruled against him. (12/20/95 RT 3.) It was only after the court had moved on to questioning appellant's *Faretta* status that appellant purported to withdraw his request for advisory counsel. (12/20/95 RT 4-5.) By then, appellant had done everything he could to avoid the court's error.

In *People v. Scott* (1978) 21 Cal.3d 284, 288-289, the defendant

objected to the prosecution's motion to compel him to undergo certain testing. After a hearing on the matter, the court ruled against him. Defendant did not object again when the tests results became available and were introduced at trial. (*Id.* at pp. 289-290.) On appeal, this Court held that the defendant's failure to renew the objection did not waive the issue for appeal. (*Id.* at pp. 290-291.) This was because the admissibility of results, whatever the outcome of the test, was fully explored at the hearing on the original motion. (*Id.* at p. 291 ["where defendant's objections have been fully considered and overruled, we have said that they need not be repetitiously renewed"].) Similarly, here, the issue of advisory counsel was thoroughly explored before the court ruled it had no authority to grant appellant's request.

Nor does the doctrine of invited error apply. "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal" (*People v. Coffman* (2004) 34 Cal.4th 1, 49, citation omitted.) Neither appellant's request nor his conduct at the hearing misled the court, so there is no basis for application of estoppel or invited error. Nor is there invited error when, as here, a party "endeavor[s] to make the best of a bad situation for which [it] was not responsible." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [citation and internal quotation marks omitted]; see also *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 302 [tactical decision to emphasize the

liability issue and minimize discussion of damages did not waive right to object on appeal to speculative damages].) Confronted with the possibility of a hearing on whether he should abandon self-representation, attended by his former counsel and the prosecutor, appellant understandably acted defensively as best he could to forestall that possibility.

For all these reasons, the facts here do not support application of any theory of waiver, estoppel or invited error.

F. Because the Court Found That Appellant Needed Advisory Counsel and Would Have Appointed One Had It Known It Could Do So, Its Failure to Appoint Advisory Counsel Would Have Been an Abuse of Discretion

As this Court has noted, a defendant requesting appointment of advisory counsel “must make a showing of need and the decision to grant or deny the request rests in the sound discretion of the trial court.” (*Crandell, supra*, 46 Cal.3d at p. 862.) Here, appellant did make that showing, which the court recognized when it found that appellant “need[ed] a lawyer to tell him what to do.” (12/20/95 RT 3.) Thus, had the court understood that it had discretion to grant appellant’s request for advisory counsel, the record demonstrates that it would have done so.

Moreover, at the time of the hearing on appellant’s request, the court was familiar with appellant’s education, background, legal abilities and other factors that this Court has looked at to determine whether or not a court abuses its discretion in denying a request for advisory counsel. (See *Bigelow, supra*, 37 Cal.3d at pp. 743-744; *Crandell, supra*, 46 Cal.3d at p. 863.) Because all the factors here weigh in favor of appointing advisory

counsel, failure to do so would have been an abuse of discretion.

The court knew, from reviewing appellant's Petition to Proceed in Propria Persona (7/19/95 RT 4-5; see 2 CT 404-409), appellant's claimed level of education, i.e., that he was a high school dropout, had completed a GED in the California Youth Authority and took a subsequent class or classes in prison. (7/19/95 RT 6; 2 CT 405.) At the *Faretta* hearing, the court had noted that appellant understood how to read and write. (7/19/95 RT 6-7.)

In *Bigelow, supra*, 37 Cal.3d at pp. 743-744, the defendant was a Canadian with a ninth-grade education, which the Court considered in finding that a denial of Bigelow's request for advisory counsel would have been an abuse of discretion. In coming to the opposite conclusion in *People v. Clark* (1992) 3 Cal.4th 41, abrogation on another ground recognized by *People v. Pearson* (2013) 56 Cal.4th 393, 462, the Court noted that Clark had graduated from a preparatory school for entry in the armed services academies, did "top security work" in radio intelligence while in the military, and later earned a license as a stationary engineer. (*Id.* at pp. 111-112.) While appellant claimed to have a GED, which was more than the defendant in *Bigelow* had, appellant's level of education and work history doing manual labor (2 CT 405), pales in comparison to the education, training, professional certification and military work status attained by the defendant in *Clark*. Thus, appellant's educational level was a factor supporting appointment of advisory counsel.

Judge Ball was also aware of appellant's limited legal abilities. In

his request for self-representation, appellant noted he had used the law library in 1993 and 1994, but had never previously represented himself. (2 CT 405.) Judge Ball had presided over the *Faretta* hearing, as well as additional proceedings after it. At the hearing on appellant's *Faretta* motion, appellant's participation was limited to responding affirmatively or negatively to the questions posed by the court and prosecutor. (See 7/19/95 RT 3-13.) Appellant's participation was similarly limited at other hearings Judge Ball held on pretrial matters. (See, e.g., 2 CT 418; 7/21/95 RT 16-21 [during discussion of legal materials to be given to appellant, he says three words]; 2 CT 420; 7/27/95 RT 29-31 [minimal participation during discussion of jury waiver]; 2 CT 424; 8/2/95 RT 34-37 [same]; 2 CT 425, 8/9/95 RT 45-46 [same as to discussion of time waiver]; 2 CT 427, 8/11/95 RT 47-51 [same when time and jury waivers taken]). Appellant was more expressive at times when discussing concrete matters such as his requests for phone privileges and more legal materials in his cell or access to his legal runner. (See 7/27/95 RT 22-28.) However, these exchanges did not reveal any abilities regarding arguing motions, examining witnesses, or other skills needed for trial. (Cf. *Crandell*, *supra*, 46 Cal.3d at pp. 864-866.) Judge Ball therefore had ample time to observe appellant's legal abilities in court or lack thereof.

In finding there would have been no abuse of discretion in *Crandell*, the Court did not discuss the defendant's education, relying instead on the fact that Crandell had done very well representing himself at the preliminary hearing prior to the request for advisory counsel. (*Crandell*,

supra, 46 Cal.3d at pp. 856, 864.) Crandell had brought discovery and numerous other motions demonstrating he could engage in reasoned argument, subpoenaed witnesses, and engaged in skillful examination and cross-examination of witnesses. (*Id.* at p. 864.)

Similarly, in *People v. Clark*, *supra*, 3 Cal.4th 41, this Court found it would not have been an abuse of discretion to deny the defendant's request for advisory counsel where, prior to the hearing on his request for advisory counsel, Clark had questioned witnesses skillfully, called motions by their correct names and otherwise demonstrated "considerable skill and intelligence." (*Id.* at pp. 111-112.)

In contrast to both *Crandell* and *Clark*, appellant had not previously represented himself and had not examined witnesses or otherwise demonstrated skill in court. (See, e.g., 7/19/95 RT 2-15 [hearing on *Faretta* motion]; 12/20/95 RT 1-8 [hearing on request for advisory counsel].) Appellant's lack of demonstrated skill in the courtroom supports Judge Ball's conclusion that he needed a lawyer to advise him. (12/20/95 RT 3.)

Finally, there was never any suggestion that appellant sought advisory counsel to delay or obstruct the proceedings. (See, e.g., 7/19/95 RT 3 [delay], 8 [based on court's observations of appellant's appearance and conduct, court noted at the *Faretta* hearing that it did not see evidence that he wanted to be disruptive or disrespectful].)

"Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice." (*Crandell*, *supra*, 46 Cal.3d at p. 863

(citations and internal quotation marks omitted).) The court below had access to the relevant information needed to rule on a motion for advisory counsel, and with that background explicitly found that appellant needed a lawyer to advise him. (12/20/95 RT 3.) Any decision to the contrary would have been an abuse of discretion and counter to the court's view of the demands of equity and justice.

G. Reversal Is Required

Because the court's failure to grant appellant's request for advisory counsel would have been an abuse of discretion, the rule of per se reversal applies. (*Crandell, supra*, 46 Cal.3d at pp. 861, 864.) Per se reversal serves to vindicate the state's independent interest in the fairness and accuracy of a capital proceeding. (*Bigelow, supra*, 37 Cal.3d at p. 747, citing *People v. Chadd* (1981) 28 Cal.3d 739, 752–753.) This is especially an issue here, where the court and prosecutor participated in the nonadversarial proceeding that resulted in appellant's conviction and death sentence. For these reasons, the conviction must be reversed and death sentence vacated.

* * * * *

II.

ALLOWING APPELLANT TO REPRESENT HIMSELF, WAIVE A JURY TRIAL AND JOIN THE PROSECUTION TEAM TO ACHIEVE A DEATH SENTENCE WAS TANTAMOUNT TO ACCEPTING A GUILTY PLEA, IN VIOLATION OF PENAL CODE SECTION 1018 AND THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

Appellant's persistent efforts to plead guilty were rejected because his counsel did not consent. By waiving counsel and his right to a jury trial on guilt and penalty, testifying extensively against himself and otherwise joining forces with the prosecutor to assure a guilty verdict, true findings on the special circumstances and a death sentence, appellant was allowed to do what Penal Code section 1018 prohibits for defendants charged with capital offenses – plead guilty without the consent of counsel. As the trial court recognized when announcing the death verdict:

We have gone through a court trial which the court would characterize as a slow plea Mr. Morelos has offered no defense to the charges. He has offered no mitigation in the penalty phase of the trial. In fact, the defendant has exercised his constitutional right to testify and has taken the stand and under oath admitted his crimes, admitted the enhancement, the special circumstances, and he has given testimony to justify the finding for the court to impose the death penalty.

(2 RT 533, italics added.)

Under these circumstances, to say that appellant did not plead guilty because the court and parties went through the motions of a trial is to elevate form over substance in a manner that cannot be countenanced by

section 1018 and this Court's interpretation of it. Moreover, allowing a capital defendant to choose to become his own second prosecutor violates the Eighth Amendment, because it permits a selection process that is irrational and arbitrary, with a resulting unreliable death determination. This breach of section 1018 deprived appellant of a state-created liberty interest in violation of the due process clause of the 14th Amendment and further violated his rights under the Eighth Amendment to a reliable sentencing determination.

B. Factual Background

Shortly after his arrest on October 20, 1992, appellant told officers during his first interrogation that he planned to plead guilty to killing the victim, so did not think there would be a trial. (Ex. 12AA; 2 SCT 158-159.) He also asked the interrogating officers whether he had to have an attorney. (*Id.* at p. 159.) He would not cooperate with an attorney if given one and instead would plead guilty and "be cooperative with the court system." (*Id.* at p. 160.)

The Santa Clara Public Defender was appointed to represent appellant on October 23, 1992. (4 SCT 160.) On February 22, 1993, the court denied appellant's request made pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). (1 SCT 114, 116.) Another *Marsden* motion was pending when competency proceedings were instituted. (4 SCT 157; 7/6/93 RT 7-8; 8/23/93 RT 4.) On July 6, 1993, appellant requested pro. per. status to obtain access to the law library to research pleading guilty; he had talked to the court about this several weeks earlier. (7/6/93

RT 7.) The court denied the request, due to the pending competency proceedings. (7/6/93 RT 7-8.) Appellant insisted that he would be found competent, fire his attorney and plead guilty. (7/6/93 RT 8.)

After appellant was found competent (1 SCT 137; 9/22/93 RT 1-2), he withdrew his *Marsden* motion in an effort to plead guilty, proceed to sentencing and receive a death sentence. (1 SCT 138; 10/4/93 RT 3-4.) Defense counsel would not consent to a guilty plea and the court requested briefing. (10/4/93 RT 4-5.) Defense counsel argued that under section 1018 and *People v. Chadd* (1981) 28 Cal.3d 739 (*Chadd*), it was error for a trial court to accept a defendant's plea of guilty to a charged capital offense without being represented by, and having the consent of, counsel. (1 SCT 139-141; 10/4/93 RT 4.) The prosecution agreed. (10/27/93 RT 3.) Appellant, on the other hand, wrote to the court opposing his lawyer's position. (1 SCT 143-149.) The court ruled that under section 1018 and *Chadd*, appellant could not plead guilty to the charges without his attorney's consent. (10/27/93 RT 3-4.)

On July 5, 1995, appellant indicated he wanted to discharge his attorney and represent himself. (7/5/95 RT 2-3.) On July 19, 1995, after a hearing, the court granted his request pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). (2 CT 404-409; 7/19/95 RT 3-14.)

A week later, appellant called the prosecutor, informing him he wanted to plead guilty. (7/27/95 RT 29.) The prosecutor informed the court that the Attorney General had approved this; however the prosecutor, citing *Chadd*, did not. (7/27/95 RT 29-30.) The prosecutor preferred a

court trial with a pro. per. defendant and announced that he and appellant had agreed to waive a jury for the trial. (7/27/95 RT 30.) Appellant ultimately waived a jury for both phases of trial. (2 CT 427; 8/11/95 RT 47-50; 3 CT 528; 1 RT 1-2; 2 RT 329.)

As detailed below, appellant went far beyond self-representation; rather, he joined the prosecution team. Appellant waived his rights and chance to challenge the prosecution's case at every significant opportunity. He also worked with the prosecution on procedural and substantive matters to strengthen its case. He testified at the guilt phase, admitting all charges and allegations and specifically shoring up the weaker parts of the prosecution's case. His testimony at the penalty phase pumped up the aggravating evidence to the point that the court chose to disregard some of his numerous, unsupported admissions. Finally, appellant urged the court to sentence him to death.

C. Applicable Legal Principles

In California, the trial court has no authority to accept a plea of guilty to a capital crime from a defendant who has waived counsel.

Section 1018 provides in relevant part:

No plea of guilty of a felony for which the maximum punishment is death, or life in prison without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel.¹⁴

¹⁴ Section 1018 further provides: "No plea of guilty of a felony for
(continued...)"

Under the pre-1973 version of section 1018, a self-represented defendant could not plead guilty, but nothing in the statutory language barred a represented defendant from pleading to a capital charge against the express advice of counsel. (*People v. Vaughn* (1973) 9 Cal.3d 321, 327-328.) The requirement that defense counsel consent to a guilty plea in cases where the maximum punishment is death was added to the statute in 1973 and is “an integral part of the Legislature’s extensive revision of the death penalty laws in response to the Supreme Court’s decision in *Furman v. Georgia* (1972) 408 U.S. 238.” (*Chadd, supra*, 28 Cal.3d at p. 750.) The requirement of counsel’s consent was intended to “eliminate. . . arbitrariness” and “serve as a further independent safeguard against erroneous imposition of the death penalty.” (*Ibid.*) Thus, this statutory protection exists to protect the reliability of death determinations required by the Eighth Amendment, by ensuring a rationally selective and non-arbitrary process for adjudging who shall receive the ultimate punishment. The last sentence of section 1018 contains the Legislature’s explicit intent that the statute “be liberally construed to effect these objects and to promote

¹⁴(...continued)

which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel.”

justice.” The provision requiring counsel’s consent was retained when the Legislature amended section 1018 again as part of the 1977 death penalty statute. (*Sand v. Superior Court* (1983) 34 Cal.3d 567, 571.)

This Court first addressed the 1973 amendment to section 1018 in *Chadd, supra*, 28 Cal.3d at pp. 744-745, where the trial court permitted a defendant to plead guilty to the capital offenses against the advice of his counsel. The trial court reasoned that because the defendant was competent to act as his own attorney under the standards of *Faretta*, it could accept his guilty plea despite counsel’s refusal to consent, as this would be “tantamount to” relieving defense counsel and permitting the defendant to represent himself. (*Ibid.*) The trial court thereupon allowed the defendant to plead guilty to all counts and to admit all the charged enhancements and the special circumstance allegations. (*Ibid.*)

This Court reversed the defendant’s conviction, as it was obtained in violation of section 1018. (*Chadd, supra*, 28 Cal.3d at p. 746.) The Court rejected the Attorney General’s argument that section 1018 could be “construed” to allow Chadd to discharge his attorney, represent himself, and plead guilty. First, the argument was hypothetical, as Chadd had not actually represented himself. (*Ibid.*) Second, section 1018 was plain and needed no construction. (*Ibid.*) Finally, and most significantly, the Court stated that:

[T]he Attorney General’s proposal would make a major portion of the statute redundant. He urges in effect that it be read to permit a capital defendant to discharge his attorney and plead guilty if he knowingly, voluntarily, and openly

waives his right to counsel. But that is precisely what the third sentence of section 1018 expressly authorizes noncapital defendants to do. The proposal would thus obliterate the Legislature's careful distinction between capital and noncapital cases, and render largely superfluous its special provision for the former. Such a construction would be manifestly improper.

(*Id.* at p. 747, footnote and citations omitted.)

Moreover, allowing counsel to veto his client's decision to plead guilty does not violate a defendant's "fundamental right to control the ultimate course" of the prosecution because there is a "larger public interest at stake in pleas of guilty to capital offenses." (*Chadd, supra*, 28 Cal.3d at pp. 747-748.) While the decision how to plead is personal to a defendant,

the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. Thus it is the legislative prerogative to specify which pleas the defendant may elect to enter (Pen. Code, § 1016), when he may do so (*id.*, § 1003), where and how he must plead (*id.*, § 1017), and what the effects are of making or not making certain pleas.

(*Id.* at pp. 747-748, fns. omitted; *North Carolina v. Alford* (1970) 400 U.S. 25, 38-39 [holding that state may constitutionally prohibit all guilty pleas to murder].)

The Court also held that *Faretta* did not affect the validity of section 1018 as it "did not strip our Legislature of the authority to condition guilty pleas in capital cases on the consent of defense counsel." (*Chadd, supra*, 28 Cal.3d at p. 750.) The Court rejected the Attorney General's argument that the right to self-representation made section 1018's prohibition on a

defendant's plea of guilty without the consent of counsel unconstitutional, observing:

Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent.

(*Id.* at p. 751.)

This Court has reaffirmed *Chadd* on two occasions. In *People v. Massie* (1985) 40 Cal.3d 620, trial counsel and the court allowed the defendant to plead guilty to capital murder under the mistaken assumption that a defendant could so plead pursuant to *Faretta*. The Court vacated the plea, re-affirming the language in *Chadd* that found that section 1018 was unaffected by *Faretta*. (*Id.* at p. 625; *Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, 74 ["While *Massie* is correct that he enjoys a constitutional right to self representation, this right is limited and a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity of the proceedings".])

In *People v. Alfaro* (2007) 41 Cal.4th 1277, the defendant argued that the trial court erred in refusing to allow her to plead guilty to a capital offense against the advice of her counsel, asserting that had she done so, that would have enhanced her mitigation theme of remorse at the penalty phase. (*Id.* at p. 1298.) Like the Attorney General in *Chadd*, Alfaro argued that a defendant's *Faretta* right implied a right to enter an unconditional

guilty plea against the advice of counsel. (*Ibid.*) The Court, noting that section 1018 was one of several exceptions to the general rule recognizing a defendant's autonomy interest in a criminal case (*ibid.*), declined to revisit and limit the rule of *Chadd*. (*Alfaro, supra*, at p. 1300.) The Court held that *Chadd*'s reasoning was sound, as it was based on an appreciation that section 1018 represented "the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings." (*Ibid.*, citing *Chadd, supra*, 28 Cal.3d at pp. 750, 753.)

In this regard, this Court has distinguished situations wherein a defendant has a personal, constitutionally protected right to accept or reject a plea bargain offer in which the defendant is offered some benefit in exchange for the plea. (*People v. Alfaro, supra*, at p. 1302 & fn. 5, citing *In re Alvernaz* (1992) 2 Cal.4th 924, 936-937.) There is no corresponding right to enter an unconditional plea. (*Ibid.*)

D. Appellant's Actions and Inactions Below Were Tantamount to a Guilty Plea to Capital Murder Without the Consent of Counsel in Violation of Section 1018

Stymied in his attempts to plead guilty, appellant waived counsel, a jury and significant trial rights, and aligned himself with the prosecutor to assure a death sentence. The resulting court trial was a sham and no more than a slow plea of guilty, in violation of section 1018.

This Court has defined a slow plea as an:

'agreed-upon disposition of a criminal case via any one of a number of contrived procedures which does not require the

defendant to admit guilt but results in a finding of guilt on an anticipated charge and usually, for a promised punishment.’ Perhaps the clearest example of a slow plea is a bargained-for submission on the transcript of the preliminary hearing in which the only evidence is the victim’s credible testimony, and the defendant does not testify and counsel presents no evidence or argument on defendant’s behalf. Such a submission is ‘tantamount to a plea of guilty’ because ‘the guilt of the defendant [is] apparent . . . and conviction [is] a foregone conclusion if no defense [is] offered. [Citation.]

(*People v. Wright* (1987) 43 Cal.3d 487, 497, (abrogation on another ground recognized by *People v. Mosby* (2004) 33 Cal.4th 353, 360-361), quoting *People v. Tran* (1984) 152 Cal.App.3d 680, 683, fn. 2.) If, however, the facts or applicable law are in dispute at the preliminary hearing or at the time of the submission, then the proceeding is not tantamount to a guilty plea: in short, “if it appears on the whole that the defendant advanced a substantial defense, the submission cannot be considered tantamount to a guilty plea.” (*People v. Wright, supra*, 43 Cal.3d at pp. 496-497.) Although the “clearest example” is a submission on the transcript of the preliminary hearing for a promised punishment, a slow plea includes other procedures designed to result in a finding of guilt. (See, e.g., *People v. Tran, supra*, 152 Cal.App.3d at pp. 682-683 [holding procedure was a slow plea where, following victim’s direct testimony, defendant waived jury, stipulated to a lesser included offense and submitted question of guilt without cross-examination, or offering evidence or argument].)

Wright recognized that it may be difficult to determine whether a

particular procedure is a “slow plea” and cautioned that an appellate court must assess the circumstances of the entire proceeding. It is not enough for a reviewing court to simply count the number of witnesses who testified at the hearing following the submission. A submission that prospectively appeared to be a slow plea may turn out to be part of a full-blown trial if counsel contested the sufficiency of evidence for those counts or presented another potentially meritorious legal argument against conviction. Conversely, a submission that did not appear to be a slow plea because the defendant reserved the right to testify and call witnesses or argue the sufficiency of the evidence (see *People v. Guerra* (1971) 21 Cal.App.3d 534, 538 []) may turn out to be a slow plea if the defense presented no evidence or argument contesting guilt.

(*People v. Wright, supra*, 43 Cal.3d at pp. 496-497.)

Applying this analysis, the Court held that the proceedings in *Wright* were not tantamount to a guilty plea. Although Wright waived his right to a jury trial and submitted the preliminary hearing transcript for review, both sides reserved the right to call additional witnesses, defendant presented evidence in support of his motions to suppress and he argued that he was not guilty of the most serious charges. (*People v. Wright, supra*, 43 Cal.3d at pp. 498-499.)

In sharp contrast, the proceeding below was the equivalent of a slow plea. As explained *post*, appellant repeatedly attempted to plead guilty, waived significant trial rights, never challenged the prosecution’s case and testified, admitting the only count and the three special circumstance allegations, and making additional, unsubstantiated admissions designed to put himself in the worst light possible to achieve his stated aim of a guilty

verdict and death sentence.

1. It Was Apparent Well Before Trial Began That Appellant Wanted to Plead Guilty and Receive a Death Sentence

As noted above, this Court assesses the circumstances of the entire proceeding to determine whether it was, in fact, a slow plea. (See *People v. Wright, supra*, 43 Cal.3d at pp. 496-497.) Here, appellant told the police during interrogation that he would plead guilty. (Ex. 12AA, 2 SCT 158.) On July 6, 1993, when proceedings were suspended for a competency determination, appellant informed the court, as he had several weeks earlier, that he wanted to plead guilty. (7/6/93 RT 7-8.) After he was found competent, appellant withdrew his pending *Marsden* motion in an attempt to plead guilty, proceed to the sentencing phase and obtain a death sentence. (1 SCT 138; 10/4/93 RT 3.) Just a week after his *Faretta* motion was granted, appellant called the prosecutor to see if he would agree to appellant pleading guilty. (7/27/95 RT 29.) As appellant reiterated once more in his penalty phase testimony, he had wished to plead guilty even before the preliminary hearing, but his attorney did not agree. (2 RT 509.)

2. Appellant's Waivers and Attempted Waivers Also Demonstrate That the Trial Was a Slow Plea

That the trial was a thinly disguised slow plea is also demonstrated by the rights appellant waived or failed to exercise, as waivers are a significant factor in determining whether or not a proceeding was tantamount to a slow plea. (See *People v. Robertson* (1989) 48 Cal.3d 18, 39-40 [submissions, whether on a preliminary hearing transcript, or via

slow pleas or proceedings tantamount to a plea of guilty, are defined by the rights a defendant surrenders].) As noted above, appellant waived the right to counsel (7/19/95 RT 3-14), and right to trial by jury. (8/11/95 RT 47-49, 1 RT 1-2, 2 RT 329.) Appellant waived opening statement and closing argument at both phases of trial. (1 RT 23, 2 RT 324 [guilt]; 2 RT 329, 454 [penalty – no opening statement given], 532 [waives closing argument].) Appellant waived cross-examination of all guilt phase witnesses. (See 1 RT 76 [Picklesimer], 105 [medical examiner], 128 [Hehnke], 150 [Martini], 169 [Zaragoza], 173 [Henry], 186 [Salas], 251 [Gracie] and 260 [Sterner].)

Appellant waived his Fifth Amendment privilege (2 RT 268), and testified against himself at all phases of trial, admitting Count 1 (the only charge), and all enhancements, special circumstances and aggravating evidence. (See, e.g., 2 RT 310-311 [Count 1, murder]; 2 RT 269-272 [specials]; 2 RT 316-317 [prior convictions]; 2 RT 472 [Epling assault]; 478-479 [Salas assault]; 479 [1977 shooting at police officers]; 482 [Long sexual assault]; 486-487 [threatening Felker]; 488-489 [Cota sexual assault]; 495-496 [Lucky grocery assault].)

Appellant told the court that after the parties rested at the penalty phase that he wanted to make a motion for a “speedy sentence.” (2 RT 451.) When he waived penalty phase closing argument, he again asked the court for a “speedy sentence” and immediate transfer and then reminded the court of this request at his sentencing. (2 RT 532, 547.) Appellant unsuccessfully tried to waive the referral to probation. (2 RT 540-541.) He refused to make a motion for new trial or to reconsider the verdict. (2 RT

541, 545.)

In short, appellant waived his rights and/or chance to challenge the prosecution's case at virtually every opportunity.

3. Appellant Worked with the Prosecutor to Ensure a Guilty Verdict, True Findings on the Special Circumstances and a Death Sentence

This case diverges greatly from those in which a pro. per. defendant passively fails to challenge the prosecution's case. The Court has found this scenario permissible, because "a capital defendant representing himself under *Faretta* has no duty to 'present a defense' but may simply 'put the state to its proof' Such a defendant can presumably also take the stand and confess guilt." (*Chadd, supra*, 28 Cal.3d at p. 750, fn. 7, citing *People v. Teron* (1979) 23 Cal.3d 103, 115.)

People v. Sanders (1990) 51 Cal.3d 471, addressed this aspect of the relationship between "equivalents" of guilty pleas and the bar of section 1018. The Court rejected Sanders's contention that his choice to forego a mitigation presentation in his penalty phase was tantamount to a guilty plea, not because nothing other than a true conventional guilty plea would violate section 1018, but because what occurred in Sanders's trial was found not to be "tantamount to a guilty plea" and thus not violative of the statute. (*Id.* at p. 527.) Rather, Sanders's decision to refrain from offering evidence "did not amount to an admission that he believed death was the appropriate penalty" and "did not necessarily make it any more likely that his jury would find death was the appropriate penalty." (*Ibid.*)

Appellant, on the other hand, confessed guilt; admitted the charged murder, special circumstances and aggravating incidents; attempted to admit much additional unnoticed and unproven aggravating evidence; and otherwise repeatedly and actively sought a swift conviction and judgment of death. He became, in effect, his own second prosecutor, as demonstrated by the following facts.

a. Pretrial and Guilt Phase Proceedings

Appellant began contacting the prosecutor even prior to representing himself. (7/19/95 RT 9 [prosecutor previously received a letter from appellant].) Appellant requested court orders so he could call the prosecutor and/or the homicide unit (8/2/95 RT 37-39, 9/6/95 RT 6, 7- 8), and had extensive pretrial discussions with the prosecutor. (See, e.g., 8/2/95 RT 38 [noting lengthy discussions the prior two days]; 39 [noting that jail sometimes cut discussions between appellant and the prosecutor short; once prosecutor got jail to extend the call]; 8/11/95 RT 47 [reporting that appellant and prosecutor talked for one and a half hours that morning].)

Appellant relied on the prosecutor to assist him with procedural matters. (See, e.g., 1 RT 128 [appellant spoke to prosecutor in holding tank regarding problems contacting appellant's investigator and potential witness]; 1 RT 133-134 [prosecutor called jail to try to resolve problems with appellant's access to his sister/legal runner].)

More significantly, appellant abandoned various constitutional and trial rights after consultation with the prosecutor. As noted above, it was the prosecutor who, stating he preferred a court trial with a pro. per.

defendant, announced that he and appellant had agreed to waive a jury for the trial. (7/27/95 RT 30.) After discussing the issue with the prosecutor, appellant agreed to testify at the guilt phase about the “torture aspects of the case” and “various factors” about the crime itself and agreed to a line of questions to cover issues not yet covered in the prosecution’s case-in-chief. (2 RT 268-269.)

After the guilt phase verdict, appellant indicated he was not sure if he would be ready to start the penalty phase the next day. (2 RT 326.) Appellant had not sent out any subpoenas and wanted to talk to the prosecutor. (2 RT 326-327.) After the two conferred, the prosecutor stated that appellant wanted to proceed to penalty immediately, which is what transpired. (2 RT 326-327, 329.)

Appellant also actively assisted the prosecution in making its case. Appellant started during the prosecutor’s opening statement at the guilt phase, reminding the prosecutor that he had also blindfolded Anderson. (1 RT 13.) Pursuant to his conversation with the prosecutor the night before he testified, appellant agreed to testify about “issues not already covered,” covering areas the prosecutor wanted covered. (2 RT 268-269.) In addition, appellant testified that he had the intent required for the torture special circumstance and that sex with Anderson was not consensual as appellant had told the police. (2 RT 269-270.) In addition to his extensive testimony about the crime on cross-examination, appellant continued to testify to much irrelevant and aggravating guilt phase testimony as the cross-examination continued. (See, e.g., 2 RT 273-274 [appellant wanted

money so he could murder Cota and Terry, would still kill Terry if he could, although he no longer remembered why, and would hurt and maim Cota]; 2 RT 313 [appellant had planned to kill the people in his phone book that were crossed out].)

b. Penalty Phase

Throughout the penalty phase, appellant continued to build the case against himself. He cross-examined only two prosecution witnesses, first eliciting additional aggravating evidence from Timothy Felker. (2 RT 377.) Appellant then apparently tried to establish, unsuccessfully, through the store security officer Kenneth Money that charges based on the Lucky's Market incident were later dropped. (2 RT 428-430.) However, appellant then admitted that when he accelerated outside Lucky's market, he was trying to hit Money with the car. (2 RT 495-496.) Appellant recalled John Epling at penalty as his only witness other than himself, eliciting still more aggravating evidence. (2 RT 454-456.)

During his direct testimony, appellant made numerous judicial admissions regarding aggravating incidents, including incidents that were not part of the prosecution's case-in-chief. (2 RT 466-470.) During cross-examination, the prosecutor questioned appellant about twelve noticed aggravating incidents: six presented in the prosecution's case-in-chief and another six for which no other evidence was presented. (2 RT 471 et seq.; see also Court Ex. 35, letter noticing 14 incidents in aggravation.) Appellant made further judicial admissions to all but two of the incidents, which he could not remember, as well as to numerous other additional

incidents of violence.¹⁵ (See 2 RT 472-474 [appellant may have been trying to kill Epling and did rob Schurmann]; 478-479 [Salas testimony regarding November 19, 1991, assault was true]; 479-480 [shooting at officers Grant and Garner in 1977]; 480-482 [inmate stabbing at CYA]; 482-483 [Long assault]; 486-487 [Felker]; 489-490 [1992 assaults on Cota].)

The prosecutor had developed two of the aggravating incidents as a result of discussions with appellant about Dr. Missett's notes of his interview with appellant. (8/2/95 RT 33.) Dr. Missett had met with appellant shortly after the interrogations because the prosecution brought him in to evaluate appellant "while he was still in a mental state . . . similar to the mental state he was in at the time of the crime" (2 CT 308.) Appellant's admissions to Dr. Missett appear to be another example of appellant's efforts to be sentenced to death.

Appellant further testified on cross-examination that he had no remorse and should receive the death penalty because the state had a right to retribution and it was only a matter of time before he killed again. (2 RT 503-504, 507-509, 516.)

Thus, appellant did not merely "put the state to its proof." (*People v. Chadd, supra*, 28 Cal.3d at p. 750, fn. 7.) Appellant actively helped the prosecutor, sometimes under the prosecutor's guidance, meet their shared

¹⁵ In analyzing factors in mitigation versus factors in aggravation, the court considered only those incidents for which the prosecutor had presented victim-witnesses. (2 RT 540.) Appellant therefore references only those incidents herein.

goal of a conviction and death sentence.

E. That Appellant Participated in the Trial Process in Order to Receive the Death Penalty Rather than to Defend Himself Is Further Evidence of a Slow Plea

Appellant went through the motions of representing himself at trial. For instance, appellant requested and received funds for an investigator. (See, e.g., 1 RT 128 [appellant has new investigator]; 132 [appellant wants his investigator to interview a witness]; 169 [recess so appellant can talk to his investigator]; 2 RT 392, 420-421 [witness refuses to meet with appellant's investigator].) These actions were never in the service of defending himself, however; as described above, appellant never presented any witnesses to dispute the charged crime, special circumstances or aggravating evidence or to supply mitigation.

The few objections and motions appellant attempted lacked adversarial significance. For instance, shortly before the prosecutor rested at the guilt phase, the court suggested to appellant that he look into making a motion under section 1118.¹⁶ (1 RT 254.) Appellant obliged; the sum total of his 1118 motion was to “place” an 1118 motion, asking “that People’s evidence be, be weighed and any evidence that’s not pertinent to

¹⁶ Section 1118 provides that “[i]n a case tried by the court without a jury, a jury having been waived, the court on motion of the defendant or on its own motion shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading after the evidence of the prosecution has been closed if the court, upon weighing the evidence then before it, finds the defendant not guilty of such offense or offenses.”

guilt be dismissed.” (2 RT 263.) The court asked appellant if he was referring to the second special circumstance, and appellant assented. (2 RT 263.) The discussion of this losing motion was then conducted entirely by the court and prosecutor regarding whether a corpus was needed for the oral copulation and sodomy special. (See 2 RT 263-264.) Thus, this “motion” served only to make a record at the court’s behest: the court initiated it, identified the issue, then resolved it with the prosecutor, with no input from, or apparent understanding by, appellant.

Another telling example of appellant going through the motions to achieve a death sentence was his initial request for a psychiatrist or psychologist to testify at the penalty phase, for the sole purpose of foreclosing any issues on appeal. Dr. Jackman, a psychiatrist, was appointed to appellant’s case at trial. (2 RT 386, 388.) Earlier Dr. Jackman had been retained by appellant’s counsel and interviewed appellant. (2 RT 388.) Appellant wanted Dr. Jackman simply to write a report based on his notes from that earlier interview and testify “in my behalf, whatever, you know, his thoughts on me are.” (2 RT 388.) The record is silent as to what, if any, conclusions Dr. Jackman reached regarding appellant. (See 2 RT 389.)

Appellant, however, abandoned his attempt to have Dr. Jackman testify because according to appellant, Dr. Jackman had “entrapped” himself by speaking to “Legal Aid Society or ACLU or something like that.” (2 RT 386.) Appellant told the court and prosecutor that Dr. Jackman then increased his fee from \$12,000 for testimony to \$90,000,

which would include a social history investigation; psychiatric, neuropsychological and medical evaluations; and testimony. (2 RT 386-387.) Dr. Jackman's alleged reasoning, according to appellant, was that if the court refused to pay this sum, it would be grounds for reversal. (2 RT 387-388.)

Appellant then proposed that Drs. Burr and Echeandia, who had written reports "for a 1017¹⁷ and 1368¹⁸," could testify to what they had written.¹⁹ (2 RT 389-391.) Appellant did not want another expert appointed; he did not want to "go through all that." (2 RT 390-391.) The court promised to have appellant's case put on a calendar to request funds for these two doctors to testify. (2 RT 391.)

Appellant, however, presented no mental health witnesses. (2 RT

¹⁷ Evidence Code section 1017 allows for appointment of a psychotherapist "upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition."

¹⁸ Section 1368 outlines procedures to be following when a doubt arises as to a defendant's mental competence.

¹⁹ Dr. Douglas Harper was appointed at defense counsel's request on November 16, 1992, to evaluate appellant under Evidence Code section 1017. (1 SCT 106-107.) The court appointed Robert C. Burr, M.D., on June 14, 1993, to examine appellant "to determine if there is any evidence of mental incompetence that might to lead to a doubt pursuant to 1368 P.C." (1 SCT 121.) The court then appointed Dr. David Echeandia on September 1, 1993, to evaluate appellant under section 1368. (4 SCT 137, 150.)

459.) He instead submitted the reports of Drs. Harper, Burr and Echeandia, Confidential Exhibits 32, 33 and 34, respectively. (2 RT 459, 462, 463.)

Asked to explain his decision not to call Dr. Jackman, appellant responded:

I don't care who testified. It was just a matter I wanted to cover these issues. . . . I wanted to make sure that we – that I covered the grounds for an appeal, make sure there wasn't no grounds.

(2 RT 512.) Appellant also told the court that:

[Jackman] would have done the same thing I did, go through my chronology, my history, and he would have probably touched on my father abusing me and my family, . . . There's no sense in it. . . . I don't think it's directly related or has any really significance It's just a waste of time. . . . the psychology of it, I think is bullshit

(2 RT 513.)

In fact, submission of the three reports helped appellant achieve his goal of a death sentence as shown by the court's findings prior to announcing appellant's sentence. Based on its review of these reports, the court at sentencing found no evidence to support the existence of factor (d), extreme mental or emotional disturbance (2 RT 537), or factor (h). (2 RT 538 [no evidence of mental disease, defect or lack of capacity; appellant had ability to appreciate criminality of his conduct, knew exactly what he was doing, was able to and did have capacity to conform his conduct to requirements of law].)

As the above facts demonstrate, although the parties did not submit the case on the preliminary hearing transcript, appellant's trial was

nevertheless completely different from those in which this Court has rejected a claim that a proceeding was the equivalent of a slow plea. (See, e.g., *People v. Sanchez* (1995) 12 Cal.4th 1, 29-30, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [no slow plea where proceedings involved submission of preliminary hearing transcript, during which defense counsel engaged in substantial cross-examination and presented witnesses, the prosecution presented additional witnesses, the defense moved to strike testimony and for a judgment of acquittal and argued extensively that the prosecution had not proven guilt of murder or the special circumstances]; *People v. Robertson, supra*, 48 Cal.3d at pp. 37, 40 [waiver of jury for penalty and submission of testimony of specified witnesses on transcripts of prior proceedings was not a slow plea where parties reserved the right to and did call witnesses, and defendant did not concede that death was the appropriate penalty but rather offered “a complete and skillful defense”].)

F. Appellant’s Strategy of Suicide-by-Court Did Not Implicate a Fundamental Right That Overrides Section 1018

In *People v. Alfaro, supra*, 41 Cal.4th 1277, this Court rejected Alfaro’s argument that the trial court erred in refusing to remove or substitute counsel to allow her to plead guilty. (*Id.* at p. 1302.) The Court reasoned that while a defendant may have a right to control a fundamental aspect of his or her defense, those rights were not violated because nothing in the record showed that Alfaro sought to enter the plea in order to benefit

her penalty defense. (*Ibid.*) Hence, Alfaro’s dispute with her counsel “did not implicate a constitutionally protected fundamental interest that might override the plain terms of section 1018” (*ibid.*) or, it follows, the state’s independent interest in the reliability of its death judgments that section 1018 is designed to serve.

Here, interfering with appellant’s choice to represent himself similarly would not have implicated any constitutionally protected fundamental interest. As in *People v. Alfaro, supra*, 41 Cal.4th 1277, nothing in the record here shows that appellant’s attempt to plead guilty was motivated by a desire to gain a tactical benefit at the penalty phase, other than to commit state-assisted suicide. Just as it was error for the trial courts in *Chadd* and *Massie* to accept a guilty plea without counsel’s independent consent, so too was it error for the trial court in the instant case to proceed with a court trial that the court itself recognized was nothing more than a slow plea of guilt to the capital charges. (See 2 RT 533.)

**G. Because the Trial Was a Contrived Proceeding
Tantamount to a Guilty Plea in Violation of Penal Code
1018 and the Eighth and Fourteenth Amendments, the
Court Must Reverse**

The fact that the proceeding was denominated a court trial by the court and parties, the prosecution presented live testimony and appellant actively participated does not change what actually occurred. As this Court recognized in *Wright*, “[i]t is not enough . . . to simply count the number of witnesses who testified at the hearing following the submission.” (*People v. Wright, supra*, 43 Cal.3d at p. 496.) Even when a defendant reserves the

right to call witnesses or contest the sufficiency of the evidence, the proceedings “may turn out to be a slow plea because the defendant presented no evidence or argument contesting guilt.” (*Id.* at p. 497.)

Certainly where, as here, the defendant repeatedly demonstrates his wish to plead guilty and be sentenced to death, and then aligns himself with the prosecution at trial to achieve his goal, the proceeding is at best a slow plea in violation of section 1018 and the Eighth Amendment. (See *Chadd, supra*, 28 Cal.3d at pp. 750-751 [revision of § 1018 in 1973 was meant to satisfy the Eighth Amendment, avoid the arbitrary and capricious imposition of the death penalty, and serve as independent safeguard against erroneous imposition of a death sentence].) Because of the de facto slow plea below, there was no “filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant . . . simply wants the state to help him commit suicide.” (*Chadd, supra*, 28 Cal.3d at p. 753.)

The facts of this case illustrate what happens when the court allows an unrepresented capital defendant to work hand and hand with the prosecution to ensure his own death sentence. The proceeding lacked integrity, was neither fair nor appeared fair and the result, driven in large part by appellant’s death wish, was necessarily random and unreliable. (See *Indiana v. Edwards* (2008) 554 U.S. 164, 176-177 [limits on self-representation may be imposed to assure fair trial resulting in a proper verdict and sentence and to assure appearance of fairness]; *Massie v. Sumner, supra*, 624 F.2d 72, 74 [court may appoint counsel over an

accused's objection to protect public interest in fairness and integrity]; *Chadd, supra*, 28 Cal.3d at pp. 750, 753 [1018 represents state's strong interest in reducing risk of mistaken judgments in capital cases and thus maintaining accuracy and fairness of its criminal proceedings].)

For all these reasons, the court must reverse appellant's conviction of first degree murder in Count I, the three special circumstances alleged in support of that count and the death sentence. (See *People v. Massie, supra*, 40 Cal.3d at p. 625 [reversing capital murder count, related robbery and robbery special circumstance where defendant pled guilty without counsel's consent]; *Chadd, supra*, 28 Cal.3d 739, 754-755 [reversing capital murder count, related special circumstances and death sentence where trial court erred in accepting defendant's guilty plea to capital offense without counsel's consent].)

* * * * *

III.

THE COMPLETE BREAKDOWN IN THE ADVERSARY PROCESS AT APPELLANT'S TRIAL VIOLATED DUE PROCESS AND REQUIRES REVERSAL

A. Introduction

Appellant's trial took place without two fundamental pillars of protection in the criminal justice system – an attorney for the defense and a jury. Into this vacuum came the prosecutor and a suicidal defendant. The foundations of a system of fair, just processes that depend on an adversarial test of evidence were reduced to a sham, farce and mockery, with everyone trying to get to the same place – a death sentence – while the Constitution and the integrity of appellant's trial were cast aside along the way.

Perhaps because the adversarial system had completely broken down, multiple layers of errors compounded others. Appellant, who wanted to be convicted and sentenced to death, aligned himself with the prosecution. The prosecutor, going far beyond the boundaries of proper advocacy, prepared appellant to testify at the guilt phase about “issues not already covered” (2 RT 269), i.e., holes in the prosecution's case. Testimony from the state's witnesses, including appellant, was untested by cross-examination and unlimited by objections. In reality, the trial was a performance directed by the prosecutor. The court abdicated its responsibility to ensure the integrity of the proceedings, even when it became blatantly apparent that the adversary system had broken down. The federal Constitution demands that all criminal trials be fair.

(U.S. Const., Amends. 5th & 14th.) Justice Cardozo included adversarial testing among the rights which constitute the “essence of a scheme of ordered liberty.” (*Palko v. Connecticut* (1937) 302 U.S. 319, 325.) The testing must not be a mere show: “The hearing, moreover, must be a real one, not a sham, or a pretence.” (*Id.* at p. 327.) Here, appellant’s trial was not “a real one,” but more like a two-act play with a foregone outcome. The necessary adversarial testing never took place, the public interest in truth and fairness was not met and justice did not even “satisfy the appearance of justice.” (*Offutt v. United States* (1954) 348 U.S. 11, 14.) The trial failed to satisfy the state’s independent interest in the fairness and integrity of its proceedings and the heightened degree of reliability demanded of death verdicts. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 15, 16 & 17.) The conviction, death eligibility finding and death verdict must be set aside.

B. Applicable Legal Principles

1. The Adversary System Is Fundamental to Our System of Justice

The due process clause guarantees every criminal defendant “the fundamental elements of fairness in a criminal trial.” (*Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) “[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues” (*Strickland v. Washington* (1984) 466 U.S. 668, 685.) A one-sided proceeding, even if cloaked in the garb of a trial, violates this constitutional protection.

[T]ruth,” Lord Eldon said, “is best discovered by powerful statements on both sides of the question.” This dictum describes the unique strength of our system of criminal justice. . . . *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).

(*United States v. Cronin* (1984) 466 U.S. 648, 655, fn. omitted.) When adversarial testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law. (See *id.* at p. 659 [“if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable”]; see also *Rose v. Clark* (1986) 478 U.S. 570, 577-578 [without basic protections such as impartial judge, “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence” and “no criminal punishment may be regarded as fundamentally fair”].)

The “system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.” (*Polk County v. Dodson* (1981) 454 U.S. 312, 318.) Thus, when adversarial testing is lacking, the public interest in fair trials is not served.

2. Capital Cases Require Heightened Procedural Reliability

The Supreme Court has consistently underscored the need for heightened procedural reliability in cases where the death penalty is concerned. (See, e.g., *Ake v. Oklahoma* (1985) 470 U.S. 68, 77-84 [factfinding must be especially accurate in capital cases, thus justifying the

expansive use of expert assistance]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [because of the qualitative difference between life and death sentences, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case”].)

The requirement of heightened reliability in capital cases also forms the legal basis upon which the Supreme Court has repeatedly extended constitutional protections to capital defendants. (See, e.g., *Turner v. Murray* (1986) 476 U.S. 28 [expanded voir dire in capital cases]; *Caldwell v. Mississippi* (1985) 472 U.S. 320 [limits in capital cases on prosecutorial argument diminishing jury’s responsibility]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [requiring instruction on lesser-included offenses in capital cases while not required in noncapital cases]; *Green v. Georgia* (1979) 442 U.S. 95 [state hearsay rules must bend in capital cases to allow consideration of mitigating evidence].)

For these reasons, the Eighth Amendment is at play during the guilt as well as the penalty phase of a capital trial.

3. Judges Have a Duty to Insure the Fairness of the Trial Process at All Stages of the Proceedings

A trial judge has a duty to ensure that a criminal defendant is afforded a bona fide and fair adversarial adjudication of his case. (*People v. McKenzie* (1983) 34 Cal.3d 616, 626-627, abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.) “The trial judge, as the neutral factor in the interplay of our adversary system, is vested with the

responsibility to ensure the integrity of all stages of the proceedings.”
(*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1415.)

The court before which a defendant appears without counsel similarly has a duty “to take all steps necessary to insure the fullest protection” of the constitutional right to a fair trial at every stage of the proceedings. (*Von Moltke v. Gillies* (1948) 332 U.S. 708, 722, citation omitted.) “This duty cannot be discharged as though it were a mere procedural formality.” (*Ibid.*) The protective duty extends to all “essential rights of the accused.” (*Glasser v. United States* (1942) 315 U.S. 60, 71.) In California, the court also has a “duty . . . [in] a case being conducted by a layman or a laywoman in propria persona to see that a miscarriage of justice does not occur” (*Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1008.)

The neutrality requirement preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done.” (*Joint Anti-Fascist Committee v. McGrath* (1951) 341 U.S. 123, 172 (conc. opn. of Frankfurter, J.)) Therefore, “justice must satisfy the appearance of justice.” (*Offutt v. United States, supra*, 348 U.S. at p. 14.) As this Court has explained,

‘there is a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient.’ [citation] Thus, ‘[j]udges ... cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law [citation] who apply the law uniformly and consistently.’

(*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 910; quoting *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1100, 1103.)

Judges also have an ethical duty to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (Cal. Code of Judicial Ethics, Canon 2A.)

4. Prosecutors Have a Special Role in the Adversary System and a Duty to Do Justice and Act Ethically

Within the adversary system, the role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation “far transcends the objective of high scores of conviction” (*People v. Andrews* (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to an “elevated standard of conduct” because he or she exercises the sovereign powers of the state. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) As the United States Supreme Court has explained:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor – Indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

(*Berger v. United States* (1935) 295 U.S. 78, 88.) Put differently: “The prosecutor’s job isn’t just to win, but to win fairly, staying well within the

rules.” (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; accord *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.)

C. The Adversary System Broke Down When the Prosecutor Improperly Gave Appellant a Road Map for His Guilt Phase Testimony That Led Appellant to Change His Earlier Statements and Testify to Fill in Evidentiary Gaps in the Prosecution’s Favor

Appellant confessed to his sister Michelle Salas within hours of shooting Anderson. He then confessed to Picklesimer that evening, then made inculpatory statements to the police the following day during booking, then again while being transported to recover the body, and again during two lengthy interrogations, one on videotape and the other on audiotape. (1 RT 48-52, 148-150, 160-161, 163-164, 167, 179-180, 185, 187-188, 189, 197- 198, 203, 251-252.) Appellant’s statements and the physical evidence discovered as a result of them were the basis of the case against him.

Despite appellant’s immediate and extensive confessions, however, defense counsel exposed significant evidentiary gaps in the prosecution’s case regarding the special circumstances during cross-examination and argument at the preliminary hearing.

After the preliminary hearing, appellant was permitted to represent himself and work with the prosecutor to pursue his goal of conviction and a death sentence. The prosecution presented essentially the same guilt phase case at the trial as it had at the preliminary hearing, with the same witnesses

testifying at both proceedings.²⁰ Thus at trial, the prosecutor still faced the same evidentiary problems identified by defense counsel earlier. Prior to appellant testifying at the guilt phase, the prosecutor and appellant discussed his testimony and agreed on “a line of questioning” that would “cover issues not already covered.” (2 RT 269.) As a result, appellant changed his pretrial statements regarding the special circumstances. (2 RT 269-270.) Not surprisingly, these were the same areas the defense had zeroed in on at the preliminary hearing, as described *post*.

The court never intervened or even commented on this turn of events. The prosecution’s overreaching constituted misconduct and this, separately or together with the court’s abdication of its “responsibility to ensure the integrity of all stages of the proceedings” (*People v. Bradford*,

²⁰ Officer Dean Martini testified about appellant’s admissions during booking (1 CT 3-17; 1 RT 149-150); Dr. Parvis Pakdaman about the autopsy findings (1 CT 17-61; 1 RT 77-105); and Officer Steve Gracie about the searches of Picklesimer’s house, the hotel room and the scene where the body was recovered. (2 CT 223-243; 1 RT 204-254). At the preliminary hearing, appellant’s statements were presented through Officer Michael Sterner (2 CT 243-322), whereas at trial Sterner (1 RT 189-199), and Sergeant Zaragoza (1 RT 151-169), provided the foundation for admission of the tapes of appellant’s statements, which were admitted and played at trial. (1 RT 163-164, 187-188, 197-198, 256, 259-260.) James Hehnke, Anderson’s partner (1 CT 63-107; 1 RT 106-128), and Picklesimer, appellant’s friend (1 CT 109-219; 1 RT 23-76), also testified at both proceedings. The only new witnesses at the guilt phase at trial were Officer Steve Henry, who testified about appellant’s arrest (1 RT 170-174), and appellant’s sister, Michelle Salas (1 RT 174-186), who testified about appellant’s admissions to her shortly after appellant shot Anderson.

supra, 154 Cal.App.4th at p. 1415), constituted a breakdown of the adversary system.

1. Defense Counsel Exposed Significant Flaws in the Prosecution Case at the Preliminary Hearing

The points of contention at the preliminary hearing were whether or not the robbery and sexual assault were incidental to the killing²¹ and whether there was sufficient evidence to hold appellant to answer on the torture special circumstance. (See, e.g., 1 CT 182-185; 2 CT 253-255, 317-318 [objections and argument during testimony going to issue of whether appellant planned to kill Anderson from the start and robbery was an afterthought].)

Sterner, part of the police interrogation team, testified at the preliminary hearing that appellant told the officers that he and Anderson had orally copulated each other, that Anderson had an erection and appellant had penetrated him anally. (2 CT 273-275.) According to appellant, although Anderson's hands were tied and he was "under gunpoint," the 20 minutes of sexual relations was not rape. (*Ibid.*)

At the preliminary hearing, the prosecutor argued, inter alia, that it was a "dual purpose" case, where appellant killed Anderson to prevent

²¹ Section 190.2, subdivision (a) (17), required that the murder was committed while the defendant was engaged in, or during the attempted commission of, immediate flight after committing or attempting to commit certain enumerated felonies, including (I) robbery in violation of section 211 or 212.5; (iv) sodomy in violation of section 288 or (vi) oral copulation in violation of section 288a. (Pen. Code (1992).)

identification and also to rob him, and that Anderson submitted to appellant's forceful act of oral copulation and sodomy because appellant had control of him through a firearm and the initial use of force when appellant kidnaped him. (2 CT 325-327, 333.)

Defense counsel responded that there was insufficient evidence to sustain a holding on the sodomy/oral copulation special circumstance. (2 CT 330.) She also argued that the evidence did not establish that appellant had killed the victim in order to advance the independent felonious purpose of robbery or sodomy/oral copulation, i.e., she argued that they were incidental to the killing and therefore did not qualify as special circumstances. (2 CT 329-330, citing *People v. Green* (1980) 27 Cal.3d 1, 62, abrogated on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 239 [to prove robbery-murder special circumstance, prosecution must prove that defendant formed intent to steal before or while killing the victim].)

Defense counsel argued that it was uncontroverted that appellant returned from Oregon specifically to kill Anderson and others on his list, and that "from the moment he laid eyes on him, Mr. Morelos intended to kill Mr. Anderson." (2 CT 329-330.) She further argued that although Proposition 115 had abolished the corpus delicti requirement for the sodomy and oral copulation specials, the Eighth Amendment nevertheless required heightened reliability. (2 CT 330.) Defense counsel pointed out that the evidence adduced at the preliminary hearing consisted of the officer's testimony that appellant had told his interrogators no force was

used, and there was no physical evidence to show any kind of forcible anal intercourse according to the testifying coroner, Dr. Pakdaman. (2 CT 330; see also 1 CT 50, 180 [underlying testimony].) Thus, there was insufficient evidence to hold appellant to answer on the sodomy and oral copulation special circumstances. (2 CT 330.)

Regarding the torture murder special circumstance, the prosecution argued, based on Dr. Pakdaman's testimony, that the ligatures on Anderson's genitals had caused bruising, that the lightest pressure in that area would cause "great pain," that even slight movement would cause even more excruciating pain, and that appellant had tied the ligature for the specific purpose of causing great pain.²² (2 CT 327-328.)

Defense counsel disputed the prosecutor's version of Dr. Pakdaman's testimony.²³ (2 CT 327.) She also pointed out that appellant,

²² For murders committed after the 1990 passage of Prop 115, the torture-murder special circumstances requires that the murder be intentional and involve the infliction of torture, which includes a torturous intent. (*People v. Streeter* (2012) 54 Cal.4th 205, 237; § 190.2, subd. (18).) The intent to torture is "the intent to inflict or cause extreme pain." (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) A third element, that the defendant inflicted extreme cruel physical pain and suffering upon a living human being of any duration, was eliminated by Proposition 115 in 1990. (*People v. Wilson* (2008) 44 Cal.4th 758, 802-803 & fn. 10.)

²³ Dr. Pakdaman had testified that the skin and structures around the external genitalia are thinner and more susceptible to injuries so a bruise mark could happen in seconds. (1 CT 28, 30.) Although beyond his professional domain, Dr. Pakdaman stated that men who experience even
(continued...)

who cooperated with his interrogators, never used the word “torture” to describe anything he had done with Anderson. (2 CT 330; see also 2 CT 302, 321-322 [underlying testimony].) Rather, appellant told them that the point of trussing Anderson was to prevent him from getting away while appellant left the motel room to go to the ATM. (2 CT 302, 331.) Anderson was snugly tied and if he moved he would be in pain, but there was no evidence he had moved. (2 CT 331-332, 302.)

The court took an overnight recess to review the evidence and consider the *Green* issue (2 CT 334), then held appellant to answer on Count I and all the special circumstance allegations the following day. (2 CT 336.)

2. The Prosecutor Improperly Prepared Appellant to Testify at Trial

Appellant and the prosecutor conferred frequently before and during the trial. (See, e.g., 7/27/95 RT 29; 8/2/95 RT 37, 39; 1 RT 128, 131; 2 RT 268-269; 2 RT 326-327.) They spoke when appellant called the prosecutor’s office, while appellant was in the holding tank and during recesses. (See, e.g., 8/2/95 RT 39; 1 RT 128; 2 RT 326-327.) In general, this was permissible, as communication is not prohibited between attorneys and opposing parties known to be unrepresented by counsel. (State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No.1993–131, 3; *McMillan v. Shadow Ridge At Oak Park Homeowner’s*

²³(...continued)
minor trauma to the scrotum experiences significant pain. (1 CT 49-50.)

Ass'n (2008) 165 Cal.App.4th 960, 967.) However, the prosecutor went far beyond any permissible line regarding communication with a pro. per. defendant when he shaped appellant's inculpatory guilt phase testimony.

The defense portion of the guilt phase began with appellant taking the stand:

The Defendant: Well, I'd like to let the prosecution question me. We discussed yesterday that a line of questioning that we both more or less agreed on that would cover issues not already covered.

The Court: Well, he can only cross-examine you about things that you have testified to on direct. Mr. Schon, you waive any question and answer format and let the defendant -

Mr. Schon: Yes, I do. And I'd like to state for the record Mr. Morelos discussed with me yesterday whether he wanted to testify. I indicated it was up to him to testify. I can't advise him of it. But if he did testify, there are certain areas I would like to cover concerning the torture aspects of the case with him and various factors about the crime itself I would ask him questions about. But his testifying is up to him. Right, Mr. Morelos?

The Defendant: Yes, sir.

The Court: He can only cross-examine you on areas you covered in your direct. He waived

the formality of question and answer. So narrative, if you just want to tell us what you want to tell us, that's fine with me.

The Defendant: Well, one point that I don't think was thoroughly discussed was the torture of Mr. Anderson.

(2 RT 268-269.) Appellant then continued with his testimony, described *post*.

The prosecutor thus helped prepare appellant to testify. While a defendant can take the stand and confess guilt (*People v. Bloom* (1989) 48 Cal.3d 1194, 1222), the prosecutor's role simply does not permit him to help prepare a pro. per. defendant to do so. (See *People v. Andrews, supra*, 14 Cal.App.3d at p. 48 [prosecutor's duty is to see that those accused of crime are afforded a fair trial].) It was improper for the prosecutor here to take advantage of appellant's assertion of his right to self-representation by converting him into a prosecution witness; the adversary system ceased to function when the prosecutor did so.

Moreover, although the exact contents of the discussion between appellant and the prosecutor the day before appellant testified are unknown, the impact of the discussion was to lighten the prosecution's burden of proof at the guilt phase. This is demonstrated by comparing appellant's pretrial statements with his testimony at trial as outlined in the next section.

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3. Appellant Changed His Pretrial Statements When He Testified So as to Fill in the Evidentiary Gaps the Prosecutor Had Identified

Appellant had told his interrogators that when he saw Anderson at the bar, he remembered that Anderson owed him about \$60 for methamphetamine. (2 CT 250.) Appellant had the intent to kill Anderson when he first saw him, “kind of for the fact that if he burned me once, he’ll definitely do it again.” (Ex. 11A, 2 SCT 150.) He also told the officers that the victim had an erection, so although he was tied up and it was at gunpoint, it was not rape, “as outlandish as that seems.” (Ex. 12BB, 2 SCT 166-167, 170.) Appellant described tying up Anderson so that if he moved while appellant was gone from the motel room, Anderson would choke and be in serious pain. (Ex.11A, 2 SCT 141.)

In contrast, at trial appellant testified that he had the intent to rob the victim beforehand of as much money as he could, more than Anderson owed him (2 RT 280); that even though he had told the police the sex was consensual, it was not (2 RT 270), and that the scrotum ligatures were done in order to inflict “extreme pain.” (2 RT 298.)

Appellant changed other aspects of his previous statements in an attempt to show that he tortured Anderson. Although appellant told the police that he had run his knife over Anderson and drawn blood “like a needle mark” to scare him (Ex. 11A, 2 SCT 62, 139), at trial he characterized this as torture. (2 RT 286-287.) Similarly, during interrogation appellant stated that “almost instantaneous[ly]” before

shooting Anderson, he told him “I’m going to kill you” (Ex.11A, 2 SCT 148), but added at trial that he said this to “torture” him. (2 RT 309.)

That appellant changed his account to suit the needs of the prosecution is further demonstrated by how he introduced his narrative testimony on the torture and sexual assault allegations:

Well, one point that I don’t think was thoroughly discussed with the torture of Mr. Anderson.

It was stated that I put ligatures on Mr. Anderson around his neck and around his scrotum, and the reason for doing this was stated that, that I was to keep the victim from escape (sic).

Another reason for this was to, was to inflict a certain amount of fear I inflicted great bodily pain, and I wanted to make sure I hurt him and that he knew I was serious.

(2 RT 269-270.) Appellant then testified that “another point that I think needed to be addressed was sexual assaults. I stated in a confession to detectives that the victim was consensual to having sex with me, and in a sense that was the case, but it really wasn’t true.” (2 RT 270.)

Thus, appellant addressed the “issues not already covered” (2 RT 269), i.e., whether he had the intent to torture and whether the sodomy and oral copulation were incidental to the murder, and changed his story on them. Nevertheless, despite leading questions, appellant was not always able to follow the prosecutor’s cues. For instance, he testified that his plan had been to rob and kill, but to only have sex if the opportunity presented itself. (2 RT 277.) Not surprisingly given the evidence, the court asked the

prosecutor in his closing argument whether the special circumstances would be incidental if the court found the murder was willful, deliberate and premeditated. (2 RT 321.)

For the reasons stated in the previous subsection, the prosecutor's work with appellant to shape his testimony in the prosecution's favor constituted misconduct and a due process violation. When the focus of inquiry is on the fundamental fairness of a proceeding,

the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

(*Strickland v. Washington, supra*, 466 U.S. at p. 696.) The results here simply were not reliable, as appellant tailored his testimony on significant points to suit the prosecution's wishes.

The prosecution itself earlier had recognized the problem presented by a defendant who changes his initial statements to the police to meet his later needs at trial. Right after the interrogations, the prosecution called in Dr. Missett to evaluate appellant.²⁴ (2 CT 307.) While the interrogators felt that appellant was "mentally competent," they feared that a defense at trial would be that appellant was "not mentally competent" when the crimes occurred. (2 CT 308.) They wanted appellant evaluated "while he was still in a mental state . . . similar to the mental state he was in at the time of the

²⁴ The prosecution turned over Dr. Missett's notes from the interview to appellant, but never produced a report. (8/2/95 RT 33.)

crime . . . ,” rather than have an evaluation done years down the line “when his mental state could have changed or other attitudes could have come up” to alter it. (2 CT 308.) Thus, the prosecution’s position was that appellant’s early uncounseled statements more accurately reflected his mental state at the time of the crime than later ones would.

Appellant now makes the same argument: his trial testimony, developed with the help of the prosecutor, was not an accurate reflection of his mental state at the time of the crime.

D. The Breakdown in the Adversary System Meant That the Evidence Was Not Tested

Because appellant’s confessions and judicial admissions, given as part of appellant’s attempt to receive a death sentence, provided evidence needed to establish the necessary elements for the special circumstances, adversarial testing of the evidence was especially important. The adversary system is premised in part on the theory that attorneys on both sides zealously promote each client’s interests. (Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice* (1992) 44 Vand. L.Rev. 45, 53-54.) This creates a system of checks and balances, with the attorneys keeping an eye on each other and on the judge to assure that each is performing properly and ethically his or her role. (*Ibid.*) Here, there were no checks and balances, as the prosecutor took unfair advantage of appellant’s determination to commit judicial suicide and the court did little to hold the prosecutor back. This problem included, but went beyond, the prosecutor’s enrollment of appellant as a witness for the prosecution as described above.

1. The Prosecutor Presented Misleading Testimony

At trial, the prosecutor presented incomplete, misleading testimony regarding the marks on the victim's genitals, which was relevant to the torture special circumstance. At the preliminary hearing, Dr. Pakdaman testified on direct examination that bruise marks on the genitalia were partially superimposed by postmortem lividity. (1 CT 26-27.) On cross-examination, Dr. Pakdaman conceded that it was difficult to determine the extent to which markings on the genitalia were caused by bruising or by lividity. (1 CT 45-47.) Bruising can be differentiated from lividity by dissecting through the skin or by looking at tissue under a microscope, because blood vessels rupture from a bruise, but blood stays in the vessels with lividity. (1 CT 42-44.) Notably, Dr. Pakdaman did not examine the tissue to make such a determination. (1 CT 48.)

In contrast, at trial the prosecutor elicited no testimony regarding lividity in the area of the genitalia. (1 RT 83-84.) Rather, Dr. Pakdaman's description of all the markings on the genitalia as bruising went unchallenged. (1 RT 87-90.) The prosecutor characterized the bruising as extensive, and pressed Dr. Pakdaman to give an opinion on the "extensiveness of the bruising in relation to the pain," and on whether, "given the extensive bruising to the decedent's scrotum area, that this would be very painful?" (1 RT 90-91.) Asked whether this "extensive injury" was designed to cause pain, Dr. Pakdaman opined that "one might assume the possibility of purposeful application of pressure for production of pain." (1 RT 91-92.)

The defense cross-examination at the preliminary hearing attacked a key fact underlying this argument, i.e., whether the markings were bruises at all. (1 CT 40-48.) Thus, with adversarial testing this point – whether and how much genital bruising existed – would have been thoroughly explored. Dr. Pakdaman’s earlier testimony that the bruising he saw could have been caused in as little time as seconds (1 CT 28), also would have counteracted the impression given by the prosecution’s examination of Dr. Pakdaman at trial regarding the extensiveness of bruising and pain. Instead, the prosecutor was able to present a misleading version of the facts on the key point of the amount and significance of any bruising that was present, which would otherwise have undermined the torture murder special circumstance finding.

Reflecting the complete absence of an adversarial process at trial, the prosecutor’s argument at the contested preliminary hearing was longer than his argument at the uncontested guilt phase trial with its much higher burden of proof²⁵. (Compare 2 CT 325-329 and 332-334 [preliminary hearing argument, over six pages] and 2 RT 319-323 [guilt phase argument, four pages].)

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²⁵ At the preliminary hearing, the prosecutor only had to prove that there was some rational ground for assuming the possibility that an offense has been committed and appellant was guilty of it. (*People v. Hall* (1971) 3 Cal.3d 992, 996.)

2. The Court Failed to Impose Statutory Controls During the Prosecutor's Questioning of Appellant

Another breakdown in the adversary system occurred when the court failed to impose limitations on witness questioning, allowing appellant's testimony to become a free-for-all. The "Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'" (*Blackburn v. State of Ala.* (1960) 361 U.S. 199, 206, quoting *Lisenba v. People of State of California* (1941) 314 U.S. 219, 236.)

A court has discretion to control the questioning of witnesses and must exercise reasonable control over questioning to make it effective for the ascertainment of the truth. (Evid. Code, § 765.) "A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice." [Citation.] (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951.) The court here should have exercised control of the questioning in order to hold the prosecution to its burden of proof and assure a reliable process in appellant's capital trial.

Leading questions are prohibited in direct examination and permitted on cross-examination. (Evid. Code, § 767 subd. (a).) However, leading questions should not be permitted when the witness is friendly to the cross-examiner. (*People v. Spain* (1984) 154 Cal.App.3d 845, 852-853; 1 Jefferson's Cal. Evidence Bench Book (4th ed. 2009) § 28.36, p. 525; see also Evid. Code, § 773 and Comment to Evid. Code, § 767.) "Allowing the examiner to put answers in the witness' mouth raises the possibility of collusion [citations], as well as the possibility that the witness will

acquiesce in a false suggestion. [Citation.]” (*People v. Spain, supra*, 154 Cal.App.3d at p. 853.)

Here, the whole process was stood on its head. In reality, appellant was testifying in support of the prosecution’s case and was not an adversary. The court therefore should have enforced Evidence Code section 773, subdivision (b)²⁶, and prohibited the prosecutor from asking appellant leading questions. Because the court did not fulfill its duty under the Evidence Code to control the questioning, the prosecutor improperly “employ[ed] leading questions as to matters brought out in support of his own cause.” (*California Fruit Cannery Ass’n v. Lilly* (9th Cir. 1911) 184 F. 570, 573; see, e.g., 2 RT 277 [the reason you had to kill him was to cover up robbery or to keep from being caught]; 286 [by upset, you were angry, is that what you are telling us]; 286 [to torture him did you hit him, beat him, cut him up]; 298 [did you tie (genital ligatures tight) to inflict extreme pain]; 305 [your intent at that point was to kill him, get rid of him? So he wouldn’t call the police?]; 314 [so you took his life for \$40]; see also 273, 278, 285, 291, 294, 296-297, 300, 302, 313.)

Appellant’s direct examination consisted of about 40 lines in the reporter’s transcript addressing why appellant placed the ligatures, his intent to kill and hurt Anderson, and that he raped Anderson and had used

²⁶ Evidence Code section 773, subdivision (b), provides that the “cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the same rules that are applicable to direct examination.”

excessive force to subdue him. (See 2 RT 269-271.) The prosecutor then not only questioned appellant extensively about all his interactions with Anderson and his thoughts and feelings about what happened, but also ventured far beyond appellant's testimony, contrary to Evidence Code section 761.²⁷ The court initially pointed out that this was not permitted (2 RT 269), but then never reined in the prosecutor, who elicited irrelevant and prejudicial testimony beyond the scope of the direct examination. (See, e.g., 2 RT 273-274 and 313-314 [appellant's thoughts about killing others on his list]; 275-276 [carried firearms when he went to movies with Picklesimer so if he was stopped by police, he would have another murder under his belt]; 278 [prior uncharged misconduct]; 314 [whether appellant felt remorse about killing Anderson]; 312, 315-316 [appellant's activities after killing Anderson].)

In addition, the court never put any brakes on appellant's guilt phase testimony that something might or could have happened, or that he believed something happened, or that it must have happened, etc., which occurred repeatedly. (See, e.g., 2 RT 289 [appellant testifies he might have had a knife drawn while Anderson orally copulated him]; 2 RT 298 [appellant might have inflicted pain when he put the cloth strips around Anderson's testicles]; for additional examples, see also 276-277; 279, line 7; 284, lines 11-12, 23, 27; 285, lines 5-7; 287, lines 12-13; 288, lines 6, 25; 289, lines

²⁷ Evidence Code section 761 limits cross-examination to questions within the scope of the direct examination.

25-28; 295, lines 4, 7; 302, line 10; 303, line 26; 304, line 4; 306, lines 3].) The fact that appellant was unable to state as fact so much testimony is another factor undermining its reliability.

In summary, the prosecutor improperly manipulated two key witnesses, appellant and Dr. Pakdaman, to make its case and the court abdicated its statutory responsibility to ensure that the questioning would be effective for the ascertaining the truth. Therefore significant evidence was never subjected to adversarial testing and appellant's trial was not a fair one. (*Strickland v. Washington, supra*, 466 U.S. at p. 685.)

E. The Court Should Have Intervened to Insure That There Was an Adversarial Adjudication at the Guilt Phase

A court has a duty to "take all steps" to protect a defendant's constitutional right to a fair trial. (*Von Moltke v. Gillies, supra*, 332 U.S. at p. 722.) Because this duty is not a "mere procedural formality" (*ibid.*), the trial court should have intervened to guard this right. For example, when appellant announced that he and the prosecutor had agreed on a line of questioning on "issues not already covered" (2 RT 268), the court should have elicited more details from appellant and the prosecutor regarding the roadmap that the prosecutor laid out for appellant's testimony. This would have shed additional light on exactly how appellant came to change his testimony regarding the special circumstances as described above, and whether and how to credit his testimony. The court also should have intervened and exercised control over the prosecutor's questioning of appellant pursuant to the Evidence Code.

These or similar actions would have led to more accurate and reliable testimony; decreased or eliminated speculative, unreliable and improperly prejudicial testimony; and given the court information needed to assess when appellant's testimony was so unreliable that it should not be credited. By failing to engage in this way, the trial court failed in its duty to safeguard a fair, adversarial trial process. (See *People v. McKenzie, supra*, 34 Cal.3d at pp. 626-627 [trial judge has duty to ensure that a defendant afforded fair adversarial adjudication].)

F. The Prosecutor's Special Role in the Adversary System Trumps Appellant's Acquiescence to the Prosecutor's Actions

Prosecutorial misconduct raises ethical issues. (*People v. Manson* (1976) 61 Cal.App.3d 102,164 ["If it is true that [the prosecutor's] interview with [the defendant] occurred under circumstances contrary to law, then a major ethical question arises"]) Prosecutors, as members of the State Bar, are obligated to adhere to the Rules of Professional Conduct as mandated by the Legislature. (*Ibid.*, citing Bus. & Prof. Code, § 6076.) Although prosecutorial misconduct and ethical violations are not coextensive, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." (*Wheat v. United States* (1988) 486 U.S. 153, 160.) Similarly, California courts consider ethical issues when analyzing constitutional questions. (*People v. Sharp* (1983) 150 Cal.App.3d 13, 18, abrogation on another ground

recognized by *People v. Plyler* (1993) 18 Cal.App.4th 535 [recognizing that Ethics Opinions are advisory only and not binding on the courts, but using relevant professional conduct rule to conclude that prosecutor prejudicially denied the defendant his right to counsel].)

Though appellant assented or acquiesced to the actions of the prosecutor at issue in this argument, that is not the end of the story. Neither appellant's *Faretta* waiver, his stated goal of achieving a death sentence, his teaming up with the prosecutor nor his agreement to any specific action changed the core duties and function of the prosecutor, "to vindicate the right of the people as expressed in the laws that give those accused of a crime a fair trial." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649 (dis. opn. of Douglas, J.)). Moreover, a defendant cannot waive rights with regard to an attorney's ethical duties. (*United States v. Lopez* (1993) 4 F.3d 1455, 1462 [Rule 2-100 against communicating with represented parties is concerned with duties of attorneys, not rights of parties; ethical obligations are personal and may not be vicariously waived].)

For these reasons, the prosecution, as representative of the state, bears responsibility for its overreaching and misconduct below. The prosecutor had a duty to stay "well within the rules" (*United States v. Kojayan, supra*, 8 F.3d at p. 1323), but instead took improper and unfair advantage of appellant's pro. per. status and suicide-by-court strategy. This Court should not sanction the prosecution's role here in the breakdown of the adversary system.

G. The Court Utterly Failed to Protect the Integrity of Appellant's Trial at the Penalty Phase

The penalty phase of a capital trial is also an adversarial proceeding where “the adversarial testing process works to produce a just result under the standards governing decision.” (*Strickland v. Washington, supra*, 466 U.S. at pp. 686-687.)

As described above, the prosecutor's questioning and appellant's testimony made it apparent that the adversarial process was a sham. Moreover, by the end of the guilt phase, the court also knew that appellant had waived his Sixth Amendment right to counsel (7/19/95 RT 13) and a jury (1 RT 1-2), his Fifth Amendment right against compulsory self-incrimination (2 RT 268), and his right to opening statement, closing argument (1 RT 23, 2 RT 324, and cross-examination of all the prosecution witnesses. (1 RT 76, 105, 128, 150, 169, 173, 186, 251 and 260.) Given this lack of procedural protections, the court should have been especially vigilant to take all steps necessary to insure protection of the constitutional right to a fair trial (see *Von Moltke v. Gillies, supra*, 332 U.S. at p. 722), and guard its neutral role. This did not happen; rather, the court appeared to be trying to help appellant with his goal of a death sentence, as the following examples illustrate.

When the court asked appellant at the end of the guilt phase if he would be ready to proceed with the penalty phase the following day, appellant responded that he had not yet subpoenaed any witnesses and asked to consult with the prosecutor. (2 RT 326.) Following a short recess,

the prosecutor informed the court that he and appellant had “discussed scheduling for the penalty and he wants to proceed forthwith with penalty, which is fine with me.” (2 RT 327.) Appellant was silent and the court and prosecutor went on to discuss scheduling. (2 RT 327.) The penalty phase began the following day (2 RT 329), and appellant testified but presented no mitigation witnesses.²⁸

That this strange turn of events did not even provoke a comment from the court shows how skewed the proceedings had become. The prosecutor took on the role of an attorney, conferring with his client, then announcing whether or not they would seek a continuance.²⁹ Appellant was forfeiting his Sixth Amendment right to compulsory process and, possibly, his right under the Eighth Amendment to present mitigating evidence. Yet the court treated the matter as one of mere scheduling rather than questioning appellant and at least confirming that he had, indeed, decided not to get witnesses in to testify.

As explained in more detail in Argument II, according to appellant, a potential expert had told him that not putting on a psychologist or

²⁸ The only witnesses appellant presented at the penalty phase were himself and prosecution witness John Epling, from whom he elicited more aggravating evidence. (2 RT 454-456.)

²⁹ Of course, in certain situations, even a continuance requires a defendant’s personal waiver. (See, e.g., § 859b, subd. (a) [requiring defendant’s personal waiver to continue time for preliminary hearing beyond certain time frames].)

psychiatrist at the penalty phase would create an issue for appeal. (2 RT 386-388.) After explaining his subsequent plan on presenting mental health evidence to the court, appellant asked whether it would “cover that whole issue this other doctor is trying to raise about the appeal?” (2 RT 391.) The court responded “it should.” (*Ibid.*) The court, by advising appellant that his attempts to eliminate grounds for appeal should be successful, was supporting appellant’s goal of suicide-by-court. It also undermined California’s statutory scheme requiring an automatic appeal to safeguard the rights of those upon whom the death penalty is imposed. (See *People v. Stanworth* (1969) 71 Cal.2d 820, 833.)

Towards the end of the penalty phase, appellant informed the court that the following day, after he and the prosecution both rested, he wanted to move the court for a speedy sentence. (2 RT 451.) The court told appellant it “could probably accommodate” him and would “hit the books to see what has to be done.” (2 RT 451.) By its offer to try to speed up the sentencing process at appellant’s request, the court again abandoned neutrality and its responsibility to ensure the integrity of the proceedings.

These examples, as well as the earlier ones in this argument, demonstrate that the court failed in its duty to ensure that appellant’s trial was “a bona fide and fair adversary adjudication” of his case. (*People v. McKenzie, supra*, 34 Cal.3d at p. 626.)

Moreover, because of the breakdown in the adversary process, the result at the penalty phase utterly lacked reliability. Section 190.3, factor (a), directs the sentencer to consider in aggravation the “circumstances of

the crime.” As argued in the preceding sections of this argument, the prosecutor’s misconduct and court’s errors led to the admission of unreliable evidence on the special circumstances. Nevertheless, this evidence entered the penalty phase as factor (a)³⁰ evidence and the prosecutor relied upon it during his penalty phase closing argument. (2 RT 522, 524 [arguing factor (a) evidence of sexual assault and intentional infliction of pain for torture special].)

Appellant testified at the penalty phase to numerous additional crimes, including two murders in Oregon, on which the prosecution presented no evidence. (See, e.g. 2 RT 491-494.) The prosecutor argued that these incidents constituted aggravating evidence. (2 RT 529-531.) However, the court apparently found appellant so unreliable a witness that it chose to disregard these admissions. (2 RT 540.)

The prosecutor omitted evidence brought out in the adversarial preliminary hearing regarding the torture special circumstance, which in this case would have contradicted appellant’s efforts at trial to put himself in the worst possible light. For instance, appellant testified at both the guilt and penalty phases that he was not remorseful (2 RT 314, 504), and had nothing to say to the victim’s family members. (2 RT 508-509.) The

³⁰ Section 190.3 sets out the factors to be considered by the trier of fact in determining penalty, including factor (a), “The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.”

prosecutor argued at the penalty phase that appellant had shown no remorse to the victims or to Anderson's family. (2 RT 531.) In contrast, Picklesimer testified at the preliminary hearing that appellant had talked about feeling bad for the victim's family, to the point that appellant's voice got choked up at that point. (1 CT 186; see also 159 [appellant said he did not feel bad about the killing but did feel bad for victim's parents; 189-190 [the only time Picklesimer observed appellant showing emotion was when appellant talked about the victim's family].)

H. The Absence of Fundamental Fairness at Appellant's Trial Fatally Infected the Proceedings, Requiring Reversal

Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice."

(*Lisenba v. California* (1941) 314 U.S. 219, 236.) Due process is violated when "the absence of that fairness fatally infect[s] the trial" because the acts complained of "necessarily prevent[ed] a fair trial." (*Ibid.*)

The absence of fundamental fairness below is reflected in the fact that the penalty phase court trial was held pursuant to an invalid waiver and presided over by a judge chosen arbitrarily through forum shopping; the prosecutor's treatment of appellant as his own witness, including supplying a roadmap to help prove the prosecution's case; its presentation of incomplete and misleading evidence to prove the torture special circumstance; the court's failure to intervene and limit the prosecutor's overreach; and the court's partisan embrace of appellant's goal of a conviction and death sentence.

The cumulative, unique circumstances of this case lead to the inescapable conclusion that, whether viewed in isolation or toto, the adversary system broke down during appellant's trial and the resulting conviction and sentence cannot stand.

I. Because Appellant Was Deprived of Fundamental Fairness, This Court must Reach the Merits of this Claim

1. Appellant Did Not Waive His Right to Due Process and a Fair Trial

The trial court and the prosecutor, who had independent duties to ensure that appellant's trial was fair (see section B, *ante*), utterly failed to do so. This breakdown meant that due process and fundamental fairness were absent from appellant's trial. Appellant did not waive these rights and acquiescence in the actions or inactions of the court and prosecutor could not forfeit these rights. This is so for several reasons.

First, "courts indulge every reasonable presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) An apparent attempt by a criminal defendant to relinquish a fundamental constitutional right "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." (*Id.* at p. 465.) When a defendant does purport to waive a fundamental constitutional right, "it is the State that has the burden of establishing a valid waiver." (*Michigan v. Jackson* (1986) 475 U.S. 625, 633, overruled on another ground in *Montejo v. Louisiana* (2009) 556 U.S. 778, 797.)

The court below never asked appellant whether he waived his right to due process, fundamental fairness and a fair trial, nor did appellant ever do so. This court therefore must “not presume acquiescence in the loss of fundamental rights” (*Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464), i.e., appellant’s right to a fundamentally fair trial with a functioning adversary system.

Second, this Court has recognized that in certain contexts, “[a]lthough a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally.’ [Citation.]” (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 834.) The Court relied on this rationale to hold that a capital defendant cannot waive an automatic appeal in a capital case. (*Ibid.* [“a defendant’s waiver or attempted waiver of a right is ineffective where it would involve also the renunciation of a correlative duty imposed upon the court”]; see also *People v. Werwee* (1952) 112 Cal.App.2d 494, 499 [defendant could not consent to irregularities in separation of jury and thereby waive right to have statutory procedures observed]; *People v. Blakeman* (1959) 170 Cal.App.2d 596, 597-598 [defendant cannot be deemed to have waived a probation condition of banishment, which is proscribed by fundamental policy and thus void].)

Our adversary system of trials is presumed to “advance the public interest in truth and fairness.” (*Polk County v. Dodson*, *supra*, 454 U.S. 312, 318.) A neutral judge is similarly necessary because of the “compelling public interest” in having a judicial system that is both “in fact and is publicly perceived as being” fair and impartial. (*Fletcher v.*

Commission on Judicial Performance, supra, 19 Cal.4th at p. 1100.) It follows then that because of these compelling public interests, a defendant cannot forfeit or waive his due process right to a fair adversary proceeding before a neutral judge.

This principle also has been applied to the requirement that a trial court must instruct the jury on any lesser included offense supported by the evidence, regardless of the defendant's opposition, because to not do so would "impair the jury's search for truth," (*People v. Barton* (1995) 12 Cal.4th 186, 190, 196.)

Even the personal rights conferred by the Sixth Amendment must give way when society's interest in a reliable and fair trial takes precedence. A defendant's right to represent himself at trial must, under certain circumstances, bow to society's pre-eminent interest in preserving the integrity of the system as a whole, ensuring a fair and lawful outcome, and vindicating the courts' institutional need to be perceived as having accomplished those goals. (*Indiana v. Edwards* (2008) 554 U.S. 164, 176-177; see also *Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, 74 ["While Massie is correct in that he enjoys a constitutional right to self-representation, this right is limited and a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity"].) Another such circumstance involves the right to counsel of choice, which is not absolute, but is circumscribed by the paramount "institutional interest in the rendition of just verdicts in criminal cases." (*Wheat v. United States, supra*, 486 U.S. at pp. 160, 162 [because federal

courts have an independent interest in ensuring that legal proceedings appear fair, district courts have wide latitude to refuse waivers of conflicts of interest].)

The community's interest also trumps a defendant's desire to waive his Sixth Amendment right to a public trial. Waivers are prohibited due to society's pre-eminent interest in open courtrooms. (*Press-Enterprise Co. v. Superior Court of California, Riverside County* (1984) 464 U.S. 501, 508-509.)

These cases and the principles underlying them compel the conclusion that due to the strong public interest in the adversary system and the appearance and actuality of a neutral judge, appellant could not forfeit or waive his right to due process and a fair trial.

Finally, some constitutional rights cannot be waived because to do so would undermine the framework of the trial as a whole. For instance, a judge has a sua sponte duty, which cannot be waived by the defendant, to hold a competency hearing whenever substantial evidence is raised of incompetency. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *People v. Blair* (2005) 36 Cal.4th 686, 711.) This is because the conviction of an accused person while he is legally incompetent violates due process and state procedures must be adequate to protect this right. (*Pate v. Robinson, supra*, 383 U.S. at p. 378.) Similar to this are cases holding that the right to an impartial jury cannot be waived. (See, e.g., *Miller v. Webb* (6th Cir. 2004) 385 F.3d 666, 676 [when counsel fails to object to biased juror, there is no sound trial strategy that could support what is essentially a waiver of a

defendant's basic Sixth Amendment right to trial by an impartial jury].) Under this rationale as well, appellant could not waive his right to an adversarial trial that complies with due process, as the right to a fair trial is "the most fundamental of all freedoms." (*Estes v. Texas* (1965) 381 U.S. 532, 540.)

2. A Defendant Cannot Waive the Interest of the Justice System and the Community in Reliable Punishment

As explained in section B.2., *ante*, the Eighth Amendment requires that sentences be imposed with the highest possible degree of reliability in capital cases. That need for sentencing reliability is an institutional one as much as it exists for the benefit of the defendant being sentenced. The defendant, therefore, cannot frustrate the need of the courts and society for appropriate and reliable sentences by waiving the very processes designed to produce that result.

The community's interest in the proper administration of the death penalty has always been a paramount concern of the courts. The very test for determining major constitutional questions related to the death penalty is for the courts to inquire whether a particular law or practice meets or violates "the evolving standards of decency that mark the progress of a maturing society," which are determined by maintaining a link between contemporary community values and the penal system. (*Trop v. Dulles* (1958) 356 U.S. 86, 101 [statute authorizing expatriation as punishment violates the Eighth Amendment].)

The Eighth Amendment is not personal to a defendant in that it restricts state power to punish. A defendant may not, for example, voluntarily subject himself to an unconstitutional punishment by waiving the limitations imposed by the Eighth Amendment. (*Com. v. McKenna* (1978) 476 Pa. 428 [383 A.2d 174, 180-181] [despite the fact that defendant declined to challenge the validity of his death sentence, the “waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue the propriety of allowing the state to conduct an illegal execution of a citizen”].) Banishment as a punishment, even where the defendant agrees, is impermissible. (*Dear Wing Jung v. United States* (9th Cir. 1962) 312 F.2d 73, 76 [banishment as condition of suspension of sentence violates either Eighth Amendment or Due Process].) Castration as a condition of punishment, even where the defendant agrees, is impermissible. (*State v. Brown* (S.Car. 1985) 284 S.C. 407 [326 S.E.2d 410, 4-11412] [castration would violate state’s constitutional ban against cruel and unusual punishment].)

The community’s interest in ensuring reliable determinations in capital sentencing is also the reason why in capital trials victims’ family members are prohibited in their testimony from characterizing or offering opinions about the crime, the defendant or the sentence when they may be permitted to do so in other criminal cases. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509, revd. on other grounds in *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [overruling *Booth* to the extent that it prohibited sentencing phase evidence of the specific harm caused by the defendant].)

For these reasons, appellant's agreement to or acquiescence in the actions or inactions of the prosecutor or court described herein could not waive the interest of the judicial system and community in ensuring that death sentences be meted out only in appropriate cases.

3. The Court Has Discretion to Review This Claim

This Court has discretion to review legal claims in the absence of an objection at trial, even when an objection usually is required to preserve an issue for appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [an appellate court is "generally not prohibited from reaching a question that has not been preserved for review by a party"].) The Court has held "that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts" and has recognized that California courts have "examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgment [citations], or important issues of public policy are at issue [citation]." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985 [adjudicating a constitutional challenge that the defendant did not raise in the trial court]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [same]; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173 [same]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 618, fn. 29 [same].)

Appellant's claim meets these requirements. It involves the deprivation of fundamental constitutional rights, i.e., the right to due

process, a fair trial and a jury. (See *People v. Tully* (2012) 54 Cal.4th 952, 980, fn. 9 [observing that the ability to assert the deprivation of certain fundamental constitutional rights includes the right to a jury trial].) It presents questions of law that require no additional factual development below, involve enforcement of a penal statute and affect both the validity of a capital judgment and significant policy concerns.

For all these reasons, this Court should adjudicate this claim on the merits and hold that because appellant's trial was fundamentally unfair, and the concomitant interests of the justice system and the community in due process and a fair trial were frustrated, appellant's conviction and sentence must be reversed.

J. The Breakdown in the Adversary Process Constituted Structural Error

The errors described herein together constituted a breakdown in the adversary system resulting in a trial that violated due process. Therefore they were not trial errors, which "can be fairly examined in the context of the entire record and are amenable to harmless error review." (*People v. Anzalone* (2013) 56 Cal.4th 545, 554.)

Cases defy harmless error review when there is a:

"defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." [Citation.] Such errors "infect the entire trial process," [citation], and "necessarily render a trial fundamentally unfair [citation]." Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of

guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair. [Citation.]”

(*Neder v. United States* (1999) 527 U.S. 1, 8-9.) The errors herein meet these criteria.

The court’s failures to fulfill its duty to control the prosecutor and the fact-finding processes and its active embrace of appellant’s goal of securing an appeal-proof, speedy conviction and death sentence were not isolated errors, but infected the entire proceeding.

The prosecutor, whose function it was to “to serve as a public instrument of inquiry” also failed in his duty to see that appellant was afforded a fair trial. (*People v. Andrews, supra*, 14 Cal.App.3d 40, 48.) Instead, he took unfair advantage of appellant’s suicidal impulses. He treated appellant as his own client, announcing significant decisions to waive trial rights and helping to prepare appellant to testify. By telling appellant what issues he still wanted evidence on, the prosecutor gave appellant a plan to guide his testimony toward their mutual goal of a conviction and death sentence. Both the court and prosecutor ignored the fact that at trial, appellant changed his pretrial statements in significant ways to help the prosecution meet its burden of proof regarding the mental states necessary to find the special circumstances true. Because the special circumstances would have been the most significant matters in contention at a true adversarial proceeding, the prosecutor’s actions also undermined “the very reliability” of appellant’s trial “as a vehicle for determining guilt or innocence.” (*People v. Anzalone, supra*, 56 Cal.4th 545, 554.)

Under the California constitutional harmless error provision whereby some errors are not susceptible to ordinary harmless error analysis, the judgment must also be reversed “notwithstanding the strength of the evidence contained in the record in a particular case.” (*People v. Anzalone, supra*, 56 Cal.4th at p. 553, quoting *People v. Cahill* (1993) 5 Cal.4th 478, 493.)

Because the trial as a whole did not satisfy the state’s independent interest in the fairness and integrity of its proceedings and the heightened degree of reliability demanded of death verdicts under the Fifth, Eighth and Fourteenth Amendments, the conviction, death eligibility findings and death verdict must be set aside.

* * * *

IV.

BECAUSE APPELLANT’S TRIAL WAS FUNDAMENTALLY UNFAIR, THE PROSECUTION DID NOT PROPERLY DISCHARGE ITS BURDEN OF PROOF, AND STATUTORY AND CONSTITUTIONAL PROCEDURES WERE NOT FOLLOWED, THE RESULT WAS SO UNRELIABLE THAT APPELLANT’S CONVICTION AND SENTENCE MUST BE OVERTURNED UNDER *PEOPLE v. BLOOM*

A. Introduction

In *People v. Bloom* (1989) 48 Cal.3d 1194 (*Bloom*), this Court set out “rigorous standards” to be following at trial where a capital defendant rejects counsel, refuses to present a defense and argues for the death penalty. (*Id.* at pp. 1222, 1228.) The court below demonstrated a profound misunderstanding of these standards. At the end of the trial, before pronouncing sentence, the court stated:

We have gone through a court trial which the court would characterize as a slow plea. Court was kind of troubled by the procedure, but the court will note at this time the court sought guidance from the California Supreme Court in the case of *People versus Bloom* that can be found at 48 Cal.3d 1194.

(2 RT 533.) As demonstrated, *ante*, in Arguments II and III, the court abdicated its responsibility to ensure the integrity of the proceedings, and the result was a contrived proceeding that predictably ended in a conviction and death sentence. *Bloom*, however, requires that the rules of evidence, statutory mandates and proper procedures be followed, regardless of a defendant’s wishes. Because these standards were not met at appellant’s trial, his conviction, special circumstance findings and death verdict were

unreliable under the Eighth Amendment and must be reversed.

B. Applicable Legal Principles

In *Bloom*, this Court summarized its case law regarding capital defendants who elect self-representation with the announced intention of achieving a death verdict. Because of “the basic Sixth Amendment values found controlling in *Faretta* [citation],” the Court’s decisions respect the “defendant’s personal choice on the most ‘fundamental’ decisions in a criminal case. [Citation.]” (*Bloom, supra*, 48 Cal.3d at p. 1222.) For this reason, it is permissible under California law for a capital defendant to waive many of the procedural protections he has, i.e., the defendant may take the stand and confess guilt, request imposition of the death penalty, dispense with the advice and assistance of counsel entirely, waive jury trial, elect not to oppose the prosecution’s case at the guilt phase, and simply put the state to its proof. (*Ibid.*)

In addition, the Court rejected the argument that a defendant’s failure to present mitigation violated the Eighth Amendment because:

the required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present.

(*Id.* at p. 1228.)

Eighth Amendment reliability is required at both the guilt and penalty phases of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625,

638.)

C. Because the Requirements of *Bloom* Were Not Met at Appellant's Trial, the Reliability Demanded by the Eighth Amendment Was Never Satisfied

Appellant's trial lacked several of the *Bloom* requirements deemed necessary to provide the requisite reliability when a capital defendant waives a jury and requests the death penalty. First, the death verdict was not returned under proper procedures as required by *Bloom*. (See *Bloom, supra*, 48 Cal.3d at p. 1228.) As explained in Argument III, *ante*, the court abandoned its role as the guardian of due process and a fair trial in several consequential ways. This included failing to intervene when it learned that the prosecutor had helped appellant to prepare to testify on the prosecution's behalf at the guilt phase, and appearing to support appellant's goals of an appeal-proof trial and speedy sentence. A capital trial is only properly conducted when presided over by a judge who exercises his or her obligations to ensure due process and a fair trial.

Second, the prosecution did not discharge its burden of proof at the guilt or penalty phase of appellant's trial pursuant to the rules of evidence. (See *Bloom, supra*, 48 Cal.3d at p. 1228.) As explained above in Argument III, the court abdicated its statutory responsibility to control the prosecutor's examination of appellant pursuant to Evidence Code sections 765, 773 and 761. As a result, the questioning was not "effective for the ascertainment of the truth" (Evid. Code, § 765), and appellant's testimony was riddled with unreliable, irrelevant and prejudicial statements.

This case and *Bloom* are distinguishable because the trial in *Bloom* took place with significant procedural protections that were lacking at appellant's trial. The defendant in *Bloom* had counsel at the guilt phase, who presented a defense to, or mitigating account of, the murders of Bloom's father, sister and stepmother, which were at issue. The defendant testified in his own defense and others testified to his father's abusive treatment. (*Bloom, supra*, 48 Cal.3d at pp. 1206-1207.) There also was psychiatric testimony and a mental state defense. (*Ibid.*)

At the penalty phase, Bloom opted to represent himself and his request for an attorney to assist him was granted. (*Bloom, supra*, 48 Cal.3d at pp. 1215-1216.) Bloom neither testified nor presented mitigation.³¹ (*Id.* at pp. 1216-1217.) Although Bloom told the jury during argument that he deserved the death penalty and that there was no mitigation, he also referred to the guilt phase evidence about how his father abused him, telling the jurors that if they knew the facts, "you'd kill him too." (*Id.* at p. 1217.) In *Bloom* then, the defense at the guilt phase produced important evidence that mitigated the crime under factor (a). And, despite his determination not to

³¹ Appellant testified about some of his life circumstances (2 RT 463-469), but most of his testimony consisted of aggravating admissions, including a juvenile criminal history and other noticed and unnoticed aggravating evidence. (2 RT 464-469.) Appellant did not label his testimony as mitigating and denied that anything in his past history was relevant to the court's sentencing decision or had an impact on his adult decisions. (2 RT 513, 515.) The court recognized that appellant had "offered no mitigation in the penalty phase." (2 RT 533.)

present mitigating evidence, Bloom inadvertently did so as well at the penalty phase. (*Ibid.*)

In contrast, appellant changed key aspects of his pretrial confessions when he testified at the guilt phase so as to present a more aggravating account of the crime and special circumstances. (See Argument III, *ante.*) Of course, this also served as factor (a) testimony. Unlike Bloom, appellant took the stand at the penalty phase, attesting to copious aggravating evidence about himself. (See Statement of Facts, Penalty Phase – Appellant’s Presentation; see also, e.g., 2 RT 516 [“I’ll always rape all the people and I will continue to kill people. That’s the way I am”].)

Bloom, unlike appellant, made motions for a new trial and modification of the sentence and presented his mother and grandmother at the sentencing hearing, who asked that his life be spared. (*Bloom, supra*, 48 Cal.3d at p. 1217.) Finally, and significantly, although Bloom attempted to assist the prosecutor by stipulating to an uncharged robbery that the prosecutor had not offered as evidence, the prosecutor refused the stipulation. (*Id.* at p. 1216.) In comparison, as established in Argument III, the prosecutor repeatedly used appellant to take shortcuts, to the point that the adversary system collapsed.

There are similarities in the two cases. Like appellant, the defendant

in *Bloom* opted to represent himself in order to receive the death penalty,³² cross-examined some of the prosecution's witnesses in aggravation so as to bring out more aggravating evidence, and told the penalty phase sentencer that he deserved death. (*Bloom, supra*, 48 Cal.3d at pp. 1215-1217; 10/4/93 RT 3-4; 2 RT 377, 454-456, 507-508].) However, unlike at appellant's trial, the prosecution in *Bloom* carried its full burden of proof at both phases of trial, as there was an adversarial guilt phase with defense counsel and the prosecutor insisted on presenting his penalty phase case without the defendant's help.

The additional procedural protections present in *Bloom* at the penalty phase – a jury, advisory counsel during the time the defendant represented himself and the litigated motions for a new trial and modification of the verdict – all contributed significantly to the “proper procedures” and required discharge of the prosecution's burden of proof this Court found necessary in *Bloom* to make a death verdict sufficiently reliable when a self-represented defendant does not present mitigation and asks for the death penalty. In contrast, appellant's trial lacked these protections and was unreliable under the Eighth Amendment.

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³² There was also evidence that Bloom sought the death penalty not to end his life, but to expedite his appeal. (*Bloom, supra*, 48 Cal.3d at p. 1217.) Appellant, on the other hand, announced his desire to waive his appeal rights “and get on the next available list.” (2 RT 508.)

D. Conclusion

Because significant protections required by *Bloom* were absent at guilt, special circumstances and penalty phases of appellant's trial, the resulting conviction, special circumstance findings and death verdict were unreliable and must be reversed.

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V.

THE TRIAL COURT ERRED WHEN IT PERMITTED APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL

A. Introduction

In *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the defendant was denied the right to represent himself at his trial on charges of grand theft. (*Id.* at pp. 807-810.) The United States Supreme Court held that under the circumstances, forcing Faretta to accept counsel against his will deprived him of an implied Sixth Amendment right to conduct his own defense. (*Id.* at pp. 819, 836.)

Based on *Faretta*, the trial court in this case granted appellant's request to represent himself. (2 CT 404-409, 416.) That ruling was erroneous, as *Faretta* does not apply to capital cases. *Faretta* itself, as well as subsequent United States Supreme Court cases, recognize that the right of self-representation must yield when certain other interests are at stake, e.g., the basic constitutional law objective of providing a fair trial. In particular, the Eighth Amendment requires that death penalty procedures not create a substantial risk that a death sentence will be imposed in an arbitrary and capricious way. For this reason, the Sixth Amendment procedural protection of the assistance of counsel should have prevailed over appellant's wish to represent himself at his capital trial.

Additionally, *Faretta*'s three-part rationale is inapplicable to a bifurcated penalty phase trial. The trial court therefore erred when it failed to revoke appellant's pro se status at the penalty phase.

Finally, the trial court erred in allowing appellant to represent himself in this particular case. Appellant chose self-representation with the

specific purpose of being convicted and sentenced to death, and the prosecutor took advantage of this situation, such that the adversary system collapsed. Under these circumstances, the trial court's failure to provide counsel for appellant violated the Sixth and Eighth Amendments and the conviction, special circumstance findings and death sentence must be reversed.

Appellant acknowledges that this Court has held that the rule enunciated in *Faretta* extends to capital cases. (*People v. Joseph* (1983) 34 Cal.3d 936, 945; *People v. Dent* (2003) 30 Cal.4th 213, 218.) And the Court has continued to hold that the "rule announced by the *Faretta* majority . . . remains the law of the land." (*People v. Butler* (2009) 47 Cal.4th 814, 824.) To the extent that this Court finds that appellant's claim is foreclosed by *Faretta*, he still must raise it here in order to preserve his claim for review by the high court. (See *Street v. New York* (1969) 394 U.S. 576, 582 [constitutional question must first be presented and ruled upon by highest state court before U.S. Supreme Court has jurisdiction to rule upon it].)

B. Factual Background

On July 19, 1995, appellant filed a petition to proceed In Propria Persona pursuant to *Faretta* (2 CT 404-409), which was heard and granted on the same date. (2 CT 416; 7/19/95 RT 13; see also 7/5/95 RT 2-3 [appellant informs court he wants to represent himself].)

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C. Because of Recognized Limits on the *Faretta* Decision and Eighth Amendment Requirements, the Trial Court Erred When It Granted Appellant’s Motion to Represent Himself at His Capital Trial

1. The *Faretta* Decision

In *Faretta, supra*, 422 U.S. at pp. 807-808, the defendant, accused of grand theft, requested that he be allowed to represent himself. After holding a hearing on the defendant’s ability to conduct his own defense, which raised questions as to his knowledge of such matters as the hearsay rule, the trial court refused the defendant’s request and appointed counsel to represent him. (*Id.* at pp. 808-810.) On appeal from his conviction, the state appellate court found no error, noting that the defendant had no state or federal constitutional right to proceed pro se. (*Id.* at pp. 811-812.) A divided Supreme Court, relying on the Sixth Amendment, rejected that contention and held that by “forcing *Faretta, under these circumstances*, to accept [a lawyer] against his will, the California courts deprived him of his constitutional right to conduct his own defense.” (*Id.* at p. 836, italics added.)

In reaching this conclusion, the Court undertook a three-part analysis. First, the Court looked at the historical record on the right of self-representation. (*Faretta, supra*, 422 U.S. at pp. 812-817.) It concluded that its own past recognition of the right of self-representation and state constitutions “pointing to the right’s fundamental nature,” supported the principle that forcing a lawyer on a defendant is contrary to “his basic right to defend himself if he truly wants to do so.” (*Id.* at p. 817.)

Next, the Court found that the right of self-representation also was supported by the structure of the Sixth Amendment and English and colonial jurisprudence that preceded it. (*Faretta, supra*, 422 U.S. at p. 818.)

Notably, this section of the Court’s analysis frequently invokes the role of the Sixth Amendment in the right to make a defense. The language of the Sixth Amendment itself lists the rights basic to our adversary system of justice, i.e., the rights to notice, confrontation, cross-examination and compulsory process. (*Ibid.*) The Amendment thus “constitutionalizes the right in an adversary criminal trial to make a *defense* as we know it.” (*Ibid.*; italics added) The Court found that the right of self-representation was necessarily implied by the Sixth Amendment. (*Id.* at p. 819.) This is because the Amendment gives rights directly to the accused, “who suffers the consequences if the defense fails.” (*Id.* at pp. 819-820.) The Court concluded that this reading of the Sixth Amendment was reinforced by the Amendment’s roots in the legal history of England and the American Colonies. (*Id.* at pp. 821-832.)

Finally, the Court examined the right of self-representation in light of the “basic thesis” of its prior cases on the right to counsel, which is that “the help of a lawyer is essential to assure the defendant a fair trial.” (*Faretta, supra*, 422 U.S. at pp. 832-833.) The Court recognized that in most cases, defendants can “better defend” with counsel’s guidance. (*Id.* at p. 834.) Nevertheless, because the defendant will bear the consequences if he is convicted, the right to defend is personal. (*Ibid.*) In this respect, the Court invoked the importance in the law of “respect for the individual.” (*Ibid.*)

2. *Faretta* Itself and Later U.S. Supreme Court Cases Recognize the Limits of *Faretta*

Although the Supreme Court’s rationale in *Faretta*, which relied on historical and textual analyses, was broad, the Court’s ultimate conclusion was that “under the circumstances” forcing counsel upon the defendant

violated his Sixth Amendment right to conduct his own defense. (*Faretta, supra*, 422 U.S. at p. 836.) The circumstances of the case, of course, included the fact that Faretta was charged with grand theft, a noncapital offense. (See *Faretta, supra*, 422 U.S. at p. 807.)

Faretta recognized other limits to the right of self-representation as well. It noted that a judge can terminate self-representation, e.g., when a defendant “deliberately engages in serious and obstructionist misconduct.” (*Faretta, supra*, 422 U.S. at p. 834, fn. 46.) A judge can appoint standby counsel, even over a defendant’s objection, to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary. (*Ibid.*)

Supreme Court cases after *Faretta* continued to recognize its limits. In *McKaskle v. Wiggins* (1984) 465 U.S. 168 (*McKaskle*), the Court built on its comments in *Faretta* regarding standby counsel. It held that a pro se defendant’s Sixth Amendment right to self-representation, as expressed in *Faretta*, was not violated by standby counsel’s unsolicited participation in the defense, even over the defendant’s continuing objections. (*Id.* at pp. 176-177, 180.) The Court based this on “both *Faretta*’s logic and its citation of the *Dougherty* case [which] indicate that no absolute bar on standby counsel’s unsolicited participation is appropriate or was intended.” (*McKaskle, supra*, 465 U.S. at p. 176, citing *Faretta, supra*, 422 U.S. at p. 834, fn. 46; see also *United States v. Dougherty* (1972) 473 F.2d 1113, 1124-1126 [explaining utility of the role of standby counsel].) The Court also delineated the role that standby counsel could play. (*McKaskle, supra*, 465 U.S. at p. 170.)

In *Martinez v. Court of Appeal of Cal., Fourth Appellate District* (2000) 528 U.S. 152, 163 (*Martinez*), the Supreme Court held that there is

no right of self-representation on appeal. In so holding, the Court noted that *Faretta* had recognized that the right to self-representation is not absolute. (*Id.* at p. 161.) “Even at the trial level . . . the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” (*Id.* at p. 162.) The Court found most of *Faretta*’s three rationales inapplicable to appellate proceedings, including the historical evidence. (*Id.* at pp. 156-158.) *Faretta*’s reliance on the structure of the Sixth Amendment was also irrelevant. (*Id.* at p. 159.) The Amendment lists rights available for trial; it does not include any right to appeal. (*Id.* at pp. 159-160.) A defendant’s interest in autonomy, grounded in the Sixth Amendment, is also inapplicable at the appeal stage. (*Id.* at p. 161.) The Court concluded that, in the appellate context, the balance between the “competing interests” in self-representation versus the government’s interest in ensuring the integrity and efficiency of a trial tipped in favor of the State. (*Id.* at p. 162.)

Most recently, in *Indiana v. Edwards, supra*, 554 U.S. 164, after discussing the various limitations on the right to self-representation, the Court held that the right to self-representation was not infringed when the trial court refused to allow Edwards, a mentally-ill defendant, to represent himself at trial. (*Id.* at p. 174.) The Court recognized that, before permitting a defendant to represent himself at trial, the states may impose requirements beyond the mere capacity to waive the right to counsel. (See *id.* at p. 178.) Moreover, where self-representation “undercuts the most basic of the Constitution’s criminal law objectives, providing a fair trial,” the government’s interest in preserving the latter outweighs a defendant’s interest in acting as his own lawyer. (*Id.* at pp. 176-177.) Further, the courts must act to preserve constitutional processes such as a fair trial:

As Justice Brennan put it, “[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.” *Allen*, 397 U.S., at 350, (concurring opinion). See *Martinez*, 528 U.S., at 162, 120 S.Ct. 684 (“Even at the trial level...the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer”). See also *Sell v. United States*, 539 U.S. 166, 180 (2003) (“[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant’s trial is a fair one”).

(*Indiana v. Edwards*, *supra*, 554 U.S. at pp. 176-177, parallel citations omitted.)

Thus, the Supreme Court has limited *Faretta* in circumstances where its reasoning is inapplicable, the Sixth Amendment has to yield to other interests or constitutional rights, and/or where the Sixth Amendment itself does not apply. The primacy of the Eighth Amendment in capital cases must be viewed in light of these limitations.

3. Pursuant to Eighth Amendment Requirements, the Right of Self-Representation Must Be Limited to Noncapital Cases

As described above, the reasoning in *Faretta* is based upon analysis of the Sixth Amendment and the reach of *Faretta* is limited by both its facts and its reasoning. *Faretta* did not consider the circumstances of a capital trial or the Eighth Amendment. This is not surprising, given that in 1975, when the opinion was issued, capital punishment in the United States had ground to a halt following the Supreme Court’s decision in *Furman v. Georgia* (1972) 408 U.S. 238 (*Furman*). *Furman* invalidated state statutes under which juries exercised unrestrained discretion to impose capital punishment. (*Id.* at pp. 239, 312-313 (conc. opn. of White, J.), 256-257 (conc. opn. of Douglas, J.).)

Following *Furman* and after the *Faretta* opinion in 1975, the Court further developed its capital Eighth Amendment jurisprudence. The Court announced that under the Eighth Amendment, the death penalty cannot be imposed under procedures that create a “substantial risk” that it will be imposed in an “arbitrary and capricious way.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 188.) In *Beck v. Alabama* (1980) 447 U.S. 625, 638, the Court held that a prohibition against giving a lesser included offense instruction in a capital case was unconstitutional because it diminished the reliability of a guilt determination. And in *Strickland v. Washington* (1984) 466 U.S. 668, 704, the Court observed that “we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and the accuracy of factfinding.”

Examining *Faretta*’s reasoning in light of Eighth Amendment requirements demonstrates that the right of self-representation must give way at a capital trial, where procedures must guard against diminished reliability at the guilt phase (*Beck v. Alabama, supra*, 447 U.S. 625, 638), and the imposition of the death penalty in an arbitrary and capricious way (*Gregg v. Georgia, supra*, 428 U.S. at p. 188). This is because, as *Faretta* recognized, the Sixth Amendment right to counsel is one of the constitutional procedures that is essential to assure the defendant a fair trial. (*Id.* at pp. 832-833.)

In *Strickland v. Washington, supra*, 466 U.S. at p. 685, a capital case, the Court described the right to counsel as playing “a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Competent defense counsel are expected to provide the skill and knowledge

that will render the trial a reliable adversarial process. (*Id.* at p. 688.)

When such counsel is lacking, the result of a proceeding can be rendered unreliable. (*Id.* at p. 694.)

The *Faretta* opinion acknowledged that most defendants will receive a better defense with counsel's guidance than by their own unskilled efforts. (*Faretta, supra*, 422 U.S. at p. 834; see also *Martinez, supra*, 528 U.S. at p. 161 [even where counsel's performance is ineffective, it is reasonable to assume that it is more effective than what an unskilled appellant could provide for himself].) The opinion recognized that the right of self-representation "seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused be convicted and imprisoned unless he has been accorded the right to the assistance of counsel." (*Faretta, supra*, 422 U.S. at p. 832.) For this reason, the strong thrust of those decisions "must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." (*Id.* at p. 833.) The opinion summarily rejected that argument, however, because the defendant, and not his lawyer or the State, bears the consequences of a conviction, so the defendant must be free to personally decide whether to utilize counsel for his defense. (*Id.* at p. 834.) Ultimately, then, *Faretta* traded the essential protections afforded by the right to counsel for a defendant's interest in "free choice." (*Id.* at pp. 815, 834.)

In capital cases, however, there are interests at stake other than those personal to a defendant. Inherent in the Eighth Amendment prohibition against cruel and unusual punishment is the principle that the State must not arbitrarily inflict a severe punishment. (*Furman v. Georgia, supra*, 408 U.S. at p. 274 (conc. opn. of Brennan, J.). This is done by determining

whether a particular law or practice involving the death penalty meets or violates “the evolving standards of decency that mark the progress of a maturing society.” (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) These standards are decided by maintaining a link between contemporary community values and the penal system. (*Ibid.*)

Accordingly, the Eighth Amendment demands that substantive and procedural safeguards be in place to ensure that the trier of fact can make the requisite individualized sentencing determination. The assistance of counsel is one of those procedural safeguards, as the role of counsel is to render a trial reliable. (*Strickland, supra*, 466 U.S. at pp. 688, 694.)

Allowing a capital defendant to forego representation at his capital trial simply creates too much of a risk that any resulting death penalty will be imposed in an “arbitrary and capricious manner” (*Gregg v. Georgia, supra*, 428 U.S. at p. 188), and hence be unreliable.

Because the death penalty must be imposed in accord with the Eighth Amendment (see, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 599), and the right to self-representation must bend in favor of the state’s interest in the integrity of even a noncapital trial (*Martinez, supra*, 528 U.S. at p. 162), the former takes precedence at a capital trial. For this reason, the trial court erred when it permitted appellant to represent himself at his capital trial.

D. Because *Faretta*’s Reasoning Does Not Support the Right to Self-Representation at the Penalty Phase, the Trial Court Erred When it Continued to Allow Appellant to Represent Himself There

As appellant argues above, consistent with the recognized limits of the *Faretta* decision, the procedural protections afforded by the Sixth Amendment right to counsel cannot be waived in a capital trial, where “proceedings [must] be policed at all stages by an especially vigilant

concern for procedural fairness and for the accuracy of factfinding.” (*Strickland v. Washington, supra*, 466 U.S. at p. 704.) This is especially true at the penalty phase of a capital trial, where the three-part rationale of *Faretta* does not apply at all. For this reason, even if this Court rejects appellant’s argument that *Faretta* applies to the entire capital trial, it must acknowledge that it does not apply at the penalty phase, reverse the death sentence and remand for a penalty phase trial where appellant is represented by counsel.

1. The Historical Evidence Does Not Support a Right to Self-Representation at the Second Phase of a Bifurcated Proceeding

After setting forth the relevant English and colonial history, the *Faretta* court concluded that the historical record supported the right to self-representation at trial. (*Faretta, supra*, 422 U.S. at pp. 812-817.) In contrast, looking to the same historical record, the *Martinez* Court concluded that, because there was no right to appeal at the time of the Nation’s founding, the right to self-representation did not apply to an appellant. (*Martinez, supra*, 528 U.S. at p. 159.) Similarly, one cannot conclude that the historical record speaks in favor of finding a right to self-representation for defendants during the penalty phase of a capital trial.

Unified capital trials were the norm when the Sixth Amendment was created; the question of guilt and the question of death both were decided in a single jury verdict at the end of a single proceeding. (Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing* (2005) 105 Colum. L.Rev. 1967, 1972-1973, 2011.) Bifurcation came to capital cases later, largely in response to the United States Supreme Court’s Eighth Amendment decisions in the mid-1970s. (*Ibid.*)

Thus, four years after *Furman v. Georgia*, *supra*, 408 U.S. 238, the Supreme Court endorsed Georgia’s bifurcated capital trial scheme, in which a “defendant is accorded substantial latitude as to the types of evidence that he may introduce” at the penalty stage. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 164 (joint opn. of Stewart, Powell and Stevens, JJ.)) The Court recognized that “accurate sentencing information” about “the character and record” of an individual offender, which “is an indispensable prerequisite to a reasoned determination” on punishment, often may be irrelevant or extremely prejudicial to a decision on guilt. (*Id.* at pp. 190, 206.) For that reason, the Court stated that the concerns of *Furman* are “best met by a system that provides for a bifurcated proceeding.” (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.)

At the time of the passage of the Sixth Amendment, the Framers were not contemplating its application at the penalty phase of a bifurcated proceeding. Accordingly, the historical record does not speak in favor of applying *Faretta* to the penalty phase of a capital trial.

2. The Structure of the Sixth Amendment Does Not Support the Conclusion That the Right to Self-Representation Applies to the Penalty Phase at a Capital Trial

As described above, in *Faretta*, the Court rooted its holding in the text and structure of the Sixth Amendment, finding that it implied the right to defend oneself personally. (*Faretta*, *supra*, 422 U.S. at pp. 819-820.) In *Martinez*, *supra*, 582 U.S. at p. 160, the Court found support for its limitation on *Faretta* to the trial stage in the structure of the Sixth Amendment, a structure in which rights are “presented strictly as rights that are available in preparation for trial and at the trial itself.” Similarly, in *McKaskle*, the court made express what had been implied in *Faretta*:

“[T]he defendant’s right to proceed pro se exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged.” (*McKaskle, supra*, 465 U.S. at pp. 177-178, fn. 8.)

In contrast, the issue at the penalty phase is whether the person convicted is uniquely qualified to receive society’s ultimate punishment, not whether one has a defense to the crime charged. Indeed, “mak[ing] a defense” is so entirely absent at the penalty phase that a convicted defendant who has reached the penalty phase is not entitled to a “lingering doubt” instruction as to guilt or innocence. (*Oregon v. Guzek* (2006) 546 U.S. 517, 523-527; *People v. Hartsch* (2010) 49 Cal.4th 472, 511-513 [no lingering doubt instruction required by either federal or state Constitution].) As a convicted defendant at the penalty phase is no longer making a defense to an accusation, the structure and language of the Sixth Amendment simply does not support a finding that the right to self-representation applies at the penalty phase.

**3. A Defendant’s Interest in “Free Choice”
Recognized in the *Faretta* Line of Cases Is
Inapplicable at the Penalty Phase of a Capital Trial**

In *People v. Taylor* (2009) 47 Cal.4th 850, this Court stated that:

We have explained that the autonomy interest motivating the decision in *Faretta*—the principle that for the state to “force a lawyer on a defendant” would impinge on ““that respect for the individual which is the lifeblood of the law”” (*Faretta, supra*, 422 U.S. at p. 834, 95 S.Ct. 2525)—applies at a capital penalty trial as well as in a trial of guilt.

(*People v. Taylor, supra*, 47 Cal.4th at p. 865.)

Appellant respectfully disagrees. The words “autonomy” and “dignity” are used broadly in cases concerning the application of *Faretta*.

(See, e.g., *McKaskle, supra*, 465 U.S. at pp. 176-177; *Martinez, supra*, 528 U.S. at pp. 160-161; *Indiana v. Edwards, supra*, 554 U.S. at p. 176, citing *McKaskle, supra*, 465 U.S. at pp. 176-177; *People v. Blair* (2005) 36 Cal.4th 686, 738.) While these concepts have an innate appeal, their application at the penalty phase cannot be assumed for several reasons.

First, neither word appears in the majority opinion in *Faretta* with respect to an accused; rather, the case refers to “free choice.” (*Faretta, supra*, 422 U.S. at pp. 815, 834.) As demonstrated *ante*, the “free choice” recognized in *Faretta* applies to the right to defend oneself in a trial at which guilt of the charged offense is the issue. (*McKaskle, supra*, 465 U.S. at pp. 177-178, fn. 8.)

Most importantly, the decreased autonomy interest following conviction (*Martinez, supra*, 528 U.S. at pp. 159-161, 163) coincides with the heightened interest in dignity crucial to the Eighth Amendment. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” (*Trop v. Dulles, supra*, 356 U.S. at p. 100.) This is because “[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.” (*Ibid.*) The preservation of dignity comes in capital cases from systems that promote reliability by insisting that each capital defendant be treated and considered as an individual. (See, e.g., *Lockett v. Ohio, supra*, 438 U.S. at pp. 602-605.) Thus, a state’s power to punish is restricted and must comport with the Eighth Amendment. The rhetoric of “autonomy” is therefore irrelevant at the penalty phase of a capital trial.

Because *Faretta*’s reasoning provides no support for an affirmative constitutional right of self-representation at the penalty phase of a capital trial, the trial court erred when it permitted appellant to represent himself at

the punishment phase below. The death verdict must therefore be reversed.

E. Because Appellant Undertook Self-Representation with the Goal of Being Convicted and Sentenced to Death, and the Proceedings below Were Not Adversarial, the Trial Court Should Not Have Permitted Appellant to Waive His Right to Counsel at His Capital Trial

As demonstrated above, neither the circumstances nor reasoning of *Faretta* provides a basis for extending the right of self-representation to a capital trial. The circumstances of appellant's trial in particular demanded that the Sixth Amendment right to counsel and Eighth Amendment protection against cruel and unusual punishment take precedence over appellant's wish to represent himself.

Faretta rights exist in the context of an adversarial determination of guilt. (*McKaskle, supra*, 465 U.S. at pp. 177-178, fn. 8.) The Court's conclusion in *Faretta* extended only to a defendant's constitutional right to conduct his own defense. (*Martinez, supra*, 528 U.S. at p. 154.) The trial court therefore erred when it granted appellant's request for self-representation knowing that appellant wanted to waive his right against self-incrimination, plead guilty, admit the special circumstances and receive a death sentence. (10/4/93 RT 3-4; 7/19/95 RT 13.)

Minimally, the trial court should have revoked appellant's pro. per. status toward the end of the guilt phase when it was clear that the prosecutor was taking unfair advantage of appellant's death wish, the evidence on the special circumstances was unreliable, and the adversary system had collapsed. (See, e.g., 2 RT 268-272 and Arguments II and III, *ante*.) Neither *Faretta* nor any other case establishes that a capital defendant may use the right of self-representation to undermine the adversary system to the extent that the defendant can assist the prosecution

in securing a conviction, a finding of true to a special circumstance and the imposition of a death sentence. *Faretta* simply does not reach that far.

Also, as shown above in Argument III, section H.2., appellant's subjective desire for a death sentence does not allow him to veto requirements placed on the state to decide his sentence under proceedings that comport with the Eighth Amendment. The rights protected by the Eighth Amendment cannot be limited through consent.

Because of the need to protect the government's interest in fairness and integrity at appellant's trial (*Martinez supra*, 528 U.S. at p. 162), and heightened reliability necessary at a capital proceeding (see, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305), the court should never have granted pro. per. status to appellant. Under the circumstances which existed at appellant's trial, the failure of the trial court to provide counsel at trial violated the Sixth and Eighth Amendments and the conviction, special circumstance findings and death sentence must be reversed.

* * * * *

VI.

THE CONVICTION, DEATH ELIGIBILITY FINDINGS AND DEATH VERDICT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY PERMITTED APPELLANT TO WAIVE COUNSEL IN VIOLATION OF PENAL CODE SECTION 686.1

A. Introduction

Section 686.1 provides that “the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings.” As described below, key to the enactment of section 686.1 in 1972 was recognition by the Legislature and voters of the importance of providing fair trials and an adequate defense to criminal defendants.

Just a few years later the United States Supreme Court issued its opinion in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). As appellant argued extensively in Argument V, *ante*, the *Faretta* decision is limited and does not cover capital cases. Nevertheless, over time, the courts of this state have interpreted the right established by *Faretta* as “absolute” (*People v. Taylor* (2009) 47 Cal.4th 850, 872 (*Taylor*)), and ignored the legislative mandate of section 686.1.

More recently this Court has recognized that the “absolutist view of the right of self-representation” has been rejected. (*People v. Lightsey* (2012) 54 Cal.4th 668, 694-695, citing *Indiana v. Edwards* (2008) 554 U.S. 164, 169.) For this reason and the reasons demonstrated in Argument V above, California should now give effect to section 686.1. Vindication of the State’s policy requires counsel in the greatest number of capital cases that federal law allows. This is especially so as to the special circumstances and penalty phases, due to the primacy of the Eighth Amendment at these proceedings. (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-972 [death

eligibility and death-worthiness stages of capital proceedings must meet Eighth Amendment requirements].)

To the extent that this Court finds that appellant's claim is foreclosed by its opinion in *Taylor, supra*, 47 Cal.4th at pp. 865-866, or *Faretta*, he still must raise it here in order to preserve his claim for review by the high court. (See *Street v. New York* (1969) 394 U.S. 576, 582 [constitutional question must first be presented and ruled upon by highest state court before U.S. Supreme Court has jurisdiction to rule upon it].)

B. Because California Law Provides No Statutory or Constitutional Rights of Self-Representation, Penal Code Section 686.1, Requiring Counsel in Capital Cases, May Be Implemented When Permitted by the United States Constitution

Section 686.1, requiring that "a defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings," was adopted in 1972 pursuant to a constitutional amendment. Prior to 1972, the California Constitution, article 1, section 13, guaranteed the right of a criminal defendant to represent himself. (See generally *People v. Sharp* (1972) 7 Cal.3d 448, 463-464 [Appendix] (*Sharp*).) In order to enact legislation requiring counsel in certain cases, the constitution had to be amended. (*Ibid.*) The Legislature passed such a constitutional amendment in 1971, deleting the right to self-representation from article 1, section 13. That constitutional amendment was then put to the voters in 1972 as Proposition 3. (*Ibid.*)

The Voter Pamphlet accompanying that amendment explained that the amendment was "necessary in order to ensure the defendant is fairly advised of his rights during the trial," and to ensure "*a fair trial for every defendant.*" (Ballot Pamp., Proposed Amends, to Cal. Const. with

arguments to voters, Primary Elec. (June 6, 1972) p. 8, italics added.) The ballot pamphlet further explained that “[t]oday’s complex legal system leaves no room for the person unschooled in law and criminal procedure. Studies show that the person who represents himself in a serious criminal case is unable to defend himself adequately.” (*Ibid.*, italics added.) Thus, concern regarding the right to a fair trial and an adequate defense were animating forces behind the passage of Proposition 3 and hence, section 686.1. The statute represents “the legislatively stated policy . . . of this state.” (*People v. Dent* (2003) 30 Cal.4th 213, 224 [conc. opn. of Chin, J.].)

Immediately after the passage of Proposition 3, this Court held in *Sharp, supra*, 7 Cal.3d at p. 459, that neither the California Constitution nor any state statute conferred a right to represent oneself. (*Taylor, supra*, 47 Cal.4th at pp. 871-872.) *Sharp* remains good law as to the California Constitution and Penal Code (*id.* at p. 872, fn. 8), and the courts “should give effect to this California law when [they] can.” (*People v. Johnson* (2012) 53 Cal.4th 519, 526.) Because California law “provides no statutory or constitutional right of self representation . . .” (*id.* at p. 528, original italics), “California courts may deny self-representation when the United States Constitution permits such denial.” (*Id.* at p. 523.)

C. United States Supreme Court Decisions Permit California to Restrict the Sixth Amendment Right of Self-Representation When the Exercise of That Right Compromises the Integrity of its Death Judgments

After the United States Supreme Court decided *Faretta v. California* in 1975, the courts of this state interpreted that decision as establishing a defendant’s absolute right to self-representation. (*Taylor, supra*, 47 Cal.4th at p. 872.) However, as shown above in Argument V, *Faretta* and the decisions that followed have recognized that *Faretta* is limited by a number

of state interests. (See *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171 [recognizing that *Faretta* rights are not absolute]; *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 163 [no right of self-representation on direct appeal in a criminal case]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 187-188 [appointment of standby counsel over self-represented defendant's objection is permissible]; *Faretta*, *supra*, 422 U.S. at p. 834, fn. 46 [no right "to abuse the dignity of the courtroom"]; *ibid.* [no right to avoid compliance with "relevant rules of procedural and substantive law"]; *id.* at p. 834, fn. 46 [no right to "engag[e] in serious and obstructionist misconduct," citing *Illinois v. Allen* (1970) 397 U.S. 337]; see also *People v. Butler* (2009) 47 Cal.4th 814, 825 [citing additional limits to *Faretta* recognized in California cases, i.e., requests that are untimely, abandoned, equivocal, "made in passing anger or frustration," or intended to delay or disrupt proceedings may be denied].)

In the context of a defendant lacking mental capacity, self-representation "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Indiana v. Edwards*, *supra*, 554 U.S. at pp. 176-177.) Similarly, California's interest in the integrity and fairness of its trials takes precedence over the right to self-representation when the latter eviscerates a fair trial. In the trial below, allowing appellant to represent himself so that he could align himself with the prosecutor to assure a guilty verdict and the death penalty obliterated any chance of a fair trial. (See Arguments II, III and IV, *ante.*) Appellant's *Faretta* rights should have yielded to the government's "constitutionally essential interest in assuring that the defendant's trial is a fair one [citation omitted]." (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 177.)

D. The Trial Court's Failure to Deny Appellant's *Faretta* Motion, or at Least to Revoke His Pro Se Status after the Prosecution Rested at the Guilt Phase, Constitutes Reversible Error

As explained above, *Faretta* and its progeny permit curtailing the self-representation right where, as here, the government's interest in the integrity and fairness of its trials is threatened or eliminated. This Court has also recognized that conduct "that threatens to 'subvert the "core concept of a trial" [citation] or compromise the court's ability to conduct a fair trial [citation]' may lead to forfeiture of the right of self-representation." (*People v. Butler, supra*, 47 Cal.4th at p. 826, quoting *People v. Carson* (2005) 35 Cal.4th 1, 10.) As Justice Brennan remarked, "the Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." (*Illinois v. Allen supra*, 397 U.S. 337 at p. 350 (conc. opn. of Brennan, J.)

The trial court below thus had the authority curtail appellant's *Faretta* rights if his conduct threatened to compromise the court's ability to conduct a fair trial. (See *People v. Butler, supra*, 47 Cal.4th at p. 826.) In addition, the court had the more general "responsibility to ensure the integrity of all stages of the proceedings." (*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1415.) By failing to limit appellant's self-representation, the trial court also failed in its duty to conduct a fair trial.

At the time of appellant's request to represent himself on July 19, 1995 (2 CT 404-409), the court knew that appellant wanted to waive his right against self-incrimination, plead guilty, admit the special circumstances, and get the death penalty. (10/4/93 RT 3-4; 7/19/95 RT 13.) Because appellant's goals threatened to compromise the court's ability to conduct a fair trial, the court should have followed section 686.1 and denied

appellant's request to represent himself. At the very least, the trial court should have revoked appellant's pro. per. status when appellant took the stand at the guilt phase and it became clear that the prosecutor had helped prepare appellant to testify. (2 RT 268-269.) The trial court should have recognized then that prosecutor was taking unfair advantage of appellant's death wish, the evidence on the special circumstances was unreliable and the adversary system had collapsed. (See, e.g., 2 RT 269-272 and Arguments II and III, *ante*.)

Moreover, if a trial court can limit the right to self-representation when the request is untimely or intended to delay or disrupt proceedings (*People v. Butler, supra*, 47 Cal.4th at p. 825), it should have done so in the circumstances here. Allowing a trial to proceed when the adversary system has ceased to function is just as, if not more, pernicious than tolerating a trial where proceedings are delayed or disrupted. Certainly, a trial in which the parties are partners on the prosecution side rather than adversaries actually subverts, rather than just threatens to subvert, the "core concept" of a fair trial. (See *People v. Butler, supra*, 47 Cal.4th 814, 826.)

Revoking appellant's *Faretta* status would not have put an undue burden on the trial court; the trial court itself offered to appoint counsel for appellant at the start of the penalty phase on January 10, 1996. (2 RT 329.) In any case, revocation of *Faretta* status is not uncommon in capital cases in this state. For example, in *People v. Bloom* (1989) 48 Cal.3d 1194, appellant requested to represent himself after the jury found him guilty of capital murder. The court revoked self-representation after the penalty phase, but reinstated it for the motion to modify the death verdict. (*Id.* at p. 1203.) In *People v. Clark* (1992) 3 Cal.4th 41, 113-116, this Court upheld the trial court's decision to revoke defendant's *Faretta* status when he

announced his intention, mid-trial, to stand mute, reasoning that it was obliged “to interpret *Faretta* in a reasonable fashion.” Revoking appellant’s *Faretta* status after the prosecution rested at the guilt phase would similarly have been a reasonable interpretation of *Faretta*.

E. This Court Should Reevaluate its View That it Cannot Limit the Right of Self-Representation at a Capital Trial

This Court has rejected the claim that California may limit the right to self-representation because a case is capital one. In light of the *Faretta* line of cases culminating in *Indiana v. Edwards, supra*, 554 U.S. 164, however, it is apparent that the holdings of these cases were based on incorrect views of the limits of *Faretta*, of *Faretta* rights as absolute, of the balance between a defendant’s *Faretta* right and the state’s interest in obtaining reliable death judgments, and on the primacy of the Eighth Amendment at the death eligibility and death-worthiness stages of capital proceedings.

Thus, in *People v. Bloom, supra*, 48 Cal.3d 1194, this Court acknowledged that the Eighth Amendment imposed a “high requirement of reliability on the determination that death is the appropriate penalty in a particular case,” but stated that “the high court has never suggested that this heightened concern for reliability requires or justifies forcing an unwilling defendant to accept representation . . . in a capital case.” (*Id.* at p. 1228.) Appellant respectfully suggests that this conclusion is based upon a misreading of *Faretta*. No case is authority for a proposition not considered by the court. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.) As demonstrated in Argument V above, neither *Faretta* nor the line of Supreme Court cases that followed it were capital cases or ever considered an Eighth Amendment issue.

People v. Clark (1990) 50 Cal.3d 583 rejected the argument that *Faretta* “invalidates [Penal Code] section 686.1 which mandates representation by counsel in all stages of a capital trial, only as to the guilt phase.” (*Id.* at p. 617, fn. 26.) *Clark*’s holding was expressly premised on the now discredited theory that the right recognized in *Faretta* “is absolute.” (See *ibid.* and *Indiana v. Edwards, supra*, 554 U.S. at p. 171 [“the right of self-representation is not absolute”].)

The holdings in *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365, and *People v. Koontz* (2002) 27 Cal.4th 1041, 1074, that despite “the state’s significant interest in a reliable penalty determination,” “a defendant’s fundamental constitutional right to control his defense governs” are also undermined by *Martinez* and *Indiana v. Edwards*, which recognized that self-representation must give way when it threatens the basic objective of a fair trial, even in a noncapital case. (See *Martinez v. Court of Appeal of Cal., Fourth Appellate District, supra*, 528 U.S. 152, 162; *Indiana v. Edwards, supra*, 554 U.S. at pp. 176-177.) It follows that because the death penalty must be imposed in accord with the Eighth Amendment (see, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 599), Eighth Amendment requirements in a capital trial can outweigh an individual’s interest in self-representation.

Taylor, supra, 47 Cal.4th 850, postdates *Edwards*. There, the defendant argued that counsel was required under the Fifth and Eighth Amendments at the penalty phase in order to ensure reliability of the death verdict. (*Id.* at p. 865.) This Court relied on its prior cases for the proposition that the “autonomy interest motivating the decision in *Faretta*” applies at a capital penalty trial as well as in a trial at guilt. (*Ibid.*) However, as shown above in Argument V, the historical and structural

analyses of the Sixth Amendment the Court undertook in *Faretta* cannot be transplanted to the Eighth Amendment, which governs the death-eligibility and death-worthiness phases of a capital trial. In addition, *Faretta*'s "free choice" rationale is grounded in the right to waive procedural trial protections and does not apply to the Eighth Amendment, which imposes substantive limits on punishment. (Argument V, *ante*, and *Gregg v. Georgia* (1976) 428 U.S. 153, 172, 174.) Appellant respectfully requests this Court to reconsider its conclusion in *Taylor* and prior cases that a defendant has autonomy interests in capital cases that can eviscerate Eighth Amendment requirements. Under the circumstances here, the Court should conclude that failure to appoint counsel at trial was error.

F. Failure to Enforce Penal Code § 686.1 Was Error and Denial of Counsel Requires Reversal

The foregoing United States Supreme Court cases demonstrate that rights pursuant to *Faretta* must give way when the resulting trial is the antithesis of a fair and reliable one. (See, e.g., *Indiana v. Edwards, supra*, 554 U.S. at pp. 176-178.) As argued above in section B of this argument, similar concerns about trial fairness were the animating forces behind the enactment of section 686.1.

Because of the limits to *Faretta* described in Argument V, including the Supreme Court's recognition that the states are free, in certain circumstances, to enforce their laws requiring counsel in criminal prosecutions (*Indiana v. Edwards, supra*, 554 U.S. 164, 178), California has the latitude to enforce Penal Code section 686.1's requirement of counsel at trial, or at least at the penalty phase. Failure to do so here, when the court knew that appellant planned to, and did, achieve a death sentence by working with the prosecutor, was error. (See *People v. Carter* (1967) 66

Cal.2d 666, 672 [error to permit defendant to waive counsel in violation of state law]; *People v. Robles* (1970) 2 Cal.3d 205, 218-219 [same].)

The erroneous deprivation of the right to counsel under state law requires reversal without a showing of prejudice. (*People v. Carter, supra*, 66 Cal.2d at p. 672 [reversing judgment without showing of prejudice where defendant erroneously permitted to represent himself]; *People v. Robles, supra*, 2 Cal.3d at pp. 218-219 [reversing judgment of death without showing of prejudice where defendant erroneously permitted to represent himself at penalty phase].) Appellant's conviction, the special circumstance findings and death verdict must therefore be reversed.

* * * * *

VII.

APPELLANT WAS DENIED AN INDEPENDENT REVIEW OF HIS AUTOMATIC MOTION FOR MODIFICATION OF THE DEATH VERDICT, IN VIOLATION OF STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

Penal Code sections 190.4, subdivision (e), and 1181, subdivision (7), provide for an automatic motion for modification of the verdict for all defendants sentenced to death in California. When a verdict of death has been rendered, California law requires that the trial court conduct an independent review of the verdict to determine whether it was contrary to the law or the evidence and requires the court to state on the record the reason for its ruling. (See § 190.4, subd. (e).) The trial court must exercise its independent judgment in reexamining the aggravating and mitigating evidence and, if it determines that the verdict was contrary to the law or the evidence, it must modify the verdict. (*Ibid.*) The trial judge's responsibility in weighing the evidence includes a requirement that he or she "assess the credibility of the witnesses, [and] determine the probative force of the testimony." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 793.)

Both this Court and the United States Supreme Court have recognized that the trial court's independent review of a death verdict is a central and constitutionally required element of California's death penalty scheme. In addition, the legislative history of section 190.4, subdivision (e), shows that the California Legislature intended the trial-level independent review process to apply to all defendants, whether they are tried by judge or jury. Although the Legislature failed to provide a precise mechanism for the independent review of a trial judge's death verdict, the universal right to an independent review of the verdict at the trial level is

both constitutionally mandated and embedded in the California statute.

At no time did appellant receive the independent review of the penalty phase evidence to which he was constitutionally entitled. This deprivation amounted to a denial of due process, equal protection and a reliable sentencing determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution. Accordingly, this Court must either read into the California statute a mechanism for independent review of a trial court's penalty verdict and remand this case so that the review can take place, or the Court must declare the California statute unconstitutional as applied to cases in which a jury trial has been waived. By either avenue, this Court should vacate appellant's death sentence.

B. Factual Background

After the trial court reviewed its analysis of the factors in aggravation and mitigation and announced its verdict of death (2 RT 533-540), the court announced February 21, 1996, as the date for a motion for a new trial, motion to reconsider the death verdict and for sentencing. (2 RT 541.) After appellant informed the court he would not "enter" either motion, the court told him that it had to give him the opportunity to make the motions and if he did not, the court would proceed with sentencing. (2 RT 540-541.) On February 21, the court asked appellant if he wished to make a motion for it to reconsider the weighing of the factors in aggravation and mitigation; appellant declined. (2 RT 545.) Appellant then reminded the court that he had moved for an immediate transfer following sentencing. (2 RT 547.) After reviewing the probation report, the court imposed sentence. (2 RT 546-551.)

For the reasons argued below, appellant did not waive his right to a

modification hearing because section 190.4, subdivision (e) is a constitutionally mandated part of California's death penalty scheme.

C. *People v. Weaver* Does Not Foreclose Appellant's Argument

In *People v. Weaver* (2012) 53 Cal.4th1056 (*Weaver*), this Court found that the defendant's claim that he did not receive a proper hearing under section 190.4, subdivision (e), was not cognizable on appeal because he had failed to object. (*Id.* at p. 1091.) The Court nevertheless addressed appellant's argument that because section 190.4, subdivision (e), did not "logically apply to a court trial," the California death penalty scheme did not provide a mechanism for an independent review of a trial court's penalty phase verdict and was therefore unconstitutional. (*Ibid.*) The defendant argued that therefore the statute required another judge to review the sentencing judge's verdict. (*Ibid.*) The Court rejected this argument: "[Defendant] cites no authority holding that a defendant who waives a jury has a constitutional right to an independent review of the court's verdict, and we decline to so hold." (*Ibid.*)

Appellant's argument, in contrast, is that the case law shows that section 190.4, subdivision (e) applies to all death-sentenced defendants regardless of whether the sentence came from a jury or judge. This is because the section is a key constitutional element of California's death penalty scheme and because of the statute's legislative history. These reasons also satisfy the Court's concern that the language of the section is ambiguous. (Section D. 1 and 2, *post.*) Moreover, this Court's repeated characterizations of a hearing under section 190.4, subdivision (e), as automatic also indicates that it applies to court trials. In any case, and especially if the Court declines to interpret the statutory language as

applying to penalty phase court trials, appellant contends that he was deprived of a protection that is a key element to a constitutional, nonarbitrary capital sentencing scheme. The denial of an automatic, independent review also violated appellant's rights to Due Process and Equal Protection. (See section E., *post.*)

In addition, appellant urges this Court to reconsider its apparent requirement that appellant supply authority holding specifically that defendants waiving a jury have a constitutional right to an independent review of the court's verdict. (See *Weaver, supra*, 53 Cal.4th at p. 1091.) As appellant demonstrates below, there is more than sufficient precedent from this Court, the United States Supreme Court and the relevant legislative history for this Court to hold that the independent review provided for by section 190.4, subdivision (e), is a constitutionally mandated aspect of the California death penalty scheme.

D. All Defendants Sentenced to Death in California, Whether by Judge or by Jury, Are Entitled to a Trial-Level, Independent Review of the Death Verdict

Section 190.4, subdivision (e), is a constitutionally-mandated aspect of California's death penalty scheme under United State Supreme Court and this Court's case law. The legislative history of the death penalty statute that included this section shows that the California Legislature was aware of the constitutional importance of an independent review process that would apply to both defendants sentenced by juries or judges. Thus, the right to an independent review of the verdict for all death-sentenced defendants stems from both the statute and the United States and California Constitutions.

1. Independent Review of the Sentencing Verdict at the Trial Court Level Provides a Critical Safety Valve Necessary to Ensure the Reliability and Fairness Required by the United States and California Constitutions in Death Penalty Cases

The trial court's independent review of the death verdict is a central and constitutionally required element of California's death penalty scheme. In upholding California's death penalty statute, the U.S. Supreme Court recognized that this stage of review serves as a critical check on the danger of unconstitutionally arbitrary death sentences. In *Pulley v. Harris* (1984) 465 U.S. 37, the issue was whether the Eighth Amendment required a state appellate court to conduct comparative proportionality review upon a capital defendant's request. (*Id.* at pp. 43-44.) The Court held that comparative proportionality review was not constitutionally indispensable. (*Id.* at pp. 50-51.) Statutorily-required comparative proportionality review is one way, but not the only way, to provide a safeguard against arbitrary or capricious sentencing. (*Id.* at pp. 45-46.)

The Court went on to find that the 1977 California death penalty statute had sufficient other checks on arbitrariness without the need for comparative proportionality review. (*Pulley v. Harris, supra*, 465 U.S. at p. 51.) These are the requirements that the jury find any special circumstances beyond a reasonable doubt; that the jury determines whether death is the appropriate punishment guided by a list of aggravating and mitigation factors; that a jury's death determination is reviewed by the trial judge under section 190.4, subdivision (e), and that there is an automatic appeal. (*Id.* at pp. 51-53.)

With regard to the section 190.4, subdivision (e), the U.S. Supreme Court stated:

If the jury returns a verdict of death, the defendant is deemed to move to modify the verdict. § 190.4(e). The trial judge then reviews the evidence and, in light of the statutory factors, makes an “independent determination as to whether the weight of the evidence supports the jury's findings and verdicts.” *Ibid.* The judge is required to state on the record the reasons for his findings. *Ibid.*

(*Pulley v. Harris, supra*, 465 U.S. at pp. 52-53.) The Court went on to note that the statute stated that the “the trial judge’s refusal to modify the sentences ‘shall be reviewed.’” (*Id.* at p. 53, quoting § 190.4(e).) The court concluded that “[o]n its face, this system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under *Furman* and our subsequent cases.” (*Pulley v. Harris, supra*, 465 U.S. at p. 53.)

Subsequently, this Court similarly cited the independent review of each death judgment by the trial judge as a key element of California’s death penalty statute, one that ensures both adequate safeguards against arbitrary death judgments and the “guided” sentencing discretion required by the Eighth Amendment. (*People v. Rodriguez, supra*, 42 Cal.3d at pp. 777-778.) Both “this court and the United States Supreme Court have cited the provisions of section 190.4, subdivision (e), as a[] . . . safeguard against arbitrary and capricious imposition of the death penalty in California.” (*People v. Lewis* (2004) 33 Cal.4th 214, 226, citing *People v. Frierson* (1979) 25 Cal.3d 142, 179; *Pulley v. Harris, supra*, 465 U.S. at pp. 51-53.) This Court declared that section 190.4, subdivision (e), “is a unique and integral part” of the California death penalty scheme. (*People v. Lewis, supra*, 33 Cal.4th at p. 231.) And, it has stated that the automatic motion for modification of the verdict is an important ““safeguard[] for assuring careful appellate review.”” (*People v. Diaz* (1992) 3 Cal.4th 495, 571,

quoting *People v. Frierson*, *supra*, 25 Cal.3d at p. 179.)

Indeed, this Court has acknowledged that independent review of each death verdict at the trial level is integral to the constitutionality of the state's capital punishment scheme. (See, e.g., *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 792-794 [where trial court declined to perform independent review of the jury's verdict because the word "independent" had been removed from the statute, Court vacated death judgment, holding that "if subdivision (e) were construed as precluding independent review of the death verdict by the trial judge, questions of federal constitutionality might arise"].)

The above authorities provide the support necessary for this Court to hold that a defendant who waives a jury has a constitutional right to an independent review of the court's verdict. As *Pulley v. Harris*, *supra*, 465 U.S. at pp. 51-53, recognized, the automatic motion to modify the death verdict is one of four key components that make up California's system and protect it from a facial challenge under the Eighth Amendment. (*Id.* at p. 53.) Because appellant was denied the important safeguard of an independent review of his verdict at the trial level, he was deprived of a protection that both this Court and the Supreme Court have recognized is a key element of a constitutional, non-arbitrary capital sentencing scheme.

2. The Legislature Intended to Provide Independent Review at the Trial Level for Judge-Sentenced Defendants

The legislative history of section 190.4, subdivision (e), also provides support for the constitutional necessity of an automatic and independent review of the verdict for all defendants, including those who waive a jury at the penalty phase. The legislative history of California's

current death penalty scheme suggests that the objective of the provision was to provide a constitutionally required safety valve at the trial level to ensure the reliability and fairness of all death verdicts.³³ To that end, the trial court is charged with the important tasks of independently weighing the evidence and providing a record for adequate appellate review.

The legislative history of Senate Bill No. 155, which became the 1977 death penalty statute and includes Penal Code section 190.4, reveals that among the lawmakers' primary concerns was the inclusion of a sufficient substitute for proportionality review, which would guard against arbitrariness and pass constitutional muster. The Senate Committee on the Judiciary recognized that proportionality review is an "important guarantee of fairness," and questioned the constitutionality of a statute that did not provide for such review. (Sen. Com. on Judiciary, Death Penalty, Sen. Bill No. 155 (1977-1978 Reg. Sess.) (as amended February 17, 1977), pp. 7-8 [SB 155 Leg. Hist., at pp. 253-254].) Notably, the absence of statewide proportionality review was the subject of debate in the Assembly just before

³³ See generally, "Amendment Analysis of Senate Bill 155: Introduced Version through Eighth Version," which is the legislative history of Senate Bill 155 as compiled by the California Appellate Project (hereafter CAP). In a separate pleading, appellant respectfully requests that the Court take judicial notice of the legislative history cited herein. Counsel has attached to that pleading a copy of the legislative history, which was downloaded from CAP's password-protected website. Citations are, where possible, to both the pagination of the individual documents contained in the legislative history compiled by CAP and to the pagination of the compilation itself, hereafter referred to as "SB 155 Leg. Hist."

the independent review requirement was added.³⁴ (Assem. Com. on Criminal Justice, Analysis of Sen. Bill No. 155 (1977-1978 Reg. Sess.) (as amended March 26, 1977), p. 7 [SB 155 Leg. Hist., at p. 272].)

Despite broad agreement about the need to incorporate this type of constitutional safeguard, some legislators opposed proportionality review at the appellate level based on a perceived danger of judicial activism in the California Supreme Court. (Sen. Com. on Judiciary, Death Penalty, Sen. Bill No. 155 (1977-1978 Reg. Sess.) (as amended February 17, 1977), pp. 6-8 [SB 155 Leg. Hist., at pp. 228-229].) The Legislature ultimately entrusted this additional level of review to the trial courts, a move that indicates that the protections afforded by section 190.4, subdivision (e), were created as a substitute for appellate-level proportionality review.

Nevertheless, this Court has stated that the language of section 190.4, subdivision (e), is ambiguous and internally inconsistent with respect to whether the provision applies to judge-sentenced capital defendants as well as jury-sentenced defendants. (*People v. Diaz, supra*, 3 Cal.4th at p. 575, fn. 35.) Penal Code section 190.4, subdivision (e), reads, in pertinent part:

In every case in which the *trier of fact* has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11[81]. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by

³⁴ Subsection (e) first appears in Senate Bill No. 155, Fifth Amended Version, April 13, 1977. (See SB 155 Leg. Hist., at pp. 84-99.) It was introduced in its entirety in Senate Bill No. 155, Sixth Amended Version, April 28, 1977. (*Id.* at pp. 100-119.)

the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the *jury's* findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.

(Italics added). In *People v. Diaz, supra*, the Court stated that the first sentence of the subsection confers the right inclusively on “every case in which the trier of fact has returned a verdict,” but the subsequent sentence refers only to the trial judge’s duty to review the “jury’s findings.” (*People v. Diaz, supra*, 3 Cal.4th 495, 575, fn. 34.) This Court has declined on several occasions to resolve this issue and has never decided whether judge-sentenced defendants are excluded from the subsection’s coverage. (*People v. Weaver, supra*, 53 Cal.4th at p. 1091, citing *People v. Horning* (2004) 34 Cal.4th 871, 912, and *People v. Diaz, supra*, at p. 575, fn. 34.)³⁵

Despite any statutory ambiguity, appellant contends that the Legislature intended that section 190.4, subdivision (e), requires an independent review of a judge-imposed death verdict. There are several means by which the legislative intent can be ascertained. (See, e.g., *Comr. of Internal Revenue v. Engle* (1984) 464 U.S. 206, 214-223 & fns. 15, 16

³⁵ The Court in *Horning* suggested in dicta that the primary purpose of a section 190.4, subdivision (e), hearing is to ensure that a statement of the evidence supporting the death verdict is in the record. (*People v. Horning, supra*, 34 Cal.4th at p. 912.) However, as the opinions of this Court and the United States Supreme Court discussed above indicate, the constitutional imperative in the section 190.4, subdivision (e), process lies in the independent review of the sentencer’s verdict. Also, as discussed above, the intent of the legislature was to provide for independent review, not merely to ensure that a statement justifying the verdict was in the record. To the extent that *Horning* suggests otherwise, appellant asks this Court to reject the dicta in that case.

[discerning legislative intent via the language of the statute, the policy purpose of the statute, remarks in the House and Senate debates and floor amendments made to the statute].) First, the statute does not create an explicit exception for judge-sentenced defendants. Second, there is nothing in the legislative history of section 190.4 indicating an intent to exclude judge-sentenced defendants from the protections afforded by independent review at the trial level. (See generally SB 155 Leg. Hist., pp. 1-275.) Third, section 190.4, subdivision (e), is itself rooted in another California statute, section 1181, subdivision (7), which provides for independent review for all defendants.

Penal Code section 190.4, subdivision (e), states, in pertinent part:

[T]he defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision (7) of Section 11[81] . . . The denial of the modification of the death penalty verdict pursuant to Subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal . . .

A defendant's entitlement to this hearing flows from the unambiguously inclusive section 1181, subdivision (7), which reads, in pertinent part:

[I]n *any case* wherein authority is vested by statute in the *trial court or jury* to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding . . .

(Italics added). Section 1181, subdivision (7), thus makes no exception for judge-sentenced defendants. The statute's explicit language ("any case" where verdict is imposed by the "trial court or jury") is consistent only with the legislative intention that the elements of the modification hearing it later elaborated in section 190.4, subdivision (e), should apply to all defendants.

Although the language of section 1181 is precatory, this Court has

interpreted section 1181, subdivision (7), as imposing on the trial judge in a capital case “the duty to review the evidence,” exercising his “independent judgment.” (*In re Anderson* (1968) 69 Cal.2d 613, 623.) In *People v. Rodriguez, supra*, this Court concluded that “[b]y providing for automatic review of a death verdict under section 1181, subdivision 7, section 190.4, subdivision (e), [the Legislature] must have intended that the trial judge exercise the responsibilities for independent review imposed by subdivision 7” (*People v. Rodriguez, supra*, 42 Cal.3d at pp. 793-794.) In sum, the independent review requirement of section 190.4, subdivision (e), has its statutory foundation in section 1181, subdivision (7), which this Court has interpreted as imposing a duty on the trial court to conduct an independent review of the trial verdict. The inclusive language of section 1181, subdivision (7), reflects a legislative intent that judge-sentenced capital defendants such as appellant are entitled to that review.

E. The Denial of an Independent, Trial Level Review of Appellant’s Death Verdict Deprived Him of His Rights under the United States and California Constitutions

As noted above, in *Weaver, supra*, 53 Cal.4th at p. 1091, the defendant argued that section 190.4, subdivision (e), “does not logically apply to a court trial,” and therefore unconstitutionally fails to provide a method for independent review of the penalty verdict in a court trial. The Court noted that the defendant had cited no authority for his contention that a defendant who waives a penalty phase jury trial has a constitutional right to an independent review of the sentencing judge’s verdict, and declined to so hold. (*Ibid.*)

The Court has thus not squarely ruled, based on the statute itself, constitutional requirements, or both, whether or not section 190.4,

subdivision (e), applies to judge-sentenced defendants. As argued above, both statutory interpretation and state and federal constitutional precedents demonstrate that the section does require independent review of the penalty verdicts of judge-sentenced defendants. For this reason, the Court should remand this case for such a review. Should the Court determine otherwise, the statute is constitutionally infirm in several ways.

1. Under the Due Process Test for Judicial Bias, a Judge Who Imposes a Death Sentence Cannot Realistically Review His or Her Own Sentence

The sentencing phase of a capital trial must satisfy the requirements of due process. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969, citing *Gardner v. Florida* (1977) 430 U.S. 349, 358.) The due process clause of the Fourteenth Amendment requires “a fair trial in a fair tribunal” – an unbiased judge who has not prejudged the case before it. (*Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 876 (*Caperton*); *Bracy v. Gramley* (1997) 520 U.S. 899, 904-905; *Withrow v. Larkin* (1975) 421 U.S. 35, 46; *People v. Chatman* (2006) 38 Cal.4th 344, 363.) Proof of actual bias is not required for judicial disqualification under the due process clause. (*Caperton, supra*, 556 U.S. at p. 881; *People v. Freeman* (2010) 47 Cal.4th 993, 1001.) Rather, even if a party cannot show actual bias, there are circumstances in which the probability of bias on the part of a judge to an objective observer becomes so great that it is “constitutionally intolerable.” (*Ibid.*, citing *Caperton*, 556 U.S. at p. 881.)

In *Caperton*, the issue before the Court was whether due process was violated by a West Virginia high court justice’s refusal to recuse himself from a case involving a \$50 million damage award against a coal company whose chairman had contributed \$3 million to the justice’s election

campaign. The Supreme Court held that the probability of bias was too great to not offend due process. In a review of its jurisprudence on the issue of actual bias, the Court recognized that pecuniary interests – either direct or indirect – on the part of a judge were not the only cases where the risk of bias was so great as to offend due process. The Court reviewed and affirmed its prior case law holding that recusal was mandated when a judge had a conflict arising from his participation in an earlier proceeding. (*Caperton, supra*, 556 U.S. at pp. 880-881.) Moreover, that no actual bias was discovered was immaterial as the standard to be employed was an objective one. (*Id.* at pp. 883, 886.) The due process clause has been implemented by objective standards because of the “difficulties of inquiring into actual bias,” whether relying on the judge’s inquiry into her own bias or “appellate review of the judge’s determination respecting actual bias.” (*Id.* at p. 883.) This objective standard thus asks whether, “‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” (*Id.* at pp. 883-884, citation omitted.)

The practice of having a judge review his or her own verdict pursuant to section 190.4, subdivision (e), would not pass constitutional muster under this federal constitutional due process standard. As the Court recognized in *Caperton*, “circumstances and relationships must be considered” when determining whether a judge’s prior participation in a case creates a conflict that violates due process. (*Caperton, supra*, 556 U.S. at pp. 880-881.) The general principle is that a judge is not “permitted to try cases where he has an interest in the outcome.” (*Id.* at p. 880, quoting *In re Murchison* (1955) 349 U.S. 133, 136.)

When a court decides the verdict in a capital penalty phase trial, it replaces the jury. Although the trial court, like a jury, “must make certain factual findings in order to consider certain circumstances as aggravating factors. . . . the penalty phase determination ‘is inherently moral and normative, not factual.’” (*People v. Prieto* (2003) 30 Cal.4th 226, 263, quoting *People v. Rodriguez, supra*, 42 Cal.3d 730, 779.) Given the moral and normative nature of a death penalty verdict, and the fact that the judge will have convicted the defendant as well as made the weighty decision to impose the death penalty, a judge cannot be expected to independently review her own findings. That is, the probability of bias is too great, given a “realistic appraisal of psychological tendencies and human weakness.” (*Caperton, supra*, 556 U.S. at pp. 883-884.) For this reason, Due Process requires a truly independent review under section 190.4, subdivision (e), which, in a court trial, means that a different judge must preside over the motion to modify the verdict.

Moreover, as discussed above, section 190.4, subdivision (e), adds a constitutionally required layer of review to California’s statutory scheme, without which capital defendants in this state would be deprived of the right to be sentenced with adequate protections against the arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments and article I of the California Constitution. (See *Pulley v. Harris, supra*, 465 U.S. at pp. 52-54; *People v. Rodriguez, supra*, 42 Cal.3d at pp. 793-794; *People v. Frierson, supra*, 25 Cal.3d at pp. 178-179.) Depriving judge-sentenced capital defendants of the independent review mandated by section 190.4, subdivision (e), creates the very risk of arbitrariness and unreliability that the Supreme Court has deemed unacceptable in capital cases. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [“qualitative difference

between death and other penalties calls for a greater degree of reliability when the death sentence is imposed”]; see also *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) The need for independent review was especially critical here, given the unreliability of the proceedings for the reasons argued *ante*, in Arguments II, III and IV. Accordingly, the failure to provide appellant with an independent review of the death verdict at the trial court level denied appellant the right to have his sentence reviewed by a judge not burdened by the inherent bias of having already determined that death was the proper punishment. This in turn denied him the reliable capital sentencing determination required by the Eighth and Fourteenth Amendments, as well as article I of the California Constitution.

2. Even If Independent Trial Court Review Is Not Otherwise Constitutionally Required, the Denial of That Review to Appellant Violated His Federal Due Process Rights

The Supreme Court has held that a state creates a liberty interest when it provides a criminal defendant with a “substantial and legitimate expectation” of certain procedural protections and “that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300, quoting *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Appellant’s due process rights were violated when the trial court failed to perform the independent review of the evidence supporting the trial judge’s verdict required by section 190.4, subdivision (e). As noted above, both this Court and the Supreme Court have held that the independent review requirement is an important safeguard in California’s death penalty sentencing procedures. Here, the State failed to follow its

own statutory command that all capital defendants receive this review. Because appellant was arbitrarily denied the right to this independent review and because this denial “substantially affect[ed] the punishment imposed” (*Hicks v. Oklahoma*, supra, 447 U.S. at p. 347), appellant’s due process rights were violated.

Particularly in light of the heightened scrutiny that the Supreme Court applies to capital sentencing schemes (see *Woodson v. North Carolina*, supra, 428 U.S. at p. 305), section 190.4, subdivision (e), is unconstitutional if it does not apply to all capital defendants. By depriving appellant and other judge-sentenced defendants in California an important state-created cause of action that substantially affects their life and liberty interests, the current death penalty scheme unconstitutionally denies them their rights guaranteed by the Fourteenth Amendment and article I of the California Constitution.

3. Depriving Appellant and Other Judge-Sentenced Defendants the Independent Review Statutorily Guaranteed to All Capital Defendants Denies These Defendants Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits arbitrary and disparate treatment of citizens where fundamental rights are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 109.) The Supreme Court has recognized that when a statewide scheme affecting a fundamental right is in effect, there must be sufficient assurance “that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” (*Ibid.*) As there can be no right at stake more fundamental than life, where a state’s death penalty scheme provides an automatic independent review at the trial level to some capital defendants and not others, the Fourteenth Amendment right to equal protection under the law is violated with respect

to those defendants not afforded this additional level of review.

Equal protection analysis begins with identifying the interest at stake. As this Court has noted, “personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions.” (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) Where the interest identified is “fundamental,” courts must ““give[] [the legislation] the most exacting scrutiny”” and apply a strict scrutiny standard. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 837, quoting *Clark v. Jeter* (1988) 486 U.S. 456, 461.) A state may not create a classification scheme that affects a fundamental right without showing that it has a compelling interest justifying the classification and that the distinctions drawn are necessary to further that purpose. (See *People v. Olivas*, supra, 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

Here, the prosecution cannot meet this burden. If this Court reads California’s death penalty statute as creating separate classifications for judge-sentenced and jury-sentenced defendants, this disparate treatment is arbitrary. There is no compelling interest that would justify withholding from judge-sentenced defendants a procedural protection that this Court and the Supreme Court have recognized as constitutionally vital, and which the Legislature intended for all capital defendants.

Both the California Legislature and this Court have had ample opportunity to justify a distinction between these two categories of defendants with respect to motions to modify the verdict, yet neither has done so. The legislative history of Senate Bill No. 155 contains no indication that the Legislature intended to single out judge-sentenced defendants or exempt them from the protections provided by an independent review of the penalty verdict. (See SB 155 Leg. Hist., at pp.

1-275.) Indeed, as discussed above, while the wording of section 190.4, subdivision (e), may be ambiguous, the drafters of that subsection did not expressly exclude judge-sentenced defendants from the protections conferred by the statute. The State has no compelling interest in depriving judge-sentenced capital defendants of this important procedural safeguard and therefore it cannot claim that distinguishing this class of defendants is necessary.

In addition to protecting federal constitutional rights, the Equal Protection Clause also prevents arbitrary deprivation of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.) Thus, even if the independent review process of section 190.4, subdivision (e), was not required under the United States Constitution, the granting of that process to some capital defendants but not others deprives defendants of their right to equal protection under the law. For these judge-sentenced defendants, an independent review may well mean the difference between life and death.

F. Appellant's Claim Is Cognizable On Appeal

This Court has found that a failure to object in the context of a motion for modification under section 190.4, subdivision (e), may render the issue not cognizable on appeal. (See, e.g., *Weaver, supra*, 53 Cal.4th 1056, 1090-1091 [where defendant noted his jury waiver meant he would not receive an independent review under section 190.4, subd. (e), and defense counsel failed to object, issue not cognizable on appeal]; *People v. Horning, supra*, 34 Cal.4th at p. 912 [issue not cognizable when, after bench trial, defense counsel agreed when judge refused to rule on motion for modification on ground that it was unnecessary to repeat the reasons for the verdict].) Appellant respectfully disagrees.

As argued above, the right to a modification hearing under section 190.4, subdivision (e), is a constitutionally mandated part of California's death penalty scheme. Both this Court and the Supreme Court have recognized that independent review at the trial level is a key element of the constitutionality of California's death penalty scheme. (*Pulley v. Harris*, *supra*, 465 U.S. at pp. 51-53 [citing § 190.4, subdivision (e) as one of the key "checks on arbitrariness" in California's death penalty scheme].) For this reason, the right to a modification is not within the power of a defendant to waive.

The case of *People v. Werwee* is instructive in this regard. (*People v. Werwee* (1952) 112 Cal.App.2d 494, 499-500, abrogation recognized by *People v. Chain* (1971) 22 Cal.App.3d 493, 497.) In *People v. Werwee*, section 1121 required that the jury be sequestered when deliberations were ongoing. (*People v. Werwee*, *supra*, 22 Cal.App.3d at p. 495; see also *People v. Chain* (1971) 22 Cal.App.3d 493, 497 [§ 1121 was later amended to give trial courts discretion to separate or sequester jurors during deliberations].) Although the law was mandatory, at the trial court's suggestion, the parties agreed to let the jurors separate at night and reassemble for deliberations in the morning. (*Id.* at pp. 495, 500.) The defendant appealed on the ground that the court did not have authority to permit the separation. (*Id.* at p. 495.)

The court agreed and found that the trial court had no authority under the statute or common law to permit separation and that the consent of the defendant or his counsel could not "operate to empower or excuse the violation of an express provision of the statute." (*People v. Werwee*, *supra*, 112 Cal.App.2d at p. 496.) The court also noted the role of the constitution and statutes in preserving the "fundamental principles and established

procedure” of the jury system. (*Id.* at p. 499.)

The court further recognized that strict and vigorous enforcement of laws protecting jurors plays an important role in preserving, and promoting confidence in, the jury system. (*People v. Werwee, supra*, 112 Cal.App.2d at pp. 499-500.) If the prosecution and defense were permitted to adopt their own procedures “at variance with that prescribed by statute for the conduct of criminal cases, . . . the tendency would be toward lessened respect for and confidence” in the jury system and verdicts. (*Id.* at p. 500.)

These rationales apply to appellant’s argument here. A defendant should not be able to “excuse the violation of an express provision of the statute.” (*People v. Werwee, supra*, 112 Cal.App.2d at p. 496.) But even assuming that this Court continues to disagree with appellant’s assertion that section 190.4, subdivision (e), is, by its own terms, mandatory for all defendants, the role of the modification hearing in California’s death penalty scheme requires that one be held, even if a defendant wishes to forego it. The section is one of the California procedures that protect a capital defendant “against the evils identified in *Furman*.” (*Pulley v. Harris, supra*, 465 U.S. at p. 54.) These “evils” were that the

death penalty was being imposed so discriminatorily, [*Furman v. Georgia* (1972) 408 U.S. 238] at 240, 92 S.Ct., at 2727 (Douglas, J., concurring), so wantonly and freakishly, *id.*, at 306, 92 S.Ct., at 2760 (Stewart, J., concurring), and so infrequently, *id.*, at 310, 92 S.Ct., at 2762 (White, J., concurring), that any given death sentence was cruel and unusual.

(*Pulley v. Harris, supra*, 465 U.S. at p. 44.) Thus, like the law at issue in *People v. Werwee*, section 190.4, subdivision (e), is fundamental to, and an established part of, the system it is designed to protect. (*People v. Werwee, supra*, 112 Cal.App.2d at p. 499.) The strict and vigorous enforcement of

laws regarding the capital punishment scheme is therefore necessary. (See *id.* at pp. 499-500.)

In the event the Court finds that appellant waived the issue, the issue is still preserved for appeal because a lack of timely objection in the trial court does not forfeit the right to raise a claim asserting the deprivation of certain fundamental constitutional rights for the first time on appeal. (See *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443 [constitutional right to jury trial].) As discussed *ante*, the trial court's failure to independently review appellant's death verdict under section 190.4, subdivision (e) violated appellant's rights to Due Process and Equal Protection. Therefore, the issue is preserved for appeal.

G. The Denial of Independent Review in This Case Requires Remand for a Hearing Conducted by a Different Judge

In this case, appellant was denied the right to have an independent, unbiased judge make a constitutionally required determination whether the death penalty was contrary to the law or evidence. Appellant must now be granted a remand so that a different judge than the trial judge can conduct a hearing on an automatic application to modify appellant's death verdict.

A remand is the proper remedy. When a court errs by failing to discharge its statutory duty to reweigh evidence and determine whether, in its independent judgment, the evidence supports the verdict, this Court vacates the judgement and remands the case to the superior court for a new hearing on the motion. (See, e.g., *People v. Burgener* (2003) 29 Cal.4th 833, 892.) The failure to hold a hearing at all should get no less of a remedy.

The hearing should be presided over by an independent judge. When

the same judge who presided over the case is not available to hear the original motion to modify the verdict or a hearing held pursuant to a remand, this Court has repeatedly concluded that a different judge may preside over the 190.4, subdivision (e) hearing. (See, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 257-258; *People v. Lewis* (2004) 33 Cal.4th 214, 225-226; *People v. Espinoza* (1992) 3 Cal.4th 806, 830.) Thus, the practice of having a judge different from the trial judge preside over the motion to modify the verdict is not uncommon. There is no reason a different judge cannot preside over the modification hearing after a court trial.

For these reasons, appellant requests that the Court vacate his death verdict and remand his case to the trial court for a hearing on an application for modification of the verdict by an independent judge.

VIII.

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 consistently has rejected cogent 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 to urge their reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Section 190.2 Is Impermissibly Broad

To pass 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, section 190.2 contained 19 special circumstances, one of which, murder while engaged in a felony under subdivision (a)(17), contained 11 qualifying felonies.

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 has routinely rejected 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 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.

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

Section 190.3, factor (a), directs the sentencer to consider in aggravation the "circumstances of the crime." Prosecutors throughout California have argued that the sentencer 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. Here, for example, the prosecutor argued location, method and motive as aggravating

evidence. (2 RT 521-523.)

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 [“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 that almost all features of every murder can be and have been characterized by prosecutors as “aggravating.” Thus, California’s capital sentencing scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because it permits the sentencer 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, 976 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the sentencer 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 Fails 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. (*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”].) *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, 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) to be submitted to a sentencer or court and proved beyond a reasonable doubt.

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 *Apprendi*, *Blakely* and *Ring* 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 *Apprendi*, *Ring* and *Blakely*.

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. Appellant requests that the Court reconsider its decisions that this is not required. (See, e.g., *People v. Blair, supra*, 36 Cal.4th at p. 753.)

2. Some Burden of Proof Is Required

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, the court should have found that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors and as to the appropriateness of the death penalty.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Appellant is entitled to a sentencing proceeding that comports with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart*.

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D. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case 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 the Court to reconsider its failure to require proportionality review in capital cases.

E. California's Capital-Sentencing Scheme Violates the Equal Protection Clause

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

In a noncapital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt and aggravating and mitigating factors must be established by a preponderance of the evidence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) In a capital case, there is no burden of proof 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 the Court has previously rejected these equal protection arguments (*People v. Manriquez*

(2005) 37 Cal.4th 547, 590), but asks the Court to reconsider.

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has 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. (*People v. Cook* (2006) 39 Cal.4th 566, 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 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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IX.

THE CONVICTION, DEATH ELIGIBILITY FINDINGS AND DEATH VERDICT IN THIS CASE ARE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 1, 7, 15, 16 AND 17 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION AND MUST BE SET ASIDE

As discussed in the preceding arguments, appellant professed a desire to be executed and the trial court and prosecutor expressed no hesitation in deferring to his wish, even at the cost of the court's and prosecutor's independent, constitutionally-mandated duties to appellant and the trial process itself. The result was a capital murder "trial" that was an empty charade. Even if no single event discussed in the preceding arguments requires reversal, the trial as a whole, and the death verdict that resulted, fell far short of meeting the state's independent interest in the fairness and integrity of its proceedings and the heightened degree of reliability demanded of death verdicts. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17.) Appellant's conviction, the death eligibility findings and death verdict must be set aside.

A. Constitutional Bases for Society's Independent Interest in the Fairness and Accuracy of Criminal Proceedings and the Reliability of Death Judgments

As noted in Argument III, *ante*, the federal Constitution demands that all criminal trials be fair. (U.S. Const., 5th & 14th Amends.) "Further, proceedings must not only be fair, they must 'appear fair to all who observe them.'" (*Indiana v. Edwards* (2008) 554 U.S. 164, 177, citation omitted.)

The right to a jury trial is a fundamental constitutional right under both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *People v. Collins* (2001) 26 Cal.4th 297, 304.)

In capital trials, the United States Supreme Court has repeatedly emphasized that given the “irremediable and unfathomable” nature of the death penalty, the Eighth Amendment demands a heightened degree of reliability in all stages of a capital proceeding. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; accord, *Oregon v. Guzek* (2006) 546 U.S. 517, 525 [Eighth Amendment demands heightened degree of reliability in penalty determination]; *Beck v. Alabama* (1980) 447 U.S. 625, 637 [Eighth Amendment demand for heightened reliability applies to both guilt and penalty determinations in capital cases]; see also *Deck v. Missouri* (2005) 544 U.S. 622, 632, and authorities cited therein; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Lockett v. Ohio* (1978) 438 U.S. 586, 605, plur. opn.; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358, plur. opn.)

As discussed in Arguments III, IV and V, *ante*, the federal constitutional guarantees to fair criminal proceedings and reliable death eligibility and penalty determinations do not belong to the defendant alone. “[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant’s trial is a fair one.” (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 177, quoting *Sell v. United States* (2003) 539 U.S. 166, 180.)

Moreover, society has a legitimate, vital and independent interest in ensuring that verdicts in capital cases are just, reliable and based on reason. As the United States Supreme Court has emphasized in this regard, “[f]rom the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant *and to the community* that any decision to impose the death

sentence be, and appear to be, based on reason[,] rather than caprice or emotion,” and reliable. (*Gardner v. Florida, supra*, 430 U.S. at pp. 357-358, italics added; accord, e.g., *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300, and authorities cited therein [recognizing state’s independent and “strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings”]; *People v. Chadd* (1981) 28 Cal.3d 739, 747-750.)

There are occasions in which these interests may be at odds with a particular defendant’s desires. As demonstrated in Arguments II through V, *ante*, when the defendant’s wishes – if followed – will subvert society’s independent interest in the fairness of its proceedings and the reliability of death verdicts, the state’s interests win out. (See, e.g., *Indiana v. Edwards, supra*, 554 U.S. at p. 177, and authorities cited therein [state’s independent interest in the fairness of its proceedings permits it to impose a higher competency requirement for a defendant who wishes to control his trial through self-representation than that applied to a defendant’s ability to stand trial]; *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 162 [“the government’s interest in assuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer”]; *Sell v. United States, supra*, 539 U.S. at pp. 179-182 [government’s interest in “assuring a defendant a fair trial” and trying defendants while competent may, under certain circumstances, outweigh defendant’s constitutionally protected liberty interest in avoiding involuntary medication]; *Wheat v. United States* (1988) 486 U.S. 153, 160, 162 [state’s “independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal

proceedings appear to fair to all who observe them” may override defendant’s right to counsel of choice and willingness to waive conflict]; *People v. Richardson* (2006) 43 Cal.4th 959, 995-996 and authorities cited therein [state’s independent interest in fairness and appearance of fairness permits trial court to substitute counsel over defendant’s objection].) Indeed, as argued in Argument III, California law has long provided that while criminal defendants may waive rights and procedures that exist for their own benefit, they may not waive rights or procedures that exist for the public’s benefit. (See, e.g., *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371, and authorities cited therein [criminal defendants may not waive rights in which the public has an interest or when waiver would be against public policy]; Civ. Code, § 3513 [“anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement”].)

The principle that the state’s interest in fair and reliable capital proceedings may take precedence over a defendant’s wish applies in California. Certainly, this is true under California’s death penalty scheme, which prohibits particular defendants from unilaterally waiving “rights” that exist not only for their own benefit but also to protect California’s independent interest in the fairness of its proceedings and the reliability of its death judgments. (See, e.g., *People v. Alfaro, supra*, 41 Cal.4th at p. 1301 [California’s death penalty legislation “has its roots in the state’s strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings”]; *People v. Chadd, supra*, 28 Cal.3d at pp. 750, 753; *People v. Stanworth* (1969) 71 Cal.2d 820, 834.)

B. California's Death Penalty Scheme Reflects Society's Paramount, Independent Interest in the Fairness of its Criminal Proceedings and the Reliability of Death Judgments

Four features of California's death penalty scheme reflect the fundamental principle that under state law society has an independent interest in the fairness and reliability of capital trials. First, Penal Code section 1018 explicitly provides in relevant part that no guilty plea to a capital offense "shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel." This statute, read together with the constitutional guarantee to the effective assistance of counsel, requires counsel to exercise his "independent," objectively reasonable and *disinterested* "professional judgment" in determining whether the defendant should enter a guilty plea to a capital case. (*People v. Massie* (1985) 40 Cal.3d 620, 625.) Further, a particular defendant cannot avoid the statute's restrictions by discharging his attorney in order to represent himself and thus enter a plea without the consent of counsel, even if he or she is found legally competent to do so. (*Ibid.*) [defendant could not avoid requirement of counsel's consent under section 1018 by discharging counsel and entering guilty plea in propria persona]; *People v. Chadd, supra*, 28 Cal.3d at pp. 745, 751; see also *People v. Alfaro, supra*, 41 Cal.4th at p. 1302.)

Second, consistent with California's "independent interest in the accuracy of the special circumstance and penalty determinations, [California does] not . . . permit a defendant to stipulate to the death penalty . . ." (*People v. Teron* (1979) 23 Cal.3d 103, 115, fn. 7, overruled on other grounds in *People v. Chadd, supra*, 28 Cal.3d at p. 750 & fn. 7, citing

People v. Stanworth, supra, 71 Cal.2d at pp. 833-834.) Rather, a penalty hearing is required in which a *trier of fact*, guided by strict constitutional and statutory guidelines intended to assure reliable death judgments, determines the appropriate penalty. (Pen. Code, §§ 190.3, 190.4, subd. (a).)

Third, if the trier of fact determines that death is appropriate, California law mandates an *automatic* motion before the trial judge to modify the death verdict. (Pen. Code, § 190.4, subd. (e) [“in every case in which the trier of fact has returned a verdict or finding imposing the death penalty, *the defendant shall be deemed to have made an application for modification of such verdict or finding . . .*”], italics added.) In other words, the motion is made irrespective of whether a particular defendant seeks or even desires modification.

Finally, Penal Code section 1239, subdivision (b), provides for an automatic appeal in capital cases, which a defendant has no power to waive. As this Court has explained, “it is manifest that the state in its solicitude for a defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has also imposed a duty upon this court to make such review. We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him.” (*People v. Stanworth, supra*, 71 Cal.2d at p. 833; accord, e.g., *People v. Massie (Massie II)* (1998) 19 Cal.4th 550, 566, 570-572.)

Thus, California’s death penalty scheme as a whole makes clear that capital trials may not be used as mere instruments for particular defendants to achieve their own desires. To the contrary, “we are concerned with a principle of fundamental public policy.” (*People v. Stanworth, supra*, 71 Cal.2d at p. 834; see also, e.g., *Cowan v. Superior Court, supra*, 14 Cal.4th

at p. 371 [while criminal defendants may waive rights that exist for their *own* benefit, they may not waive rights in which the public has an interest or when waiver would be against public policy].) Two of these features were missing at appellant's trial. As argued *ante*, the trial was in fact a slow plea in violation of section 1018. (Argument II.) As demonstrated in Argument VII, *ante*, the trial court improperly failed to hold a hearing pursuant to section 190.4, subdivision (e), so another procedure designed to assure reliability was lacking at appellant's trial.

C. Pursuant to California's Death Penalty Scheme, Capital Trials May Not Be Used as Mere Instruments for Particular Defendants to Achieve Their Own Desires

Three of this Court's decisions illustrate the preceding principle that pursuant to California's death penalty scheme, capital trials may not be used as mere instruments for particular defendants to achieve their own desires.

In *People v. Chadd*, *supra*, 28 Cal.3d 739, the defendant sought to enter a guilty plea to a capital offense in order to receive a death sentence, but his counsel refused to consent on the ground that the "defendant's basic desire is to commit suicide, and he's asking for the cooperation of the State in that endeavor." (*Id.* at pp. 744-745.) The trial court recognized Penal Code section 1018's requirement of counsel's consent in guilty pleas to capital offenses, but ruled that if the defendant was sufficiently competent to discharge counsel and act as his own attorney under *Faretta v. California* (1975) 422 U.S. 806, then the defendant could enter his plea without the consent of counsel. (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 744-745.) The trial court initiated competency proceedings, found the defendant competent and accepted the defendant's plea of guilty without the consent of counsel. (*Id.* at p. 745.)

The defendant appealed his conviction and the ensuing death judgment on the ground, inter alia, that the trial court violated Penal Code section 1018 by accepting his guilty plea without the consent of counsel. (*People v. Chadd, supra*, 28 Cal.3d at p. 746.) Defending the judgment, the state argued that Penal Code section 1018 is unconstitutional because it “disturbs the ‘uniquely personal’ nature of the defendant’s right to plead guilty, denies him his ‘fundamental right’ to control the ultimate course of the prosecution, and destroys the constitutionally established relationship of counsel as the defendant’s ‘assistant’ rather than his master.” (*Id.* at p. 747.)

As noted in Argument II, *ante*, this Court flatly rejected the state’s reasoning because it “fails to recognize the larger public interest at stake in pleas of guilty to capital offenses.” (*People v. Chadd, supra*, 28 Cal.3d at p. 747.) Although it is true that, under California law, the decision to enter a plea is ordinarily personal to the defendant, “it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised.” (*Id.* at pp. 747-748.)

The 1973 amendment to section 1018, prohibiting a guilty plea to a capital offense without the consent of counsel, was part of an extensive revision of California’s death penalty law meant to satisfy the Eighth Amendment and avoid arbitrary and capricious imposition of the death penalty and thus was “intended . . . to serve as a further independent safeguard against erroneous imposition of a death sentence.” (*People v. Chadd, supra*, 28 Cal.3d at p. 750.) Considering the interplay between that interest and a defendant’s rights under *Faretta, supra*, the Court reasoned that while the *Faretta* decision recognized that the Sixth Amendment “grants to the accused personally ‘the right to *make his defense*’ . . .,” it

does not necessarily follow that he also has the “right to make *no such* defense and to have no such trial, even when his life is at stake.” (*Id.* at p. 751, italics added.)

To the contrary, “in capital cases, as noted above, the state has a strong interest in reducing the risk of mistaken judgments.” (*People v. Chadd, supra*, 28 Cal.3d at p. 751.) This strong interest is reflected in California’s entire death penalty scheme – from plea through appeal. (*Id.* at pp. 751-752, citing *People v. Stanworth, supra*, 71 Cal.2d 820, 833.) Consistent with the intent of California’s statutory death penalty scheme, section 1018 furthers the state’s independent interest in the reliability of death judgments and reducing the risk of mistaken death judgments by “serv[ing] inter alia as a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant, as here, simply wants the state to help him commit suicide.” (*Chadd, supra*, 28 Cal.3d at p. 753, italics added.) This strong interest outweighs any possible “minor infringement” on a defendant’s rights under *Faretta*. (*Id.* at p. 751; accord *Massie, supra*, 40 Cal.3d at p. 625.)

Four years after *Chadd*, in *People v. Deere* (1985) 41 Cal.3d 353, this Court again had occasion to consider the tension between society’s interest in the reliability of death judgments and a particular defendant’s desire for execution. This Court recognized, as it had in *Chadd* and *Stanworth, supra*, that “[a]lthough a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally.” (*People v. Deere, supra*, 41 Cal.3d at p. 363, quoting from *People v. Stanworth, supra*, 71 Cal.2d at p. 834.) In this regard, and as it had in *Chadd, supra*, this Court recognized that California has an

independent, constitutionally compelled interest in the reliability of death judgments and “reducing the risk of mistaken judgments,” as well as “the fundamental public policy against misusing the judicial system.” (*People v. Deere, supra*, 41 Cal.3d at pp. 362-364.) The Legislature has legitimately determined that these interests override a defendant’s contrary wishes throughout capital proceedings, from the entry of plea through appeal. (*Ibid.*) A capital trial that amounts to nothing more than an instrument by which the defendant commits state-assisted suicide violates public policy, defeats state and federal constitutional interests in the reliability of death judgments, and thus the death verdict it produces cannot stand. (*Ibid.*)

In *Deere*, this Court applied these principles to hold that where defense counsel acceded to the defendant’s wish not to present available mitigating evidence and the defendant made a statement to the factfinder in which he asked for the death penalty, the resulting death verdict was unreliable. (*People v. Deere, supra*, 41 Cal.3d at pp. 361, 364; accord *People v. Burgener* (1986) 41 Cal.3d 505, 541-543.) This Court has since disapproved of *Deere* to the extent that it held that “failure to present mitigating evidence in and of itself is sufficient to make a death judgment unreliable.” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9; accord, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1372, and authorities cited therein; *People v. Sanders* (1991) 51 Cal.3d 471, 527.) But it still adheres to the fundamental principles that the state has an independent interest in fair and reliable capital trials.

According to this Court’s post-*Deere* decisions, a death verdict is not rendered unreliable simply because disinterested counsel accedes in his competent client’s knowing, voluntary and intelligent decision to present no penalty phase defense. (*People v. Sanders, supra*, 51 Cal.3d at pp. 524-527

[“in the absence of evidence showing counsel failed to investigate available mitigating evidence or advise defendant of its significance,” death verdict was not rendered unreliable where presumably competent defendant made “knowing and voluntary” decision not to present penalty phase defense, where failure to present a defense “did not amount to an admission that he believed death was the appropriate penalty,” and where jurors heard mitigating evidence from guilt phase]; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228 [a death verdict is not necessarily unreliable simply due to competent, self-represented defendant’s decision not to present mitigating evidence at the penalty phase; so long as a death verdict is returned under “proper instructions and procedures” the reliability requirement is satisfied].) Nevertheless, the essential premise of *Deere* – that society has an independent and constitutionally guaranteed interest in the fairness and reliability of its capital proceedings and judgments, which may be violated when a capital murder trial becomes nothing more than an instrument for a particular defendant’s self-defeating desires – remains the law today. (See *People v. Sanders*, *supra*, 51 Cal.3d at p. 526, fn. 23 [while competent defendant’s decision not to present mitigating evidence or closing argument does not itself render death verdict unreliable, the “state’s interest in a reliable penalty verdict may be compromised when, in addition to the defendant’s failure to present available mitigating evidence, the jury was also given misleading instructions and heard misleading argument”]; accord *People v. Williams* (1988) 48 Cal.3d 1127, 1152 [in absence of misleading instructions or argument, or defendant’s request to factfinder to return death verdict as in *Deere* and *Burgener*, *supra*, failure to present available mitigation does not in and of itself render death verdict unreliable]; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228 & fn. 9.)

Indeed, this Court reaffirmed California's paramount, independent interest in the reliability of death judgments in *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300. There, defense counsel refused to consent to the defendant's unconditional guilty plea to a capital offense because "I know she's pleading guilty for all intents and purposes to a death sentence." (*Id.* at p. 1297.) Pursuant to section 1018, the trial court refused to accept defendant's plea or to remove or substitute counsel. (*Id.* at p. 1296.) Defendant was convicted of murder and sentenced to death. (*Id.* at p. 1297.)

On appeal, defendant argued both that her counsel unreasonably withheld his consent to her guilty plea and that she had a fundamental right to enter a guilty plea and make fundamental decisions about her defense, even against the advice of counsel, which the trial court violated when it refused to allow her to do so. (*People v. Alfaro, supra*, 41 Cal.4th at p. 1298.) Defendant attempted to distinguish *Chadd, supra*, on the ground that Chadd had sought to enter a plea in order to commit state-assisted suicide, whereas she had sought to enter a guilty plea in order to gain an advantage at the penalty phase by urging her remorse and acknowledgment of wrongdoing. (*Id.* at p. 1300.) She thus urged this Court to limit its holding in *Chadd* to those facts and argued its application to her case violated her rights to the assistance of counsel, to control over her own defense and to a fair trial. (*Id.* at pp. 1295, 1300.) This Court rejected each of her arguments.

Central to the Court's rejection of her arguments was its finding that she did not seek to enter her plea in order to gain a tactical advantage in her penalty phase *defense*. (*People v. Alfaro, supra*, 41 Cal.4th at pp. 1299-1300.) Instead, she wanted to enter an unconditional plea in order to

prevent or avoid her counsel's intended strategy of implicating a third party as an accomplice in the charged murder. (*Ibid.*)

Thus, like counsel's refusal to consent to a plea made "in order to effectuate state-assisted suicide" in *Chadd*, counsel's refusal to consent to an unconditional plea that was not intended to benefit his client's *defense* served the function that section 1018 and the extensive revision of California's death penalty legislation of which it was a part were intended to serve: as a "safeguard against erroneous imposition of a death sentence" and in furtherance of "the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings. (*Chadd, supra*, at pp. 750, 753.)" (*People v. Alfaro, supra*, 41 Cal.4th at pp. 1300-1301.) A death judgment may be erroneously imposed when the trier of fact has not determined, in accord with constitutionally and statutorily compelled procedures intended to ensure reliable death judgments, that the death penalty is warranted. In this regard, "had defense counsel capitulated to defendant's desire to plead guilty unconditionally despite the information she had conveyed to him implicating another person in the murder, defendant's plea would have cast doubt on potentially critical mitigating evidence. A guilty plea entered under such circumstances might very well lead to the erroneous imposition of the death penalty – precisely the outcome section 1018 is intended to prevent." (*Id.* at p. 1301.)

Moreover, while a defendant may have a right to control a fundamental aspect of his or her *defense* and the right to counsel to assist in his or her *defense*, those rights were not implicated or violated in that case because the defendant did not seek to enter the plea in order to benefit her penalty phase *defense*. (*People v. Alfaro, supra*, 41 Cal.4th at p. 1302.)

Hence, defendant’s dispute with her counsel “did not implicate a constitutionally protected fundamental interest that might override the plain terms of section 1018” or – it necessarily follows – society’s independent interest in the reliability of death judgments that section 1018 and California’s death penalty scheme is intended to serve. (*Ibid.*)³⁶

In other words, this Court implicitly, but undeniably, held that although a defendant enjoys the rights to present, control fundamental aspects of, and to the assistance of counsel in presenting, a *defense*, she enjoys no concomitant right to present *no defense* that will override the state’s independent interest in the reliability of death judgments. This holding is entirely consistent with *Chadd*, with the fundamental premise of *Deere, supra*, and indeed with the very text of the Sixth Amendment, which “requires not merely the provision of counsel to the accused, but ‘Assistance’ which is to be ‘for his defence.’ . . . If no actual ‘Assistance’ ‘for’ the accused’s ‘defence’ is provided, then the constitutional guarantee has been violated.” (*United States v. Cronin* (1984) 466 U.S. 648, 654, quoting text of Sixth Amendment, italics added.)

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³⁶ In this regard, this Court distinguished situations wherein a defendant has a personal, constitutionally protected right to accept or reject a plea *bargain* offer in which the defendant is offered some *benefit* in exchange for the plea. (*People v. Alfaro, supra*, 41 Cal.4th at p. 1302 & fn. 5, citing *In re Alvernaz* (1992) 2 Cal.4th 924.) There is no corresponding right to enter an *unconditional* plea. (*Ibid.*)

D. The Death Judgment Must Be Set Aside Because the Trial Was an Empty Charade That Did Not Produce a Reliable Conviction, Special Circumstance Findings and Death Verdict

Appellant's trial was fatally flawed, starting with the court's denial of appellant's request for advisory counsel, which in itself requires per se reversal. (Argument I.) After appellant testified extensively against himself and otherwise joined forces with the prosecutor to ensure a guilty verdict, true findings on the special circumstances and the death penalty, even the trial court characterized the trial as a slow plea (2 RT 533), which is prohibited by section 1018. (Argument II.) The actions and inactions of the court and prosecutor throughout the trial culminated in a breakdown of the adversary process in violation of due process, Eighth Amendment reliability requirements and state law. (Arguments III and IV.) Because the court should have and could have seen this train wreck coming, failure to appoint counsel for appellant's trial pursuant to the Sixth and Eighth Amendments and California law was also error. (Arguments V and VI.)

In a case such as this, even if no single event discussed in the preceding arguments requires reversal, the trial process, conviction and the ensuing death qualification findings and death verdict run afoul of the state's "strong" independent interest in the fairness and integrity of its proceedings, in avoiding the erroneous imposition of death sentences and in a heightened degree of reliability in death judgments. (Cf. *United States v. Cronin, supra*, 466 U.S. at pp. 656-659 [when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing" and the trial process "loses its character as a confrontation between adversaries," the trial process itself becomes unreliable and produces an unreliable result].) A conviction, death qualification findings and death verdict which

are the result of such an empty charade are constitutionally intolerable. The conviction, death eligibility findings and death verdict must be set aside.

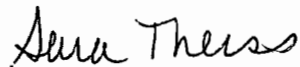
CONCLUSION

For all of the reasons stated above, the conviction, special circumstance findings and sentence of death in this case must be reversed.

DATED: July 26, 2013

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

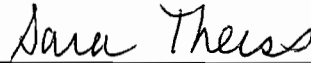


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**CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360)**

I am the Deputy State Public Defender assigned to represent appellant, VALDAMIR FRED MORELOS, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, is 50,055 words in length.

DATED: July 26, 2013



SARA THEISS

Deputy State Public Defender
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Valdamir Fred Morelos

Supreme Court No. S051968

Superior Court No. CSC169362

I, Tamara Reus, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Catherine Rivlin, Esq.
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455 Golden Gate Avenue, Room
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Clerk of the Court
Santa Clara County Superior Court
191 N. First Street
San Jose, CA 95113

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Each said envelope was then, on July 26, 2013, sealed and deposited in the United States mail at Oakland, California, 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 July 26, 2013, at Oakland, California.


DECLARANT



